

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

Case Study: APEGA v Mihaly, 2016

David Pichach

February. 18, 2018

Course Coordinator: Denis Onen

This case study will investigate the legal proceedings based on The Court of Queen's Bench of Alberta's judgement on the complaint filed by Ladislav Mihaly against the Association of Professional Engineers and Geoscientists of Alberta. Said analysis will provide an in-depth look and greater knowledge on the particular requirements to become a professional engineer in the province of Alberta, as well as the legalities in place to regulate this process. Mr. Mihaly is an Czechoslovakian-Canadian Immigrant who obtained his relevant educational certifications while attending international institutions outside of Canada, and was rejected whilst attempting to receive equivalent accreditation from APEGA which regulates the profession. As a result of this decision, Mr. Mihaly seeks financial reparations based on the grounds of racial discrimination due to his status as a non-Canadian born citizen.

The Association of Professional Engineers and Geoscientists of Alberta, which will thus forth be referred to as APEGA, is an organization that regulates who can practice engineering (and geoscience) in the province of Alberta[1]. They are recognized by the Government of Alberta through the Engineering and Geoscience Professions Act. It is up to APEGA to grant Professional Engineers the licenses they need to practice their profession in Alberta. The members of APEGA are a select group of elected members. They have an office in both Calgary as well as Edmonton.

The Court of Queen's Branch is a governmental body which is constituted by the Court of Queen's Bench Act[2]. Appeals and cross-appeals are granted or dismissed at their

judgement, as well as the option to send an appeal back to Tribunal. They are granted power by the provincial government of Alberta to dispense justice and the rule of law.

The Alberta Human Rights Commission is an independent commission that was created by the government of Alberta. Their mission is to ensure that equality is maintained between Albertan citizens as well as fight against discrimination[3]. Also, they work to ensure the rights of citizens are upheld and protected. The means to ensure their mission is held is through the methods of holding court hearings as well as tribunals.

The respondent in this case, Mr. Ladislav Mihaly, was born in the former Czechoslovakia. He successfully received a M.Sc Diploma (specialized in Technology of Fuels and Thermal Energy) from the Slovak Technical University in Bratislava (UBS) in 1975[5]. In addition to this, he also received a Certificate in Corrosion Engineering from the Institute of Chemical Technology (ICT) in Prague in 1981. He eventually successfully immigrated to Canada in 1999 where he submitted an application to APEGA for them to grant him accreditation for equivalent education and be registered as a Professional Engineer.

Dr. David Lynch is the Dean of the Faculty of Engineering at the University of Alberta. He is a practicing member of APEGA as well as a member of the Canadian Engineering Accreditation Board[5]. This boards purpose is to decide which foreign education programs permit accreditation in Alberta in the profession of Engineering.

Dr. Gary Faulkner, is one of APEGA's longest serving members on the Board of Examiners. He has recently retired from the volunteer position after holding the position of

Chair for 21 years, which he held during this appeal process[5]. As such he has vast knowledge on the workings of APEGA as well as the process they take to register applicants.

Mr. Mihaly legally immigrated to Canada in 1999, the same year that he applied to APEGA to be registered to practice his profession as a professional engineer. The Board of Examiners of APEGA reviewed his application and on February 2000 issued him a response. To permit him to register as a professional engineer, APEGA requested for Mr. Mihaly to write and pass the National Professional Practice Exam (NPPE), three additional examinations, and complete an Engineering Economics course or equivalent. A deadline of May 2001 was also given. On January 17th, 2000, Mr. Mihaly appeared to write the NPPE to fulfill APEGA's requirements. This attempt ended in a failing grade.

Months later that year, Mr. Mihaly registered to write the NPPE again. He failed to attend the day of the test and as such failed the examination for a second time. At least six months past after the second examination date, and as such, on June 29th of 2001, APEGA withdrew his application for registration. He had failed to complete the requirements by the May 2001 deadline.

A full year later, on May 31st 2001, Mr. Mihaly again contacted APEGA and requested his application to be re-activated. APEGA complied with his request and thus again applied to write the NPPE. This attempt resulted in another failing grade. With none of the previous requirements completed, APEGA again required Mr. Mihaly to complete the requirements set for him previously upon the initial registration request. This time however, they gave him a new completion deadline of November 2003.

His fourth attempt occurred in the first month of 2003 which again resulted in a failing grade. By August of that same year, with the original requirements set by APEGA still withstanding, they withdrew his application for the second time.

Three years later, on October 3rd 2006, Mr. Mihaly again contacted APEGA to re-activate his application. Unlike the first two times however, APEGA added an additional requirement of asking him to submit an up-to-date resume with a list of new references. Mihaly agreed to this request by November of that same year.

Almost a full year passed before the Board of Examiners reconsidered Mihaly's' request. Upon closer inspection, they decided that in addition to the additional requirements set-forth for Mihaly, he also needed to acquire the required one full year of professional engineering work experience in Canada. The work experiences he provided on his updated resume was not at a D-level and thus forth would not be honored on his application.

Another full year passed, and Mihaly had still not written any further examinations. However, on August of 2008, he sent a complaint into the Alberta Human Rights Commission. His complaint pointed to the *Human Rights Act*, RSA 2000, c A-25.5 [AHRA][5], and claimed that APEGA had discriminated against him on the grounds of racial discrimination, stemming from his educational origin being outside of Canada. This provided the entry point for the Alberta Human Rights Commission to enter the situation.

A tribunal was held on February 6th of 2014. The eventual ruling decided that Mihaly had succeeded in providing and amending to the Examination & Experience Standard's which APEGA uses to compare academic credentials, as he was not offered a more in-depth

assessment or other options to prove his credentials. This, to the Tribunal, is classified as discrimination. As such, the tribunal granted Mihaly \$10,000 for damages, as well as ordering APEGA to again view his application and consider registering him. Mr. Mihaly also attempted to receive compensation for lost wages during the time that he had been attempting to become registered. This was rejected by the tribunal on the fact that not even evidence was present for wrong-doing. After this, APEGA appealed the tribunals decision which was cross-appealed by Mr. Mihaly.

APEGA had requested a reversal in the decision granted previously by the Tribunal. It is within the Court of Queen's Bench legal power to reverse, confirm an order by the Human Rights Tribunal, or send the matter back to the hands of the Tribunal for further scrutiny and investigation. The conclusion to the appeal to the Queens Branch was that APEGAs claims for appeal were just, and that the cross-appeal of Mr. Mihaly were not. As such, the cross-appeal was dismissed and APEGAs appeal was granted. The Court found several problems with the Tribunals initial judgement. One of these was that the FE Exam is a discriminatory test that excludes or makes more difficult for foreign trained engineers to become registered. It is on the record that the Tribunal confirms that the FE Exam is "expected to demonstrate that their education is on par with a Canadian graduate." [5] However, they then went on to compare it to a supreme court case, known as *Meiorin*, in which a female firefighter was discharged from their profession for failing to pass the aerobic test of running 2.5km in 11 minutes. This case was viewed as providing support for the claim that a more individualized test must be required to further assess individual cases. The Tribunal utilized this comparison to condemn the FE

Exam as discriminatory. APEGA appealed on these grounds, pointing out that “running 2.5km in 11 minutes” is an aerobic exam rather than an intellectual one as the FE Exam is. They also pointed out that the comparison is false due to the aerobic test was proven to be shown irrelevant in working efficiently as a forest firefighter. The Tribunal also stated that the FE Exam was “quite difficult for most foreign engineers because when they come to Canada they usually come early in their careers.”[5] To the contrary however, the appellant provided direct evidence to this claim, as they proved that “the FE Exam has a pass rate of 85%.” The appellant also pointed to the futility in the Tribunal’s claim, as Mr. Mihaly had not once sat in on the FE Exam, so it is conjecture as to whether or not he would have succeeded or failed in writing this exam. The Court decided that no further financial damages be applied to APEGA and the cross-appeal be dismissed.

Before diving into the opinion of the author of this report’s take on the appeal decision, it is crucial to understand why APEGA even regulates who is given registered engineer status in Alberta. Because of the potential of the loss of human lives due to incompetent practice of engineering in all fields, APEGA’s purpose of regulating who can practice engineering is a crucial one. However, if clear evidence could be provided of APEGA showing a clear bias based on grounds of race or place of origin, that would be highly unethical and should be punished.

My personal take on the entire case begins with the AHRC decision that APEGA had discriminated against Mr. Mihaly based on racial discrimination. It was highly suspect that the AHRC failed to even mention the fact that Mihaly had failed the NPPE four times and continually did not meet the requirements set forth by APEGA multiple times. This is a glaring

fact and refusing to even discuss it originally looks highly dishonest and points toward the AHRC as having a political-bias before even reaching a decision. Personally, I found that APEGA did not request Mr. Mihaly to complete any additional qualifications than they would for any other foreign-trained engineer, so the argument for racial discrimination based on place of origin is false in that sense. By requesting Mihaly to the same standards of testing as they do to all applicants, I fail to see how this can be classified as discriminatory, as it is in fact the opposite. One could see that by granting Mr. Mihaly a different set of standards, or a “loophole”, this would be actually discriminatory by lowering the bar just for this specific case. It is also unrealistic to expect a regulatory body as APEGA to personally assess each applicant on a case-by-case basis rather than using standardized tests such as the NPPE and FE Exam.

Also, APEGA acted in good faith by re-opening his application after he failed to show for the NPPE and meet the requirements a second time. Personally, this fact seems as to show evidence that APEGA was treating Mr. Mihaly as they would any other applicant, regardless of his place of origin. Because of the aforementioned facts, I do agree with the decision to overthrow the ruling made by the AHRC Tribunal decision that racial discrimination was at all a factor here. The tribunals initial ruling could have essentially opened the flood-gates to allow for any future foreign-trained engineer who failed their examinations (NPPE, FE Exam), to accuse APEGA of racial profiling and sued for damages.

The initial barriers in place of NPPE, additional examinations, and the FE Exam are good tests of who is qualified to work as an engineer in Alberta, as well as the application process to APEGA. And the benefits of having a regulatory body that permits who and who cannot work as an engineer (as APEGAs mission states), is a positive one that not only helps our society but also

raises the standard of the Engineers our Province produce. However, it is crucial that APEGA does accommodate foreign-trained engineers (to a realistic extent), as the majority of these individuals possess the intelligence and prowess of working as registered engineers in Canada. Not to the level of extent that the AHRC was requesting through this court case, but to some other realistic extent. For example, if a language barrier is causing an applicant to fail their qualifying examinations, partial-accommodations should be provided to help train the applicant to get past such a barrier. A language and reading comprehension class could be offered to individuals in this situation, in which case after completing such a class the qualifications could again be tested. What is important here is that the language barrier is overcome so the testing qualifications are more fair and standardized. To fail to do so, robs the province of Alberta of brilliant minds that can lead to a more productive province.

In conclusion, the initial Tribunals decision was not based in good faith nor on concrete evidence of discrimination. The appeal was justified in being permitted as was the rejection of the cross-appeal. It is important to keep an eye on regulatory bodies like APEGA, as abuse could very well occur, and it is also important for organizations like the AHRC to exist. However, based on the evidence in relation to the case, the final verdict was justified.

References:

- [1] APEGA.ca, (2018). *About APEGA*. [Online]. Available at <https://www.apega.ca/about-apega/> [Accessed: 12-Feb-2018]
- [2] AlbertaCourts.ca, (2018). *About Court of Queen's Bench*. [Online]. Available at <https://albertacourts.ca/qb/about/jurisdiction-and-governance> [Accessed: 12-Feb-2018]
- [3] AlbertaHumanRights.ab.ca, (Oct.24, 2014). *About the Commission*. [Online]. Available at <https://www.albertahumanrights.ab.ca/about/Pages/about.aspx> [Accessed: 12-Feb-2018]
- [4] APEGA.ca, (Oct.11, 2016). *A Big Thank You for 27 Years of APEGA Volunteer Service*. [Online]. Available at <https://www.apega.ca/news/a-big-thank-you-for-27-years-of-apega-volunteer-service/> [Accessed: 17-Feb-2018]
- [5] APEGA.ca, (2016). *Citation: Association of Professional Engineers and Geoscientists of Alberta v Mihaly, 2016 ABQB 61* [Online]. Available at <http://www.apega.ca/assets/PDFs/mihaly-decision.pdf> [Accessed: 18-Feb-2018]