

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

Mihaly Case Study Report

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Introduction

The purpose of this report is to acquire background knowledge on the process of a legal situation involving APEGA, in order to apply the principles learned in the Role and Responsibilities of the Professional Engineer in Society course. I will then be able to use this knowledge to further my understanding of requirements of professional engineers in Alberta, APEGA regulations, and the legal environment in which APEGA operates.

This case study is an investigation of the Mr. Ladislav Mihaly [Mr. Mihaly] v. The Association of Professional Engineers and Geoscientists of Alberta [APEGA] case, involving the decisions of the Alberta Human Rights Commission [AHRC], The Court of Queen's Bench of Alberta [Court] and the Alberta Court of Appeal. This report will study the stakeholders involved, the background of the complaint, the reasoning of the three aforementioned decisions, and lastly I will give my personal opinion on the situation.

Stakeholders

There are many Stakeholders involved in a case such as this one, the primary stakeholders that can be identified are APEGA, the Court, AHRC, and Mr. Mihaly. Some secondary stakeholders are the Public, future international APEGA applicants, and future Canadian APEGA applicants.

APEGA is a primary stakeholder in this case because the complaint was made against the organization and its manner of licensing being discriminatory. APEGA is The Association of Professional Engineers and Geoscientists of Alberta, it is a licensing body within Alberta and its responsibility is to set and enforce high standards of practice within the province (Onen, 2018). APEGA must maintain a certain standard for all its applicants, both from within Canada and international applicants. In order to do so APEGA has set out a series of guidelines for its applicants, which each applicant must meet in order to be licenced. APEGA is a large stakeholder in the Mr. Mihaly v. APEGA case, as they were accused of discriminating against Mr. Mihaly in regards to his place of origin (Court of Queen's Bench of Alberta, 2016). APEGA was affected by this case as they had to uphold their reputation and prove to the Court that they were following the guidelines they had previously set out.

The Court is a main stakeholder in this case as they are expected to judge such civil cases and keep things just. The Court is a Superior Trial Court for the Province of Alberta that judges civil and criminal matters for the province, as well as appeal Provincial Court decisions (Queen's Bench, n.d.). The Court is expected to uphold justice within the province, as well as ensure everyone is treated fairly and without discrimination. They are a key stakeholder in this case as they are expected to look at cases like these in an unbiased manner, while ensuring that each Canadian citizen and/or permanent residents rights are not being compromised.

The AHRC is a stakeholder in this case as they are expected to protect Albertans and ensure their full rights are met. The Alberta Human Rights Act [Act] is in place to ensure that all Albertans are offered equal opportunity in many areas of life, such as earning a living, finding a place to live, and enjoying services without discrimination (About the Commission, 2012). The entire purpose of the AHRC is to make sure that under the Act, there are no Albertans being discriminated against. They are a main stakeholder in this case as they are the party that

investigated the complaint made by Mr. Mihaly and they made the initial decision on the situation. They are affected by this case because they are expected to uphold the Act and ensure that Mr. Mihaly was not having his rights under the Act compromised.

The final main stakeholder in this case is Mr. Mihaly, he is a stakeholder because he is the person making the claims of discrimination against APEGA. As an international applicant, Mr. Mihaly felt he was being discriminated against based on his country of origin and felt his former education and work experience were not being evaluated fairly (Human Rights Tribunals of Alberta, 2014). Mr. Mihaly intended to prove that he was being discriminated against and expected compensation from APEGA for the troubles he had incurred as a result of not being able to get licensing. Mr. Mihaly was directly affected by this case as he was seeking justice and reparation for how he felt he had been treated.

One of the secondary stakeholders of this case is the Public because they are directly affected by the licensing standards of Alberta. Engineers are given responsibilities that can potentially put the public at risk if not done properly. Therefore how strictly APEGA licenses its engineers has a large effect on the general public. If APEGA were to make it even more difficult to get a licence, it could result in less licenced engineers than Alberta needs, therefore having an adverse effect. If APEGA were to make it less difficult for an applicant to get a licence it could result in public safety issues such as building collapses, pipe failures, bridge failures and many more concerns. Therefore, the Public is affected by the standards that APEGA sets and in such the decision of this case.

Another secondary stakeholder is future international APEGA applicants, as they would be affected by any changes to APEGA's guidelines as a result of this case. Future international APEGA applicants could potentially face similar hardships that Mr. Mihaly faced because if nothing changes they would have to reach similar expectations to achieve licencing. These applicants may have similar struggles that Mr. Mihaly has had and could face similar issues in the standardized examinations. These standardized examinations are not one size fits all and therefore, may be a useful way of testing for some applicants, but not others (Court of Queen's Bench of Alberta, 2016). This makes the future international APEGA applicants a stakeholder in this case because APEGA may enact more individualized testing as a result of this case.

The final secondary stakeholder is future Canadian APEGA applicants, as they too are affected by any changes to APEGA's guidelines. Future Canadian APEGA applicants are affected by any changes to APEGA's licensing, particularly of international applicants, but for opposite reasons. One reason they are adversely affected is that they have gone through their degree and first few years of work experience working to meet APEGA's requirements, so if APEGA suddenly changes the requirements of international applicants, there is a chance that they will no longer be held at the same standard. Another reason is that if it is made easier for international applicants to receive licencing, they will be faced with larger competition for the engineering jobs within Alberta. Future Canadian APEGA applicants would overall not benefit from any changes in regulations that make it easier for international applicants to receive licencing.

Background

The beginnings of the Mr. Mihaly v. APEGA case date back to when Mr. Mihaly first moved to Canada and applied for APEGA registration as a professional engineer, with his formal education based out of Czechoslovakia. He was informed that he had to complete the National Professional Practice Exam [NPPE]. At a later date he was informed that he didn't pass his first try of the NPPE, also that after review of this application materials he was expected to complete three confirmatory examinations and take a course or pass an equivalent examination in Engineering Economics or take the Fundamentals of Engineering Examination [FE exam] (Court of Queen's Bench of Alberta, 2016). At this point it is noted that APEGA clearly laid out the guidelines expected of Mr. Mihaly in order to obtain his licence, but that the second half of the expectations were given at a later date than the first.

Mr. Mihaly continued with his quest to become a licenced engineer with APEGA, but the road was far from smooth. After Mr. Mihaly failed his first attempt at the NPPE and had been made aware of all the requirements of his licencing, he did not attend his second writing of the exam and had his application pulled. After two more reactivations and two more NPPE fails, Mr. Mihaly was informed that his experience within Canada thus far was not at the proper level and he would have to obtain the proper experience to reach the experience requirement (Court of Queen's Bench of Alberta, 2016). It can be seen that Mr. Mihaly was struggling to reach the requirements set by APEGA, and it should be noted that he did not attempt any of the other required examinations other than the NPPE.

The additions of requirements for Mr. Mihaly by APEGA appeared to be based on formal guidelines set out by the association. At this point Mr. Mihaly was advised by Mr. Mark Tokarik [Tokarik] that if he felt the Board of Examiners made a mistake with his application, he should submit it for a reconsideration. Mr. Mihaly never submitted a request for reconsideration, he instead filed a complaint with the AHRC (Human Rights Tribunals of Alberta, 2014). It is clear that Mr. Mihaly was advised to work out the issues within the organization, however it appears he decided to approach the situation otherwise.

Once Mr. Mihaly's complaint had been received by the AHRC, the Human Rights Tribunal [Tribunal] was set to evaluate the case and make a decision on whether he had established the examination standard and experience standard set by APEGA. In addition they explored if APEGA's standards to asses such persons without individualized assessment was found to be discriminatory (Court of Queen's Bench of Alberta, 2016). The main goal of the Tribunal was to uphold those standards set by the Act, which clearly constitute against any form of unfair treatment, such as discrimination based on where one got their education.

After the complaint went to be assessed, APEGA was given the opportunity to refute the claims. APEGA attempted to refute the claims by providing three witnesses on the subjects of engineering program assessment within Canada, the assessment of Mr. Mihaly's application, and the APEGA application process (Human Rights Tribunals of Alberta, 2014). APEGA's use of

witnesses was in an effort to prove that their decision was non-discriminatory, but was simply the consistent process and standards required to obtain licencing.

Once each side gave their case, the Tribunal came to a decision based on the evidence provided. The Tribunal ultimately came to the decision in that Mr. Mihaly had succeeded in proving discrimination based on origin and the format with which APEGA was assessing its standards was discriminatory. They ordered that Mihaly be rewarded with \$10,000 in damages and that APEGA reconsider Mr. Mihaly's application, as well as provide support in the form of possible exam exemptions, different methods of assessment, and a mentor (Human Rights Tribunals of Alberta, 2014). This win for Mr. Mihaly took a long time to achieve and was not the end of the process for him, APEGA still had the chance to appeal the Tribunal's decision.

The decision made by the Tribunal was appealed by APEGA and the appeal was set to be heard by The Court. The appeal proceedings occurred and the Tribunal was expected to address: the impact of the Court's decision in *Grover v. Alberta*, the *prima facie* test for discrimination, and the defence of a bona fide occupational requirement (Court of Queen's Bench of Alberta, 2016). These topics were used in defence of Mr. Mihaly in the initial complaint proceedings and had to be proven against APEGA, but this time to the Court in the appeal.

The Appellant, APEGA raised issues that they found in the initial decision of the Tribunal. The issues that APEGA raised in the appeal were: procedural fairness, jurisdiction, *prima facie* discrimination, and justification (Court of Queen's Bench of Alberta, 2016). These issues were areas that APEGA felt the Tribunal was unjust in its decision, and requested further proof of the implications. The final decision of the Court was that the decision of the Tribunal should be reversed and that the matter should not be remitted back to the Tribunal (Court of Queen's Bench of Alberta, 2016). Overall the Court found that the Tribunal was unreasonable in its claims of discrimination in examination and experience requirements from APEGA based on the applicant's origin.

Mr. Mihaly appealed the decision of the Court to the Court of Appeal, however he failed to take the proper steps to advance the appeal, so it was denied. After Mr. Mihaly requested to restore the appeal, the Alberta Court of Appeal refused to allow it to proceed, finding that Mr. Mihaly did not have evidence of any error in the Court's decision (Casey, 2017). The appeal by Mr. Mihaly did not contain any indication that the Court had made a wrongful decision, so the Alberta Court of Appeal was entitled to decline it.

The Court of Queen's Bench Decision

After the Tribunal's decision, APEGA appealed the case to the Court. The Court's appeal of the Tribunal's decision revolved around four main issues: procedural fairness, jurisdiction, *prima facie* discrimination, and justification (Court of Queen's Bench of Alberta, 2016). These issues were raised as APEGA felt the Tribunal was unfair or unreasonable in its decisions on these topics. They set a defense for each of the accused topics and the Court decided the reasonableness of each argument against the decision of the Tribunal.

Procedural fairness is based on whether the measures used by a decision maker in making a decision are reasonable and just. The issue that procedural fairness raised, was whether the Tribunal had broken the rules of procedural fairness when deciding issues not raised by or with the parties (Court of Queen's Bench of Alberta, 2016). This issue involved bringing forth a matter that neither of the parties had raised or argued, this is considered procedurally unfair because they are not given an opportunity to respond in the proper procedure on this new issue.

After taking into consideration both sides of the appeal, the Court came to a decision on the basis of procedural fairness. The Courts decision on the issue of procedural fairness was that APEGA had not established a breach in procedural fairness (Court of Queen's Bench of Alberta, 2016). This issue was therefore not useful for APEGA in defense of their appeal and they were forced to rely on their other arguments.

Jurisdiction is the authority to administer justice in a hearing. The issue of jurisdiction was raised in terms of whether the Tribunal was justified in assessing Mr. Mihaly's complaint. It was questioned if the Tribunal had jurisdiction to determine if discrimination over where a person receives their education is equivalent to discrimination over their place of origin (Court of Queen's Bench of Alberta, 2016). The issue APEGA had with this situation was over the fact that the Tribunal did not have jurisdiction over the complaint, as they do not protect against discrimination.

The evidence for the issue of jurisdiction was brought to the attention of the Court in the form of several case studies. One of the most relevant case studies was the *Moore v. British Columbia (Education) [Moore]* case. This case established that in a *prima facie* case of discrimination, there must be complaints to show that they possess a characteristic that is protected from discrimination and that caused them adverse impact (Court of Queen's Bench of Alberta, 2016). The main purpose of the *Moore* case in relevance to the Mihaly case, is it was undetermined whether there was sufficient evidence to prove *prima facie* discrimination.

After consideration of both APEGA and the Tribunals arguments, The Court decided that the Tribunal had clear jurisdiction in applying the tests needed to prove or disprove Mr. Mihaly's allegation of *prima facie* discrimination. The Court identified that APEGA did not establish a lack in jurisdiction in this situation (Court of Queen's Bench of Alberta, 2016). This issue was not accepted by the Court, however the issue of *prima facie* discrimination, which had been briefly discussed during the defence of this issue, was still to be determined.

Prima facie discrimination is essentially discrimination where there is sufficient evidence to prove one party was discriminatory. The issue of *prima facie* discrimination was raised based on whether the Tribunal relied on the correct legal test and reasonably applied that test to determine the presence of *prima facie* discrimination (Court of Queen's Bench of Alberta, 2016). For this issue APEGA had to prove that the tests used by the Tribunal, such as the *Moore* test, were not adequate in determining the discrimination claimed.

In the previous case the Tribunal had argued that Mr. Mihaly was adversely impacted by the expectation to complete the confirmatory exams or the FE exam. In the case of *Moore*

explained above, APEGA argued that he could not be adversely affected by exams that he never attempted because there is no way to determine whether or not he would have passed said exams (Court of Queen's Bench of Alberta, 2016). The case APEGA made in defense is directly correlated to the *Moore* test and shows how each party had a different view on what the exact implications of the *Moore* test were.

The Tribunal also came to the conclusion that APEGA's policies were based on discriminatory assumptions. They thought that foreign countries that do not have Mutual Recognition Agreements [MRA] with APEGA are assumed to have qualifications not at par with Canadian institutions. APEGA challenged that this finding had no supporting evidence and that in comparing programs of different institutions it is not assuming that they are not qualified, it is that APEGA simply doesn't have the information to know if they are (Court of Queen's Bench of Alberta, 2016). This defense was used to justify the need for these examinations from countries outside of Canada and MRA countries because if APEGA does not have proper information on an educational program, they cannot compare the level of education to that of a Canadian institution.

The Court came to a conclusion in the case of *prima facie* discrimination that there was no indication that the requirements of the NPPE exam was qualified as discrimination. They decided this, as all applicants are subject to have to write the NPPE if they do not meet the requirements for a licence. The Court concluded that the Tribunal did not properly address certain elements of the *Moore* test in their decision in relation to the NPPE and experience requirements and that the Tribunal's finding of *prima facie* discrimination was unreasonable (Court of Queen's Bench of Alberta, 2016). Now APEGA had proven that *prima facie* discrimination was not present in this case, but still had to prove that they were justified in the rest of their requirements.

The final issue raised in this case was that of Justification and whether APEGA's examinations and experience requirements were justified in this case. The issue raised was whether the Tribunal's decision was unreasonable based on APEGA's registration requirements not being justified (Court of Queen's Bench of Alberta, 2016). APEGA had to prove that they had not been more demanding of Mr. Mihaly in his examination and experience requirements, than they had of any other applicants.

The Tribunal had originally asserted that the examination requirements were not acceptable. They felt this because the examinations were not being used to correct Mr. Mihaly's academic deficiencies. They found deficiencies in his individual assessment and felt that the examinations did not accommodate Mr. Mihaly in an individualized manner (Court of Queen's Bench of Alberta, 2016). The Tribunal felt that Mr. Mihaly was not given the opportunity to succeed by passing his examinations because they were not individualized, they were standardized.

The conclusion of this issue revolved around the Tribunal thinking the FE exam did not take into account individuality. They felt the FE exam may not prove one's ability as an engineer because it does not test experience, training and background. APEGA argued that the examinations put in place are as a way to test knowledge, and that graduates of engineering wishing to practice in Canada are expected to possess this knowledge (Court of Queen's Bench of Alberta, 2016).

This defense revolves largely around what the Tribunal expected from APEGA and what APEGA actually has the resources to achieve, in theory individualized testing is a sufficient way to gain licencing, but APEGA may not have the resources for such a program.

After taking all the issues and arguments into consideration, the Court was able to make a decision on APEGA's case of justification. The conclusion that the Court came to on this topic was that APEGA had properly justified its reasoning for the examinations required for Mr. Mihaly. Although the Tribunal had concluded that Mr. Mihaly had established *prima facie* discrimination in relation to his expectation to complete the confirmatory examinations or the FE exam, the Court found this conclusion unreasonable and that APEGA had indeed justified the need for these requirements (Court of Queen's Bench of Alberta, 2016). The Court agreed that the examinations were necessary in order to prove that foreign applicants were at the same level of education as applicants within Canada.

The Court found that the examinations of applicants from institutions of unknown educational standards were necessary in order for APEGA applicants to meet their licencing standards. The Court concluded that the decision of the Tribunal be reversed, with no need to remit the case back to the Tribunal (Court of Queen's Bench of Alberta, 2016). With that APEGA won this case to reverse the Tribunal's initial decision and assured it was justified in its licencing process.

Reflection and Opinion

The final portion of the case involved Mr. Mihaly filing for an appeal in the Alberta Court of Appeal. Mr. Mihaly initially filed his appeal, but did nothing to perfect the appeal, which led to the appeal being struck by the Alberta Court of Appeal (In the Court of Appeal of Alberta, 2017). Mr. Mihaly had issues with the Court's decision and had the intention to address these issues however he did not meet their appeal standards.

The Alberta Court of Appeal has standards when restoring appeals: they require arguable merit, explanation for the delay, promptness in curing the defect, intention in proceeding with the appeal, and lack of prejudice in the respondents. Unfortunately, Mr. Mihaly did not comply with three of these standards, he did not provide an explanation for his delay, he did not show promptness in having it restored, and he did not show intention in proceeding by perfecting the appeal (In the Court of Appeal of Alberta, 2017). These issues were ultimately why Mr. Mihaly was not granted restoration of his appeal, the Alberta Court of Appeal did not see justice in proceeding with the appeal.

The result of Mr. Mihaly's appeal was that he did not meet the required test to determine if an appeal be restored. In addition, the Alberta Court of Appeal determined that APEGA had a right to have finality in the proceedings regarding their evaluation of foreign credentials and Mr. Mihaly did not indicate any prevalent error in the Courts decision (Casey, 2017). Overall, the Alberta Court of Appeal determined that the restoration of the appeal was not justified.

I would say that I agree with the Alberta Court of Appeal decision, it appears from the notes of the decision that the standards to restoring an appeal were laid out and that they were simply

following these standards when it came to Mr. Mihaly. Had Mr. Mihaly taken the time in perfecting his appeal, giving appropriate reasoning for the delay, and showing haste in the response, then I'm sure he would have been granted the restoration of his appeal.

I agree with the Court with their decision as well, in terms of the first two issues it appears that the Tribunal was simply doing its background research for the topic at hand, but the last two they were being unreasonable in their practice. I believe that the Court was correct in stating that the examination guidelines are not in place to discriminate against certain foreign countries, but they are simply there to have the international applicants prove that they are of the same knowledge level as applicants of accredited institutions. A notable point brought up in this appeal was the fact that it can hardly be proven that Mr. Mihaly was being discriminated against for these exams, given that he only ever completed the NPPE. Had Mr. Mihaly written all the exams and failed all the exams there may have been a defense that all the examinations are unfair to international applicants, but it could also be argued that he failed all the exams because he was simply not at the level of education an APEGA accredited engineer should be. Overall I would say the Court was just in reversing the decision of the Tribunal, as there was not enough supporting evidence for their claims.

In terms of the decision made by the Tribunal, I would have to say that I disagree with their decision. I can understand certain points of their defense, for instance that the examinations should be better for fitting individualized needs, as I am someone who is not particularly good at testing. However, I understand that there is no indication that APEGA has the resources for such individualized testing, making the reality of individualized testing a lot more difficult to achieve. I would have to say I also disagree with APEGA being expected to provide a mentor for Mr. Mihaly, it seems counter intuitive to base an entire argument around not favoring certain individuals and then expecting APEGA to give Mr. Mihaly special treatment. If the defense was that there should be mentors available for all international applicants, I would be in full support of that because I think a lot of Mr. Mihaly's problems could have been avoided had he be in contact with a mentor from when he first immigrated. Overall, I would say that I disagree with the Tribunal's decision, I think this is not a manner of discrimination as much as it is a manner of integration into a new society and different changes in terms of integration would be a lot more beneficial to APEGA applicants as whole.

I believe that APEGA should be more proactive in providing resources for foreign-trained engineers, but I do not believe they should compromise their licencing standards in doing so. I think it would be beneficial to provide options for international applicants to meet with APEGA members that were also once international applicants, so they can attain a better understanding of the process. In addition, I would not expect APEGA to make it easier for foreign students in particular to get licencing, I believe the process they have for determining who is fit for licencing is in place for a reason. I believe that they have processes for ensuring this testing is fair and that its main purpose is to ensure all licenced engineers meet the same standards for the protection of themselves and the public.

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