



REPORT 1: MIHALY VS APEGA CASE STUDY

ENGG 513 – Roles and Responsibilities of the
Professional Engineer

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February 16, 2018

Introduction

On August 5, 2008 Mr. Mihaly filed a complaint with the Alberta Human Rights Commission against the Association of Professional Engineers and Geoscientists of Alberta (APEGA), claiming that he was discriminated against when he was denied registration as a Professional Engineer. Whether the requirements imposed upon Mr. Mihaly by APEGA were forms of discrimination and violated the Alberta Human Rights Act (AHRA) or not are explored in this complaint.

The Alberta Human Rights Tribunal (Tribunal) had decided that APEGA did show discrimination against Mr. Mihaly when they refused to recognize his education as equivalent to the engineering degree from an accredited Canadian University, based on his place of origin, and required him to write certain examinations to confirm his academic credentials. On February 6, 2014 APEGA appealed the decision of the Tribunal and the appeal was taken to the Court of Queen's Bench.

This report will explore the requirements to become a registered professional engineer, APEGA's regulatory process, and the legal and quasi-legal environment in which APEGA operates.

Stakeholders

1. APEGA

The Association of Professional Engineers and Geoscientists of Alberta regulate the practices of engineering and geoscience in Alberta on behalf of the Government of Alberta through the Engineering and Geoscience Professions Act. Their main regulatory function is to license individuals and companies that want to practice engineering and geoscience in Alberta. These individuals or companies must meet APEGA's standards for ethical, professional, and technical competency to earn the right to practice and use reserved titles and designation. [1]

2. The Court of Queen's Bench

The Superior Trial Court of the Province, hearing trials in civil and criminal matters and appeals from decisions of the Provincial Court. Provide an impartial forum for the just and proportional resolution of legal disputes, to preserve the Rule of Law and to protect the rights and dignity of all. [2]

3. The Alberta Human Rights Commission

Protects Albertans from discrimination in certain areas based on specified grounds. Ensure that all Albertans are offered an equal opportunity to earn a living, find a place to live, and enjoy services customarily available to the public without discrimination. They aim to foster equality and reduce discrimination, through public education and community initiatives, the resolution and settlement of complaints of discrimination, and through human rights tribunal and court hearings. [3]

4. Mr. Ladislav Mihaly

Born, educated and certified as an engineer in Czechoslovakia. Holds two master's degrees, one from the Slovak University of technology and another from the Institute of Chemical Technology. Moved to Canada and applied to APEGA for registration as a P.Eng in 1999. After several application and exam attempts to become recognized as a professional engineer files a complaint with the Alberta Human Rights Commission claiming that APEGA discriminated against him based on his place of origin. [4] [5]

5. Dean David Lynch

The Dean of the Faculty of Engineering at the University of Alberta, for almost 19 years, has a statutory position on APEGA's Board of Examiners, on the Canadian Engineering Accreditation Board (CEAB), and was a witness appearing on behalf of APEGA. In his testimony, discusses topics such as the roles of the CEAB, the regulation of the engineering profession, APEGA's registration process, the accreditation process in the United States, the Washington Accord, the Substantially Equivalent Program, the Foreign Degree List (FD list), and the Fundamentals of Engineering Examination (FE exam). [5]

6. Dr. Gary Faulkner

Ph.D. in Applied Mechanics from the University of California, was the Chair of the Department of Mechanical Engineering, now the Director of Rehabilitation, Research and Technology Development, the Chair of the Board of Examiners, a Board Member of the Canadian Engineering Qualification Board (CEQB), and the second witness for APEGA. In his testimony, discusses topics such as the role of the CEQB, an overview of the role of the APEGA Board of Examiners, how to be registered as an Engineer in Alberta, the confirmatory exams, the process for examination assessment appeals, the National Professional Practice Examination (NPPE), and reviewed several documents and assessments pertaining to Mr. Mihaly and meetings from the Board of Examiners pertaining to Mr. Mihaly. [5]

7. Mr. Mark Tokarik

Holds a Bachelor of Science in Engineering, worked for Cambrian Engineering, attended law school and obtained a Bachelor of Law, joined APEGA, became Assistant Director of Registration, then Director of Registration and eventually appointed as the Deputy Registrar, belonged to the National Engineering Admissions Officials Groups, was a member of the Engineers Canada's Foreign Engineering Qualifications Committee (FEQC), was a member of Engineers Canada's Admissions Issues Committee, and served as the third witness. In his testimony, discusses topics such as the six requirements to be registered as a Professional Engineer in Alberta, where on the APEGA website to find information for International Educated Graduates (IEGs), the requirement that applicants must pass the NPPE, the FE exams, the FD list, the significance of the CEAB Substantially Equivalent Program, and cross-examination of several pieces of evidence and protocols. [5]

Background

Mr. Mihaly, born and educated in Czechoslovakia, states that he has two master's degrees. One obtained from the Slovak University of Technology in Bratislava, and the second obtained from the Institute of Chemical Technology in Prague.

Initial Application:

- May 1999 – Mr. Mihaly first applied to APEGA for registration as a Professional Engineer (P.Eng)
 - In his application states his qualifications from the Slovak Technical University is a M.Sc. Diploma, attended the institution from 1970 to 1975, and graduated with a specialization in Technology of Fuels and Thermal Energy.
 - Provided names of three references who he worked for in Bratislava so that APEGA could send them reference questionnaires for completion.
- May 13, 1999 – APEGA acknowledged his application and requested transcripts, visa and Landed Immigration form and advised Mr. Mihaly that he was required to write the NPPE.
- January 28, 2000 – Board of Examiners considered Mr. Mihaly's transcripts, reference questionnaires and experience, and decided that his degree from the Slovak Technical University had many elements

of chemical engineering, that his experience was long but narrow and that the references were from supervisors with short exposure.

- February 11, 2000 – APEGA advised Mr. Mihaly that he must, in addition to passing the NPPE, complete the confirmatory examinations and take a course or pass an equivalent exam in Engineering Economics by May 2001.
- February 11, 2000 – APEGA advised Mr. Mihaly that he had failed his first attempt at the NPPE (written on January 17, 2000).
- August 1, 2000 – Mr. Mihaly applied to write the NPPE on October 16, 2000 for a second time. Mr. Mihaly did not attend on that day to write the test.
- June 29, 2001 – APEGA advised Mr. Mihaly that his application for registration as a P.Eng had been withdrawn since he failed to write the required confirmatory exams by May 2001.

First Reactivation:

- May 31, 2002 – Mr. Mihaly asked APEGA to reactivate his application for registration and applied to write the NPPE on July 15, 2002. Explained in his email that he was unable to respond earlier due to a serious car accident and health problems after this accident.
- June 3, 2002 – APEGA reactivates his file and advised him that he is to write the three confirmatory exams by May 2003 and Engineering Economics exam by November 2003.
- June 20, 2002 – Mr. Mihaly wrote to APEGA mentioning that he was unaware that his academic degree (Master of Engineering Scientist) from Czechoslovakia does not match the bachelor's degree's requirements in Alberta.
- June 20, 2002 – he received an email response from Jennifer Scherban of APEGA and advised Mr. Mihaly that on February 11, 2000 a letter was sent stating that the Board assessed he needed to write three confirmatory exams and the 98-CS-1 exam to be registered as a P.Eng with APEGA. Stating that he was given these exams because his institution was on the FD list and in order to confirm that his education meets APEGA's standards.
- June 21, 2002 – Mr. Mihaly receive a formal reply from Mr. Tokarik of APEGA, in response to the June 19, 2002 email, stating that Mr. Mihaly was advised that his Chemical Engineering degree did not meet APEGA's academic requirements, and that his degree was on the FD list, hence the need for the confirmatory exam, which was the standard assessment in such cases.
 - Mr. Tokarik advised Mr. Mihaly that APEGA had no record of advising him previously that his education was considered equal to the Canadian engineering education.
 - Mr. Tokarik also states that in Mr. Mihaly's June 19, 2002 email, Mihaly indicates that he informs his ex-university that their accreditation is not recognized in Canada or Alberta. Mr. Tokarik states that there is no Mutual Recognition Agreements (MRA) in place between Canada and Mr. Mihaly's former country, and hence the reason he is assigned the confirmatory exams and course/exam in engineering economics.
- July 8, 2002 – Mr. Mihaly has a phone conversation with Mr. Tokarik. Telephone notes made by Mr. Tokarik were put into evidence and suggested that Mr. Mihaly was asking for a waiver based on 10 years of experience. Mr. Tokarik's notes include:
 - Mr. Tokarik explained to Mihaly confirmatory exams;
 - Mihaly indicated that he had close to 12 years of international experience;
 - He used to teach his colleagues;
 - Worked for years at a Research Institute;
 - Mr. Mihaly advised that he will send an updated resume but may not be able to locate the P.Eng supervisor he was working for because the company had gone out of business.

- May be able to get a reference from a Human Resources manager.
- July 8, 2008 – Mr. Tokarik sent out a Reconsideration and Appeal Sheet to Mr. Mihaly by fax to file an appeal if he wanted to. An appeal was not filed.
- Mr. Mihaly failed the NPPE (written on July 15, 2002)
- August 1, 2003 – APEGA withdrew his file, again, because Mr. Mihaly had not written the required confirmatory exams within the period specified by APEGA.
- August 2006 – Mr. Mihaly again complained to APEGA's Director of Professional Practice, Ray Chopiuk, about APEGA's refusal to recognize his academic qualifications and the need for him to write the confirmatory exams. Mr. Chopiuk referred Mr. Mihaly to Mr. Tokarik (APEGA's Director of Registration at the time).

Second Reactivation:

- October 3, 2006 – Mr. Mihaly asked APEGA to reactivate his application for a third time.
- October 18, 2006 – APEGA advised Mr. Mihaly that his file is reactivated, but due to the amount of time passed, they required an updated resume and a list of updated references. Mr. Mihaly provided this information on November 16, 2006. He submitted the names of a Professional Engineer he worked for more than a year in Calgary, a name of a Gas company owner and a name of a co-worker for consideration.
- August 10, 2007 – Board of Examiners reconsidered Mr. Mihaly's application and again determined that Mr. Mihaly had to complete three confirmatory exams and a course/exam in engineering economics or the FE exam. The Board also determined that Mr. Mihaly had not acquired the one-year acceptable D level North American engineering experience and was required to obtain acceptable experience.
- Mr. Mihaly did not write the required examinations and on August 5, 2008 he filed a complaint with the Commission.

Summary of Decisions Made

Tribunal found that the Examination Standard and the Experience Standard used by APEGA to assess Mr. Mihaly's educational credentials, without more individualized assessment or exploration of other options, constitutes discrimination which cannot be justified under AHRA. Tribunal rules that Mihaly is to be awarded \$10,000 for the hardship he faced and loss of dignity, and for APEGA to reconsider application. Both parties appeal this decision and the case is now handed over to the Alberta Court of Queen's Bench (Court). [5]

Court disagrees with Tribunal and finds that Tribunal made unreasonable interpretations, assumptions and required APEGA to make accommodations that would change the fundamental nature of APEGA and cause undue hardship. Mihaly attempts to have the Court reconsider their decision. However, the Court of Appeal of Alberta ultimately finds, due to insufficient evidence, an inability to meet the criteria for restoring an appeal and an absence of Mihaly's follow-up, the appeal had not met the test for restoration and the application is dismissed. [7] [8]

The Court of Queen's Bench Decision

The Court upheld APEGA's appeal and reversed the decision of the Tribunal, and the cross-appeal by Mr. Mihaly was also dismissed. [6]

The Court found the Tribunal did apply the correct legal test of justification, which required the defendant (APEGA) to prove that:

- a) It adopted the standard for a purpose or goal that is rationally connected to the function being performed;
- b) It adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
- c) The standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship

There is no issue with the first two elements of the above test. Tribunal found that APEGA has the responsibility for the registration of IEGs to assure competent practice in Alberta without causing harm to the public, and the standards applied are adopted for safety and competency reasons. The standards are rationally connected to APEGA's function and were adopted in good faith.

There is an issue, however, with the third element of the test. The Tribunal found that APEGA did not reasonably accommodate Mr. Mihaly in relation to the requirement that he write the confirmatory exams, the FE exam, the NPPE and to complete one year of Canadian experience before being certified. Section 11 of the AHRA is only in relation to conduct which has been found to constitute *prima facie* discrimination. Therefore, the Tribunal's findings that the NPPE and Canadian experience requirements were unjustified, unreasonable and outside of the scope of section 11.

The Tribunal found that it was unjustifiable to require the FE exam and the confirmatory exams because Mr. Mihaly should not be required to have to write these exams, but instead only exams that correct perceived academic deficiencies following an individualized assessment of his credentials, and that he should not have to write a standardized "one size fits all" exam, but rather be individually assessed.

The Court found that the first point was due to the Tribunal's misinterpretation of the Engineer and Geoscience Professions General Regulation (EGPR) that states that the Board of Examiners requires the applicant to complete one or more confirmatory examinations *OR* examinations for the purpose of correcting a perceived academic deficiency. The Tribunal's interpretation is deemed unreasonable because no line of reasoning was provided.

Tribunal suggest that APEGA should be more proactive and discuss and negotiate agreements with other institutions from which engineers come to Canada, but this would require a significant amount of resources and time due to the complex procedures required to accredit and assess a large number of engineering programs, which is well beyond the capacity of APEGA.

APEGA doesn't assign exams to applicants like Mr. Mihaly based on the perceived academic deficiencies. They assign confirmatory exams or the FE exam in order to assess the quality of the undergraduate engineering program they've taken. APEGA doesn't have reliable evidence about their engineering programs, so they have to assess their competence in other ways (such as post-graduate studies, suitable experience, or confirmatory exams). APEGA's policy of assigning confirmatory exams is consistent with EGPR, and consistent with its objective of ensuring the competency of professional engineers.

The Tribunal finds the FE exam to be unreasonable because it is standardized. They assume that the exam would have a disproportionate impact on foreign educated applicants and tend to prevent them from being registered as a P.Eng. There is no evidence that supports this assumption. The FE exam actually has a pass rate of 85%, and applicants who do not pass are allowed to retake the exam. It is unknown if Mr. Mihaly would pass the FE exam (or the alternative confirmatory exams) because he never showed to write any of these. The Court agrees with APEGA that there is no evidence that IEGs with entry level competence would have any difficulty passing the FE exam.

Tribunal accepts that the FE exams are developed to assure competency, and thus public safety. Confirmatory exams are developed by individuals at the University of Alberta and University of Calgary and designed to cover the material that APEGA would expect to see in someone who has graduated from a Canadian-accredited program. Mr. Mihaly would have been assigned an exam in his specialization, chemical engineering. By taking the FE exam, IEGs are expected to demonstrate that their education is at par with entry-level competence of a Canadian graduate and that they possess the knowledge that is the basis of their profession, which is reasonably necessary for safe practice as a P.Eng. Evidence showed that of 1500 IEGs, 60% registered with no issue, 25% were assigned FE or confirmatory exams and 15% had sufficient experience. It was found that FE exams have been proven by substantial empirical testing to be a valid and reliable measure of accreditation standard.

APEGA individually assesses applicant to determine if exams may be waived. They may be waived if the applicant has completed a graduate degree at a university of Canada or an MRA country, or if they have 10 years of progressively responsible engineering experience. Mr. Mihaly did not meet any of these requirements. He took issue with the assessment of his experience but did not pursue an internal appeal that presented evidence that APEGA's decision was incorrect. Tribunal believed that these assessments were unfair for foreign engineers because they usually come to Canada early on in their careers. This was not supported by the evidence, as Mr. Mihaly had more than 10 years of experience; it was the quality of this experience that was found to be insufficient.

Tribunal directed APEGA to use its best efforts to match Mr. Mihaly to a Mentor to guide and gradually integrate him into the profession. This goes beyond the scope of discriminatory conduct found of alleged and this would also require a significant amount of resources because it would have to be done not only for Mr. Mihaly but for the other 375 applicants they receive each year. Tribunal did not consider the scope of their request causing undue hardship, or Mr. Mihaly's obligation to assist in a search for possible accommodation.

Tribunal's unreasonable interpretation of the EGPR, unsupported assumptions that the FE exams disproportionately excludes foreign trained engineers from being registered with APEGA, failure to appreciate the demonstrated entry level engineering competence is reasonably necessary to safe practice as a P.Eng, failure to consider relevant factors in the assessment of undue hardship, it is clear that the Tribunal's conclusions regarding accommodation are unreasonable and unjustifiable.

The cross-appeal is only related to a remedy, and therefore dependent on a finding of discrimination that is not justified under section 11 of the AHRA. From the conclusion on the appeal, the cross-appeal is dismissed.

Reflection and Opinion

- *Do you agree with the decisions of the Alberta Human Rights Commission, the Court of Queen's Bench, and the Alberta Court of Appeal? Why or why not?*

1. Human Rights Commission (Tribunal)

The Tribunal decided that APEGA did show discrimination against Mihaly because their policies were based on discriminatory assumptions that engineers with qualifications from foreign countries are not at par with Canadian engineering accreditation standards. I disagree with this conclusion that the Tribunal made because these policies were actually based on knowledge of the programs from foreign countries done through paper reviews of foreign institutions, such as reviewing of calendars and other publicly available information with respect to programs that appear to be in relation to engineering.

Upon this decision the Tribunal stated that Mihaly should not have to write the confirmatory exams of the FE exam. I do not agree with this decision either as these exams are assigned for a reason. They are to confirm that the education they received is at par with the standards in Canadian institutions and to ensure that applicants have the knowledge to be competent engineers, which ultimately is for the protection and safety of the public. Exemption from these exams is possible if the applicant shows to have further qualifying education or a minimum of 10 years of qualifying engineering experience, but Mihaly did not meet either of these requirements. The Tribunal asking that APEGA exempt Mihaly from these exam is unreasonable because it would compromise the very fundamental purpose of APEGA being a regulatory body to help protect the public.

The Tribunal also came to the conclusion that it was unreasonable to ask Mihaly to write a "one size fits all" test. They believed that it gave IEGs an unfair disadvantage in becoming registered as a P.Eng. I disagree with this conclusion because this assumption is made with no clear evidence. The evidence presented actually shows that applicants have no issue with passing the FE exam (with a pass rate of 85%) and being registered as a P.Eng. Evidence showed that of 1500 IEGs, 60% registered with no issue, 25% were assigned FE or confirmatory exams and 15% had sufficient experience. It was found that FE exams have been proven by substantial empirical testing to be a valid and reliable measure of accreditation standard.[6]

2. Court of Queen's Bench (Court)

I agree with the decisions of the Court. The confirmatory exams and the FE exam are required of all applicants from any non-accredited institution and are in place to ensure that applicants obtain knowledge that is at par with that of an entry-level graduate from a Canadian accredited engineering institution. In other words, these exams are to confirm the understanding of the material already studied by the applicant. There is no evidence that shows that Mihaly's failure of the exam is rooted based on his place of origin because these exams are common to all foreign applicants. As seen in the discussion above it is also apparent that the countries and institutions that end up on the FD list are not chosen from random and based on the place of origin but rather through an evaluation of the actual programs that are in place. The FD list also actually worked out in Mihaly's favor because his institution was on the list, so he only had to write 3 confirmatory exams as opposed to the required 5. Applicants are also assessed on an individual basis to determine if they are required to write the confirmatory exams and FE exam. They are able to waive these exams if they obtain other qualifying degrees, or 10 years of qualifying experience, and Mihaly did not meet either of these. It was also seen

that Mihaly really did not show any initiative or effort into helping come up with reasonable accommodation, which is an obligation he has.

Overall, I believe that APEGA was more than fair and just in their procedures for Mihaly's application to be registered as a P.Eng. They gave Mihaly several chances to write the exams, and even reactivated his application after several cases of Mihaly simply not showing up and completing the required exams on time and not doing what was asked of him to successfully register as a P.Eng. They treated him with respect and ensured that his questions and misunderstanding were answered and explained in a reasonable manner. [5] They even gave Mihaly the opportunity to file an appeal and reconsider APEGA's evaluation on his experience and qualifications, but he never filed an appeal. It seems to me that Mihaly wanted an easy way out or some kind of loop hole for the procedures that APEGA has in place.

3. Alberta Court of Appeal

I agree with the Court of Appeal's decision to dismiss the application. Mihaly failed to show any effort to perfect the appeal, had no evidence to show there was error in the decision he was trying to appeal, and he delayed the appeal with no explanation and no apparent intention in time to proceed with the appeal. There are a number of factors that have to be considered in deciding whether to restore an appeal and Mihaly met little to none of these requirements, so it makes sense that the Court of Appeal decided to dismiss the application. [7] In my opinion, Mihaly simply appears to be unwilling to do the work. He didn't want to put in the required work, time and effort into writing the exams to successfully be registered as a P.Eng, and he didn't want to put in the work, time and effort to getting his appeal restored. Mihaly is either unqualified to be a P.Eng but wanted to find some loop-hole to be registered, or he is simply lazy and didn't want to do the work that was required to be a registered P.Eng and tried to find some "easier" way.

- *Should APEGA accommodate foreign-trained engineers and geoscientists? Why or why not? If yes, how should APEGA accommodate foreign-trained engineers and geoscientists?*

I think that APEGA should accommodate foreign-trained engineers and geoscientists. However, as seen in the discussion above, I don't think that the accommodation provided should be to the level of what the Tribunal was suggesting. It appears that initially, when Mihaly was first applying for registration, there was a simple miscommunication about why he had to take the test (seen from his first email to APEGA on June 20, 2002). Mihaly's misunderstanding could possibly have been due to a language barrier. It might not have been inherently apparent to him that the reason he had to write these tests were to confirm that his education was at par with APEGA's standards. His place of origin had no role in deciding if he had to write these tests or not, but rather the quality of his education that he received. The language used by APEGA can be confusing even to native English speakers, so to expect an individual who does not speak English well to understand the requirements and procedures 100% is a little unreasonable. If an interpreter is unfeasible, due to the diversity and number of applicants, a solution could be a use of more plain and simple language for the ease of understandability. If the requirements and procedures are made clear for everyone then there won't be miscommunications and will less likely result in people believing they are being discriminated against.

References

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