

Mihaly vs APEGA Case Study

ENGG 513: The Role and Responsibilities of the
Professional Engineer in Society
Instructor: Denis Onen

Aditi Dwibedi
Fernando Valera

February 16, 2018

Introduction

On August 5, 2008, Mr. Mihaly filed a complaint with the Alberta Human Rights Commission (AHRC) claiming that he had been discriminated by The Association of Professional Engineers and Geologists of Alberta (APEGA) when they denied his application for professional engineering status in Alberta. This report examines the major stakeholders in the case, the history of the case, and the process that took place in order to come to a final decision. This case was given to three bodies, namely the AHRC, The Court of Queen's Bench, and the Alberta Court of Appeal. The reasoning behind the decisions of these three bodies and our thoughts on their decisions is also discussed, as well as APEGA's role in accommodating foreign trained engineers and scientists.

Stakeholders

APEGA

The Association of Professional Engineers and Geologists of Alberta (APEGA) is the association responsible for regulating the profession of engineering and geology in Alberta. APEGA is at the forefront of this case study as they are required to defend and then appeal the decisions made by various lawful bodies. APEGA is responsible for granting licenses to practice as a professional engineer in Alberta, and because of this they must set out standard requirements for any applicants. The relevant requirements to this case include passing the National Professional Practice Exam (NPPE) and graduation from a university program recognized by the Canadian Engineering Accreditation Board or other academic qualifications and experience deemed to be acceptable by the Board of Examiners [1].

Mr. Ladislav Mihaly

Mr. Mihaly is the chief complainant for this case study. He was educated and claimed to have worked for 25 years in Czechoslovakia as a Professional Engineer [2, par. 58] before emigrating to Canada. His academic qualifications at the time were described by Mr. Mihaly as a Masters degrees from the Institute of Chemical Technology (ICT) in Prague and the Slovak University of Technology in Bratislava [2, par. 3]. Mr. Mihaly applied to register as a Professional Engineer in Alberta starting in 1999, and was unable to succeed in his application for over 8 years through several attempts. During this time he was unable to work as a Professional Engineer and thus suffered hardship in finding employment that matched his credentials [2, par. 237-239]. Mr. Mihaly opened a case with the Alberta Human Rights commission in 2008, claiming that he was discriminated for his place of origin by APEGA, which began a series of hearings that are described in this case study.

The Court of Queen's Bench

The Court of Queen's Bench of Alberta is a court of Alberta that has jurisdiction over criminal and civil matters. The Court of Queen's Bench Act constitutes the Court. The Court also handles appeals for decisions made by some provincial tribunals [3], which includes the Alberta Human

Rights Council (AHRC). It is in the appeal of the decision by the AHRC that the Court fits into this case study. APEGA is the applicant of the appeal in this case as well as the respondent for a cross-appeal by Mr. Mihaly. The Court has the power to reverse decisions made by the AHRC, and in this case, they do, based on their findings.

The Alberta Human Rights Commission (AHRC)

The Alberta Human Rights Commission (AHRC) is established by the Alberta Human Rights Act and was created to rectify and prevent discrimination of Albertans. The Commission's goal is achieved through "public education and community initiatives, through resolution and settlement of complaints of discrimination, and through human rights tribunal and court hearings [4]." Therefore, the Commission is responsible for holding tribunal hearings for Albertans that have a case for discrimination. In this case study, the AHRC is approached by Mr. Mihaly on the grounds of discrimination of his academic qualifications based on his place of origin. Their final decision is in Mr. Mihaly's favour, but the decision is immediately appealed by APEGA.

The Alberta Court of Appeal

The Court of Appeal of Alberta is the highest court in Alberta and is authorized by the Court of Appeal Act. This court is responsible for reviewing cases for errors of law that contributed to the final decision. They hear appeals from the Court of Queen's Bench of Alberta as well as the Provincial Court and from administrative boards or tribunals [5]. In our case study, the Alberta Court of Appeal gives further closure to the case brought up to the AHRC and the Queen's Bench back in 2014. Mr. Mihaly attempts to appeal the decision made by Queen's Bench to which the Court of Appeal finds that the application should be dismissed [6, par. 10].

Dean David Lynch

Dr. David Lynch was an expert witness for APEGA during the human rights trial between APEGA and Mr. Mihaly. He was the Dean of the Faculty of Engineering at the University of Alberta for over 19 years at the time of the trial [2, par. 70], and currently sits as a board director for Engineers Canada. Dr. Lynch held a position for APEGA's Board of Examiners and Canadian Engineering Accreditation Board (CEAB). During his testimony in the AHRC Tribunal, Dr. Lynch described CEAB's role in negotiating Mutual Recognition Agreements with other countries, the difficulties that accompany assessing the credentials of Internationally Educated Graduates (IEGs), and recounted various details on the CEAB's accreditation process in defence of APEGA [2, par. 73-75].

Mr. Mark Tokarik

Mark Tokarik was another witness for APEGA. He served as the Director of Registration, was a member of Engineers Canada's Foreign Engineering Qualifications Committee (FEDQ), was appointed Deputy Registrar for APEGA in September 2012. Mr. Tokarik's responsibilities included managing the registration process, maintaining the Foreign Degrees (FD) List, and dealing with matters of discipline and professional development. During his testimony to the AHRC Tribunal, Mr. Tokarik testified the requirements that APEGA lays out and makes available on their website, for IEGs in particular, as well as giving greater detail on how the FD List is maintained and the frequency with which it is updated [2, par. 120-125]. Additionally, Mr.

Tokarik formally communicated with Mr. Mihaly during Mr. Mihaly's attempts at becoming a Professional Member [2, par. 18-25].

Background

Mr. Mihaly applied to APEGA in May 1999 to register as a Professional Engineer [2, par. 4]. His education included a M.Sc. Diploma from the Slovak Technical University in Bratislava with a specialization in Technology of Fuels and Thermal Energy and a Certificate in Corrosion Engineering from Institute of Chemical Technology (ICT) [2, par. 5-6]. APEGA then sent a letter dated May 13, 1999 indicating that Mihaly must take the National Professional Practice Exam (NPPE).

Mr. Mihaly wrote the NPPE on January 17, 2000 [2, par. 8]. APEGA decided on February 11, 2000 that Mihaly must take three confirmatory exams to be completed by November 2000. Additionally, an exam in Engineering Economics would be required, to be completed by May 2001 [2, par. 10]. Mihaly did not take the confirmatory or Engineering Economics exams. He was notified that he failed his first attempt at the NPPE [2, par. 11]. Mihaly applied on August 1, 2000 to write the NPPE again on October 16, 2000, but did not attend the exam [2, par. 12]. APEGA notified Mihaly on June 29, 2001 that his application to register as a Professional Engineer was withdrawn because he did not complete the confirmatory exams [2, par. 13]. Mihaly requested that APEGA reactivate his application on May 31, 2002 and applied to write the NPPE for the third time on July 15, 2002 [2, par. 14]. Mihaly failed the NPPE exam again [2, par. 23].

APEGA reactivated Mihaly's file on June 3, 2002. Mihaly was tasked with taking three confirmatory exams to be completed by May 2003 and an Engineering Economics exam to be completed by November 2003 [2, par. 15]. Mihaly did not take the exams [2, par. 24]. APEGA notifies Mihaly on August 1, 2003 that his application to register as a Professional Engineer was again withdrawn because he did not complete the confirmatory exams [2, par. 24].

APEGA reactivated Mihaly's file again on October 18, 2006. Mihaly was given the option of taking the Fundamentals of Engineering exam or three confirmatory exams and an Engineering Economics exam [2, par. 27]. Mihaly did not take any of the exams [2, par. 29]. Mihaly filed a complaint with the AHRC on August 5, 2008 [2, par. 29]. The complaint was based on the grounds that APEGA had discriminated his academic qualifications due to his place of origin and thereby denied him registration as a Professional Engineer based on his place of origin [2, par. 30].

On February 6, 2014, the AHRC finds that APEGA discriminated Mihaly's academic qualifications and insufficiently attempted to accommodate Mihaly to be able to meet their qualifications. The decision awards Mihaly with \$10,000 in payment by APEGA [2, par. 247]. The AHRC did not award lost wages to Mr. Mihaly due to uncertainties and a lack of evidence in support of his claim [2, par. 248] [7, par. 19]. Additionally, APEGA was ordered by the AHRC to: (1) Consult directly with the educational institutions that Mr. Mihaly graduated from to review his credentials, (2) allow Mr. Mihaly to challenge certain examinations where he was not given an exemption, and (3) establish a committee within three months that would assess

Mihaly's qualifications to remedy any perceptions of academic deficiency and give Mr. Mihaly alternatives to succeed in his application. These options included exam exemptions and collaboration with accredited Alberta post secondary institutions to provide programs that Mr. Mihaly could take to fulfill the qualifications that APEGA believed he was missing [2, par. 249].

Neither party was satisfied by the AHRC's decision and on November 20, 2014, APEGA appeals the decision to the Court of Queen's Bench of Alberta. Mr. Mihaly issued a cross-appeal on the same day [7, par. 42]. The Court of Queen's Bench of Alberta (CQBA) finds that the decision made by the AHRC was made with a lack of evidence. Specifically, the CQBA found that the Tribunal was unreasonable in concluding that there was *prima facie* discrimination with regards to the NPPE and requirement of Canadian experience [2, par. 109] and in coming to the conclusion that APEGA did not justify their discrimination [2, par. 150]. It also found the actions required of APEGA by the AHRC's decision to be unjustifiable. The CQBA decided that decision by the AHRC is to be reversed, that the case does not need to be sent back to the AHRC, and that Mihaly's cross-appeal be dismissed [2, par. 153-154]

Mihaly filed an application with the Alberta Court of Appeal on February 22, 2016 to appeal the decision made by the CQBA [6, par. 3]. Alberta Court of Appeal (ACA) dismissed the application on January 10, 2017 on the grounds that it failed to meet the majority of the criteria required to restore an appeal. These included a lack of merit for the appeal, an unexplained length of delay in the appeal, and an absence of a prepared Appeal Record [6, par. 6-8]. The ACA did note that the respondent, the AHRC Tribunal, deserved a conclusion to the matter since its decision over eight years prior to the ACA's decision [6, par. 9].

The Court of Queen's Bench Decision

When the case was brought to the Court of Queen's Bench, Madam Justice June Ross brought to attention the following issues in relation to the case: procedural fairness, jurisdiction, *prima facie* discrimination, and justification.

The issue of procedural fairness surfaced when the Tribunal claimed that APEGA was not following Section 8 of the Engineering and Geoscience Professions General Regulation (EGPR) [2]. Section 8 outlines that an applicant (for professional engineering designation) may be assigned confirmatory examinations or examinations which would focus on correcting some deficiency in the applicant's education [7]. The Tribunal claimed that APEGA's examinations were not in fact addressing a deficiency in Mr. Mihaly's education and used this to support their argument for *prima facie* discrimination. In response to this, APEGA argued that not only was the Tribunal misinterpreting Section 8 of the EGPR, but they were also not being fair in their proceedings as Section 8 of the EGPR had not been discussed during the hearing by any party. Regarding the issue of procedural fairness, Justice Ross concluded that the Tribunal had not breached the rules of procedural fairness since the case was based on discrimination not justified under the Alberta Human Rights Act (AHRA) (which had been brought up during the hearing and by the Tribunal) [7]. The Tribunal simply used Section 8 of the EGPR to support their case of discrimination. There was no requirement on their part to consult all the parties involved on "every point of law they refer[red] to" in their argument [7]. Justice Ross also concluded that APEGA had sufficient opportunity to respond to all evidence in the case.

The issue of jurisdiction involved deciding whether the Tribunal had any basis for claiming discrimination based on place of origin. APEGA argued that place of origin is not the same as "place of origin of academic qualifications", referring to the case of *Grover v Alberta Human Right Commission (AHRC)* [7]. In the case of *Grover v AHRC*, it was decided that the place of origin does not extend to where someone obtained their education. Justice Ross concluded that a better test for prima facie discrimination was outlined by *Moore v British Columbia (Education)* [7]. *Grover v AHRC* was not as relevant since in that case, there was no connection between the place of origin of the complainant and the place where they obtained their education. Without support from the *Grover* case, APEGA could not establish the claim that the Tribunal did not have the jurisdiction to consider Mr. Mihaly's case.

The third issue addressed by Justice Ross was in determining prima facie discrimination. Specifically, she examined whether the Tribunal was able to establish a case for discrimination as well as a case for unreasonable registration requirements on the part of APEGA. The Tribunal used the test of prima facie discrimination as set by the Supreme Court of Canada in *Moore v British Columbia (Education)* [7]. This test specifies that the complainant must possess a characteristic protected from discrimination, they must prove that they suffered from an adverse impact, and lastly they must show that the characteristic played a role in the adverse impact they experienced [7]. In this case, it was apparent that the place of education was linked to the place of origin. When applying the 'Moore Test' the Tribunal argued that Mr. Mihaly was in fact treated differently due to his place of origin and faced adverse impact in the form of multiple examinations from APEGA. In response, Justice Ross concluded that while the requirement to write confirmatory exams or the Fundamentals of Engineering Exam (FEE) was related to place of origin, the requirement to write the National Professional Practice Exam (NPPE) and obtain an year of engineering experience was not. The NPPE and experience requirements did not demonstrate discrimination based on place of origin as APEGA requires these from applicants that come from countries that do not have Mutual Recognition Agreements (MRAs) [1]. Without MRAs, it is difficult to establish whether the foreign program in question is on par with Canadian engineering programs. It was thus concluded that Mr. Mihaly's place of origin was not a factor to any adverse impact he faced from having to complete the NPPE and experience requirements set by APEGA.

The fourth and last issue outlined by Justice Ross related to the confirmatory exams and whether the Tribunal's finding that APEGA's registration requirements were unreasonable was justified. Regarding the confirmatory exams, the Tribunal made a case for prima facie discrimination stating firstly, that Mr. Mihaly should only have been required to write exams that address academic deficiencies in his education and secondly, that he should have been individually assessed instead of being forced to write a standardized exam. In response to the first argument, Justice Ross concluded that it was a misinterpretation of Section 8 of the EPGR [7]. Section 8 stated that exams could be confirmatory, as well as with the purpose to address academic deficiencies [2]. Regarding the second point, there was no evidence that the FEE would be difficult for foreign trained graduates with the necessary background and skills required for professional engineering. The Tribunal had also ordered APEGA to make additional accommodations for Mr. Mihaly, such as providing him with a mentor that would help him integrate into the profession. Justice Ross concluded that actions such as these would alter APEGA's standards and cause it to "act outside of its regulatory role" [7]. As well, she pointed

out that Mr. Mihaly also had a responsibility to search for accommodation. Seeing as he had not attempted either of the three confirmatory exams or the FEE, Justice Ross found that the Tribunal had not considered lack of effort on his part when making a case for undue hardship. The Tribunal's conclusions that APEGA had failed to accommodate Mr. Mihaly were found to be unreasonable. Justice Ross reversed the Tribunal's decision.

Reflection & Opinion

The decisions made by the AHRC, after considering the facts of Mr. Mihaly's case, are hard to support. The AHRC claimed that Mr. Mihaly was being discriminated based on his place of origin due to the additional examinations he was required to complete. After examining APEGA's application processes, it is hard to prove that this is the case. Examinations such as the NPPE are required by applicants to ensure that they possess the technical knowledge required [1]. Applicants exempt from these exams include graduates from programs covered under MRAs or those with 10 years of "progressively responsible engineering experience" [7]. Initially it may seem unfair that Mr. Mihaly was required to write these exams while others were not, but we must consider the fact that his academic qualifications were individually assessed by APEGA's Board of Examiners and found not be eligible for exemption. As well, we must consider that APEGA has the duty of ensuring that a standard of quality is met when granting professional designations. APEGA was not discriminating based on place of origin, rather it was basing its decision on the quality of education and experience possessed by the applicant.

The decisions made by the AHRC are less persuasive because they lacked evidence for some of their claims. One example is their misinterpretation of Section 8 of the EPGR [7]. They also had no basis for the claim that completing the confirmatory exams or FEE would be an undue hardship on Mr. Mihaly. From the Court of Queen's Bench, it was concluded that there was no evidence that the FEE would be difficult for qualified foreign graduates to complete successfully [7]. ARHC's argument that APEGA did not accommodate Mr. Mihaly's situation was also weak as they did not consider the lack of effort on Mr. Mihaly's part in accommodating APEGA's policies. Justice Ross stated this when the case went to the Court of Queen's Bench. Mr. Mihaly did not do enough to accommodate as he chose not to fill out an internal appeal of APEGA's waiver decision [7]. He also did not attempt to write either of the three confirmatory exams. For these reasons, we cannot agree with ARHC's conclusion that Mr. Mihaly was discriminated based on his place of origin. We agree with the decisions reached by the Court of Queen's Bench.

We also agree with the decision reached by the Alberta Court of Appeal. In this case, Mr. Mihaly referred to a number of items which he felt had been overlooked at the Court of Queen's Bench. However, none of these items provided further support for his case. He also failed to meet several conditions for restoring the appeal. Without all these conditions met (such as an explanation for his delay in restoring the appeal) there was no possibility of his application being considered [6].

After considering the current application process and the facts of Mr. Mihaly's case, we believe that APEGA should accommodate foreign trained engineers and geoscientists. However, it should do so without compromising its standards or policies. This is necessary as it would be

unethical to grant a professional designation to applicants who are not qualified. The process used by APEGA currently satisfies this in most cases. Evaluating cases on an individual basis such as in Mr. Mihaly's case, ensures that APEGA's standards are met and also that applicants are fairly judged based on their qualifications. By accommodating foreign trained engineers through MRAs or exemptions based on experience, APEGA is adding diversity to the workforce. It is also introducing new and unique talent and affording opportunities to highly qualified professionals. In accommodating foreign trained engineers and geoscientists, we believe the current policies in place are sufficient. However, there is room for improvement in that APEGA and other regulatory bodies could make more efforts to expand the number of institutes considered for MRAs. In general, if there was more consistency in the quality of engineering programs around the world, the application process for foreign trained engineers and geoscientists would be simpler.

References

- [1] "Professional Member Applications | APEGA", Apega.ca, 2018. [Online]. Available: <https://www.apega.ca/apply/professional-member/>. [Accessed: 16- Feb- 2018].
- [2] Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 (CanLII), <<http://canlii.ca/t/g3051>>, retrieved on 2018-02-13
- [3] "Jurisdiction & Governance", Albertacourts.ca, 2018. [Online]. Available: <https://albertacourts.ca/qb/about/jurisdiction-and-governance>. [Accessed: 16- Feb- 2018].
- [4] "About Us", Albertahumanrights.ab.ca, 2018. [Online]. Available: <https://www.albertahumanrights.ab.ca/about/Pages/about.aspx>. [Accessed: 16- Feb- 2018].
- [5] "Role and Operation of the Court of Appeal of Alberta", Albertacourts.ca, 2018. [Online]. Available: <https://albertacourts.ca/ca/about/role-and-operation>. [Accessed: 16- Feb- 2018].
- [6] Mihaly v Association of Professional Engineers and Geoscientists of Alberta, 2017 ABCA 15 (CanLII), <<http://canlii.ca/t/gwthp>>, retrieved on 2018-02-14
- [7] Association of Professional Engineers and Geoscientists of Alberta v Mihaly, 2016 ABQB 61 (CanLII), <<http://canlii.ca/t/gn3bs>>, retrieved on 2018-02-14