

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

Professor: Denis Onen

Mihaly Vs. APEGA Case Study

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Introduction

The purpose of this report is to provide an analysis of the Court of Queen's Bench conclusion of Alberta citation ABQB 61. The case at hand involves a foreign engineer Mr. Ladislav Mihaly and The Association of Professional Engineers and Geoscientists of Alberta (APEGA).

In 2008, Ladislav Mihaly filed a complaint with the Alberta Human Rights Commission (AHRC) against APEGA. Prior to filing the complaint, Mihaly, who acquired his education in a Czechoslovakia, was required by APEGA to write confirmatory exams to ensure his level of education was satisfactory. After failing the required competency exams, and not writing others, Mihaly took APEGA to court under the argument that they discriminated against him based on his place of origin. The AHRC Tribunal of the human rights commission determined that APEGA had indeed violated the human rights of Mihaly, and ordered APEGA to pay \$10,000. In an appeal, the case was taken to the Court of Queen's Bench, where the decision of the Tribunal was reversed.

Stakeholders

APEGA:

The Association of Professional Engineers and Geoscientists of Alberta (APEGA) was formed in 1920 with the purpose of regulating the engineering and geoscience professions within Alberta. APEGA is the largest self-regulated professionals association in western Canada, and serves members in a multitude of industries (APEGA). For the purpose of protecting the public, the association has rules in place for foreign engineers to become regulated within Alberta. Depending on the applicant's background, the association may require them to pass a series of exams. In the Mihaly case, Mihaly felt as though these exams discriminated against him due to his place of origin. The association was the defendant in the case with the Tribunal, and the appellant in the Court of Queen's Bench.

The Court of Queen's Bench:

The Court of Queen's Bench is the superior trial court in Alberta (Alberta Courts). The bench hears trials ranging from civil to criminal matters, and appeals decisions of the provincial court. Issues first make their appearance at provincial court, and if deemed to be of the proper seriousness, will go to the court of Queen's Bench. The Court of

Queen's Bench was involved in APEGA's appeal of the decision made by the AHRCA Tribunal.

Alberta Human Rights Commission:

Established under the Alberta Human Rights Act, the Alberta Human Rights Commission is responsible for protecting individuals against discrimination. The independent commission was created by the Government of Alberta, and has a two-fold mandate: foster equality and reduce discrimination (Alberta Human Rights Commission). The commission satisfies these goals through the resolution of complaints, community initiatives, and court hearings. In the studied case, Mr. Mihaly filed a complaint with the commission.

Ladislav Mihaly:

Mr. Ladislav Mihaly, the focus of this analysis, is an immigrant from Czechoslovakia with an education in engineering. Since 1999 he has pursued accreditation as an engineer in Alberta, however has failed to meet APEGA's requirements. He failed the required ethics examination twice and refused to write technical examinations. Mihaly took his case to the Alberta Human rights Commission under the argument that APEGA was discriminating against his place of origin by making him write these examinations.

Justice June Ross:

Madam Justice June Ross was the Justice of the Court of Queen's Bench involved in APEGA's appeal of the initial finding of discrimination by the Tribunal of the AHRC. Justice Ross upheld the appeal and reversed the decision of the Alberta Human Rights Commission. Justice Ross also dismissed the cross-appeal made by Mihaly, finding the Tribunal's conclusion unreasonable under the Alberta Human Rights Act.

Mark Tokarik:

Mr. Mark Tokarik is a professional engineer, and joined APEGA in 1999 as an Assistant Director of registration. In September 2012, he was appointed as the Deputy Registrar for APEGA where he was responsible for the registration process of members. Tokarik sat on multiple engineering committees, including the National Engineering Admission Officials Group, which is a group of the directors of registration from every province. He was also a member of the Engineer's Canada Foreign Engineering Qualifications Committee (FEQC). THE FEQC is responsible for maintaining and adding new institutions to the foreign degree list. Tokarik was a respondent in the Mihaly case.

Dean David Lynch:

Dr. Lynch was an expert witness representing the respondent (APEGA) in the Mihaly case. Lynch was the Dean of the Faculty of Engineering at the University of Alberta, and provided testimony on international agreements and APEGA's evaluation of foreign engineer credentials. Due to his position as Dean of the Faculty of Engineering, Lynch had a statutory position on APEGA's board of examiners. Under legislation, this board is responsible for assessing the qualifications of all registration applicants. Furthermore, Lynch is on the Canadian Engineering Accreditation Board, which assess qualifications of Engineers within Canada, and assess equivalency of international engineering programs with Canadian programs.

Background

Ladislav Mihaly was born and educated in Czechoslovakia. In May, 1999 he applied to APEGA for registration as a Professional Engineer after immigrating to Canada. APEGA acknowledged Mr. Mihaly's application, and stated that he was required to write the National Professional Practice Exam (NPPE). After failing his first attempt on Jan. 17, 2000, he was informed in February that in addition to passing the NPPE, he must complete three confirmatory exams, and take a course or pass an exam in Engineering Economics by May, 2001. On Aug. 1, 2000, Mihaly applied to write his second attempt at the NPPE exam, however did not attend scheduled test. On June 29, 2000, APEGA advised Mihaly that his application was withdrawn as he failed to write the required confirmatory exams by May, 2001. On May 31, 2002, Mihaly requested re-activation of his application and applied to write the NPPE on July 15, 2002, which he failed for the second time. On June 3rd, 2002, APEGA reactivated his file and advised Mihaly that he was required to write the three confirmatory exams before May 2003, and the Engineering Economics course or exam by Nov. 2003. Mihaly failed the NPPE for the third time in June and APEGA withdrew his file on Aug. 1, 2003.

On October 3rd, 2006, Mihaly asked APEGA to reactivate his application for a third time. APEGA reactivated his file and requested an updated resume and list of references. On August 10, 2007, the Board of Examiners reconsidered Mr. Mihaly's application and again determined he must complete three confirmatory exams plus a course or exam in Engineering Economics, or the Fundamentals of Engineering Exam (FE Exam). They also determined that Mr. Mihaly had not acquired the minimum one year of Canadian professional engineering experience in a D-level position. Mihaly did not write the exams requested.

On Aug. 5, 2008, Mihaly filed a complaint with the Alberta Human Rights Commission, in accordance with the Alberta Human Rights Act, RSA 2000, c A-25.5 [AHRA], alleging that APEGA discriminated against him based on his place of origin when he was denied registration as a professional engineer. On February 6, 2014, the Tribunal found that “Mr. Mihaly has succeeded in establishing that the examination standard and the experience standard used by [APEGA] to assess his educational credentials, without more individualized assessment or exploration of other options, constitutes discrimination which cannot be justified under the [AHRA]: Tribunal Decision, and para 242” (Court of Queen’s Bench Decision, 2016).

The Tribunal awarded Mr. Mihaly \$10,000 in general damages, and ordered APEGA to reconsider Mr. Mihaly’s application. The order also included provisions that required APEGA to appoint a committee to assess and apply “individual assessment options to Mr. Mihaly with a view to correcting any perceived academic deficiencies” (Court of Queen’s Bench Decision, 2016). APEGA was also directed to appoint a committee to assist Mihaly by matching him with mentor and directing him to networking and language training resources. The Tribunal declined to award lost wages to Mihaly due to the uncertainties involved in the licensure and employment process and a lack of evidence for the claim.

APEGA appealed the decision made by the Tribunal, and Mihaly cross-appealed due to the lack of remuneration for lost wages. The appeal was taken to the Court of Queen’s bench and set for hearing on Dec 12, 2014, however was delayed as the court requested submissions on behalf of the respondent regarding legal issues raised by the Appellant. The appeal hearing proceeded on July 23 and 24, 2015, where APEGA argued that the Tribunal’s reasoning was rife with logical errors, contained facts unsupported by evidence, and failed to take into account relevant considerations (Casey, 2017). Ultimately, the decision of the Court of Queen’s Bench reversed the Tribunal decision and dismissed Mr. Mihaly’s cross appeal.

Court of Queen's Bench Decision

APEGA filed an appeal brief on November 20, 2014, against the decision of the Human Rights Tribunal. Mihaly cross-appealed the decision as well. The Law Society of Alberta filed a brief as Intervener on November 21, 2014. The appeal was initially set for December 12, 2014, however was postponed as the court requested counsel to address the following legal issues relating to the matter:

1. The impact of this court's decision in *Grover V Alberta*;
2. The test for *prima facie* discrimination;
3. The test for the defence of a bona fide occupational requirement.

The appeal hearing proceeded under the Honourable Madam Justice J. Ross on July 23 and 24, 2015. The Court of Queen's Bench had the power to confirm, reverse, or vary the order of the tribunal, and make any order the tribunal may make.

The Tribunal, which determined that APEGA violated Mihaly's human rights on the basis of place of origin, had declined to award lost wages to Mihaly due to the impossibility to determine there was a causal connection between the discrimination against Mihaly and any loss of wages. Furthermore, Mihaly failed to present any evidence of lost wages. Mihaly sought either a \$1,000,000.00 award and registration with APEGA, or \$2,000,000.00 with no registration from APEGA.

APEGA raised four issues in their appeal of the tribunal's decision:

1. Procedural fairness: Did the tribunal breach rules of procedural fairness?
2. Jurisdiction: Does the place a person receives their education constitute discrimination based on place of origin?
3. *Prima facie* discrimination: Was the proper procedure followed to determine whether Mr. Mihaly demonstrated *prima facie* discrimination?
4. Justification: Was the Tribunal's decision unjustified or unreasonable?

With regards to the fairness of the requirements APEGA imposes on foreign engineers, Justice Ross determined that APEGA had not established a breach of the rules of procedural fairness. The Tribunal had concluded the exams were not for the purpose of correcting a perceived academic deficiency, however APEGA argued this statement ignored that they were either implemented for the stated case or confirmatory examinations.

An important note in the case was whether the place one receives their education constitutes being discriminated based on their place of origin. APEGA argued that the

Tribunal had no jurisdiction over Mihaly's complaint, as the AHRA does not protect against discrimination based on the place of academic qualifications. During the Tribunal hearing, the Human Rights Commission argued that place of origin did not mean "place of birth," but rather "where you came from." In order for the decision of the Tribunal to be confirmed, it must be proven that Mr. Mihaly faced *prima facie* discrimination, and that this discrimination was a result of his place of origin. A *prima facie* case of discrimination occurs when the plaintiff has sufficient evidence to prove discrimination occurred against them. In order to establish *prima facie* discrimination, the Moore test requires complainants to demonstrate:

1. They have a characteristic protected from discrimination,
2. They have experienced an adverse impact, and
3. The protected characteristic was a factor in the adverse impact

In the Court of Queen's Bench, Justice Ross did not find APEGA policies to be based on discriminatory assumptions. She noted the Tribunal made no reference to the evidence when they made their decision, and found their conclusion to be unreasonable. Due to the unreasonable finding, Ross was unable to defer the Tribunal's on Mihaly having a protected characteristic. On the topic of whether Mihaly faced an adverse impact, it was agreed that he indeed faced the impact of writing confirmatory exams, that he would not be required if he received his education in Canada. However, Justice Ross found that to a reasonable extent, the protected characteristic was not a factor in the adverse impact. This conclusion was reached due to the fact that the confirmatory exams are to ensure the competency of the engineer in order to protect the public. The tests are required for individuals whose education has not been confirmed by APEGA. Furthermore, it could not be concluded that APEGA did not reasonably accommodate Mihaly, as he had failed to even attempt three confirmatory examinations. Due to these reasons, Justice Ross concluded that Mr. Mihaly did not face *prima facie* discrimination to a reasonable and justifiable extent, and that the decision of the Tribunal should be reversed.

Reflection

The Alberta Human Rights Commission found that the system for evaluating Mr. Mihaly's previous education and credentials was discriminatory. We do not agree, as Mr. Mihaly failed his ethical exam three separate times, and did not attempt to write any technical examinations. Mihaly was required to undergo the same registration process as all foreign engineers. It is paramount for self-regulating professions like APEGA to protect the public by ensure admitted individuals are qualified to undertake the responsibilities expected of them (Simons, 2016).

The Court of The Queen's Bench reversed the Tribunal's ruling as it had numerous legislative interpretation errors. Regulatory bodies like APEGA should not be required to completely change their credential review system, or compromise heavily on a case-by-case basis (Simons, 2016). To ensure the safety and protection of Canada's citizens, proper qualification is extremely important and new members must prove they are able to practice as professionals. The ruling of the Alberta Court of Appeal promotes fairness and eliminates subjectivity in the admission process, strengthening a system that values quality in the profession and safety for the Canadian public.

Many foreign-born engineers and geoscientists may experience difficulty when immigrating to Canada. Immigrants regularly are educated by a foreign system, and may experience setbacks due to language deficiencies or culture differences. Foreign educational requirements and standards may be different from those within Canada. As a result, many previously practicing foreign professionals do not qualify. This should not be considered discriminatory, as it places an emphasis on the skills and education of the individual, instead of the origin of their education and experience.

Engineers and geoscientists benefit society through the developments of technologies and solutions that not only progress societies, but aim to improve safety for both people and the environment. A higher number of engineers and geoscientists in Canada is a benefit, both economically and socially. Professionals from other nations can offer alternative and innovative views on all aspects of engineering, and having a greater number of foreign engineers or geoscientists may be advantageous for creating a diverse market.

Offering assistance in the form of mentors, language assistance programs, or networking resources may be very cost-intensive. However, there should be programs in place to allow for maximum inclusivity without spending an unbalanced amount of capital. One potential solution would be a user-based fee system, where the foreign applicant would receive mentorship and other networking assistance for a fee. This solution aids the applicant without placing a large economic strain on APEGA. Regardless of assistance, foreign applicants should be required to take an ethical exam and competency exams that demonstrate a sound understanding of engineering knowledge, in order to be sure all accepted professionals are qualified.

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