

ENGG 513 - The Roles and Responsibilities of the Professional Engineer in Society

Report 1- Mihaly vs APEGA

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February 12, 2018

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Introduction

This report is a case study based on the Mihaly vs The Association of Professional Engineers, Geoscientists and Geophysicists of Alberta (APEGA) case of 2014. Mr. Ladislav Mihaly is a international engineer who complained to the Alberta Human Rights Commission (AHRC) because he believed that he was being discriminated against based on his country of origin, which is the Slovak Republic since he was asked to write exams to confirm his education credentials by the APEGA board of examiners. APEGA states that the interest and safety of the public is of the utmost priority and as such they believe that if the tribunal's decision were to stand that it would have negative impacts on the ability and reputation of the regulators in the engineering profession. The purpose of this report is to explore all aspects of this case. We will first identify the key stakeholders and explain their role in this case study. Then background information will be provided to summarize the history of this case and the process and timeline that it followed. Once all the information has been drawn out, the decision of The Court of Queen's Bench will then be discussed and the reasoning behind the decision. The report will conclude with our reflection and opinion on the decision made by The Court of Queen's Bench.

Stakeholders

This section will explain each of the key stakeholders who were part of this issue.

APEGA which is the Association of Professional Engineers, Geoscientists and Geophysicists of Alberta is an organization that operates in Alberta, Canada. APEGA was established in 1920 and its primary goal is to serve the public and its interests by regulating the practices of professional engineering and geoscience in Alberta. To practice engineering in Alberta one must be licensed with APEGA.

The Court of Queen's Bench is another one of the key stakeholders in this case. In this case study we will be dealing with The Court of Queen's Bench of Alberta which is the supreme trial court in the Canadian province of Alberta. The Court of Queen's Bench will provide us the final decision for this case and if they agree or disagree with the Tribunal or with APEGA.

The next key stakeholder to be discussed is the Alberta Human Rights Commission or AHRC. The AHRC was established under the Alberta Human Rights Act (AHRA) and it is responsible for the reduction of discrimination "through the resolution and settlement of complaints of discrimination, and through human rights tribunal and court hearings."

Mr. Ladislav Mihaly is the other party in this case study who is against APEGA. He was born in former Czechoslovakia and he obtained his M.Sc Diploma with specialization in Technology of Fuels and Thermal Energy from the Slovak Technical University in Bratislava. As well he obtained a Certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague. In May of 1999 he immigrated to Canada where he then applied to APEGA for registration as a Professional Engineer.

Dr. David Lynch is Dean of the faculty of Engineering at the University of Alberta and holds a statutory position on the Board of Examiners. He was also a member of the Canadian Engineering Accreditation Board (CEAB), which assesses engineering programs in Canada and outside Canada. Dr. Lynch was one of three witnesses who provided evidence before the Tribunal on behalf of APEGA's registration processes, in general and more directly related to Mr. Mihaly.

APEGA CEO Mark Flint, P. Eng. is another stakeholder in this issue. He states APEGA's stance clearly on this by saying "APEGA firmly believes that the public interest must be the paramount concern of any self-regulating profession." He also states that, "while we respect the important role of the Alberta Human Rights Commission, the tribunal's decision with regard to Mr. Mihaly, were it to stand, would have had significant negative impacts on the ability of regulators – and not just in engineering but in geoscience, medicine, law, dentistry, and accounting to name but a few – and would have resulted in an unacceptable increase in risk to public safety and well-being."

Honourable Madam Justice J.M. Ross is another one of the key stakeholders in this case study. She is part of the Court of Queen's Bench of Alberta and is based out of Edmonton, Alberta. She is the overall decision maker in this case study for APEGA vs Mihaly and therefore is a key stakeholder for this issue.

Background

This case study starts with Mr. Mihaly, an international engineer who immigrated to Canada in May of 1999. Upon his arrival to Canada Mr. Mihaly applied to APEGA for registration as a Professional Engineer so that he may practice his profession here in Alberta. On May 13, 1999, APEGA confirmed that they received his application and notified Mr. Mihaly that he would be required to write the National Professional Practice Exam (NPPE).

On February 11, 2000, APEGA once again reached out to Mr. Mihaly and advised that in addition to passing the NPPE he would also be required to complete three confirmatory exams and take a course or pass an equivalent Engineering Economics Exam by May 2001. They also notified him that he failed his NPPE that was written on January 17, 2000. After failing his first NPPE, Mr. Mihaly applied to retake the test and

he did not show up on the day of that test. APEGA withdrew his application since he had failed to complete the requirements by May 2001.

Mr. Mihaly contacted APEGA to reactivate his application and he proceeded to write the NPPE again in July of 2002, which he failed yet again. In January of 2003 Mr. Mihaly once again wrote the NPPE and failed it a third time, which led to APEGA withdrawing his application for a second time. In October of 2006 Mr. Mihaly again asked APEGA to reactivate his application, to which APEGA again told him that he must pass all the requirements and in addition must obtain one-year of acceptable D-level Canadian engineering experience.

Mr. Mihaly did not write the exams and instead filed a complaint with the AHRC in August of 2008, alleging that APEGA discriminated against based on his place of origin when he was denied registration as a professional engineer.

In February of 2014, the tribunal (the AHRC) 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." The tribunal awarded Mr. Mihaly \$10,000 and ordered APEGA to reconsider Mr. Mihaly's application. This Tribunal Decision went under appeal and cross-appeal by APEGA and Mr. Mihaly respectively.

Three witnesses then provided evidence before the Tribunal on behalf of APEGA's registration processes, in general and in relation to Mr. Mihaly. These witnesses described and explained how APEGA goes through its processes to register an individual as a Professional Engineer.

On November 20, 2014, APEGA filed its appeal and the respondent Mr. Mihaly filed a response statement the same day. The Law Society of Alberta filed as Intervenor on November 21, 2014. The Alberta Human Rights Tribunal filed its submissions, relating to the standard of review on November 28, 2014. The appeal was initially set for hearing on December 12, 2014 but it actually commenced on July 23, 2015 and ended the next day.

APEGA submitted that the Tribunal had no jurisdiction over Mr. Mihaly's complaint because the AHRA does not protect against discrimination based upon the place of origin if academic requirement, which was found in a different case (Grover vs Alberta Human Rights Commission).

APEGA in its Notice of Appeal sought a "reversal of the decision of the Human Rights Tribunal." The Court of Queen's Bench concluded that the decision of the Tribunal should be reversed, and that there is no need, in the circumstances, to remit the matter back to the Tribunal.

As well, Mr. Mihaly's cross-appeal relates only to remedy, and is therefore dependant on finding discrimination which has not been justified, therefore the cross-appeal is dismissed.

The Court of Queen's Bench Decision

The Court of Queen's Bench has reversed the ruling of the Human Rights Tribunal which stated; that the exams APEGA required Mr.Mihaly to write to confirm his credentials were discriminatory and ordered the association to reconsider Mr.Mihaly's application and pay him \$10,000 in damages. Below, we are going to discuss the reasons that made Madam Justice Ross of the Court of Queen's Bench to reverse the decision of the Human Rights Tribunal.

First, before we move into discussing the reasons behind the Court of Queen's Bench decision;we are going to briefly mention and discuss the Alberta Human Rights Act, and some of its sections. The Alberta Human Rights Act (AHRA) prohibits discrimination in the area of employment. The AHRA prohibits discrimination based on the protected grounds of race, colour, ancestry, place of origin, religious beliefs, gender, gender identity, gender expression, age, physical disability, mental disability, marital status, family status, source of income and sexual orientation. Moreover, section 11 of the Alberta Human Rights ACT (AHRA) states that "[a] contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances." Furthermore, the discrimination alleged by Mr.Mihaly against APEGA falls under the provision of the AHRA, section 4, which states:

No person shall:

(b) discriminate against any person or class of persons with respect to any goods, Services, accommodation or facilities that are customarily available to the Public,

because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, ancestry, place of origin, marital status, source of income, family status or sexual orientation of the person or class of persons or of any other person or class of persons.

The Human Rights Tribunal found that APEGA did not accommodate Mr.Mihaly reasonably, regarding the requirement that he write confirmatory examinations or the Fundamental Engineering (FE) Exam; as well as, the requirement that he write the National Professional Practice Examination (NPPE) and to complete one year of Canadian experience before being certified. In addition, the Tribunal found that the requirement for Mr.Mihaly to write confirmatory examinations or the FE Exam is prima facie discriminatory, therefore, must be justified under section 11 of the AHRA. The

Tribunal found that the above mentioned requirements were unjustifiable under section 11 of AHRA on two grounds:

- that Mr.Mihaly should not have been required to write confirmatory examinations or the FE Exam, but only examinations to correct perceived academic deficiencies following an individualized assessment of his credentials;
- that mr.Mihaly should not have been required to write a standardized “one size fits all” examination, rather than being individually assessed.

Madam Justice Ross found, that the findings by the Tribunal that the examinations assigned by APEGA were not “for the purpose of correcting a perceived academic deficiency”, as required by, section 8 of the Engineering and Geoscience Professions General Regulation (EGPR); were based on erroneous interpretations of section 8, and that the Tribunal was not familiar with EGPR, and did not pursue submissions from knowledgeable parties regarding the interpretation of section 8 of the EGPR. Section 8 of EGPR states:

A person who meets the following requirements and applies to the Registrar for Registration is entitled to be admitted as an examination candidate:

- (a) the applicant is of good character and reputation;
- (b) the applicant is a graduate of
 - (i) a university program in engineering or geoscience, or
 - (ii) a related academic program that is acceptable to the Board of Examiners, but the Board of Examiners has required the applicant to complete one or more confirmatory examinations for the purpose of correcting a perceived academic deficiency .

Madam Justice Ross, found the Tribunal’s interpretation of section 8 of the EGPR was unreasonable, writing: “No line of reasoning was provided by the Tribunal and none was submitted by the parties on the appeal that would support an interpretation of s 8 of the EGPR that disregards the disjunctive ‘or’ and gives no independent effect to the words ‘confirmatory examinations’. The Tribunal’s interpretation of the section was unreasonable”. Furthermore, Madam Justice Ross stated that: “APEGA’s policy of assigning confirmatory examinations where competence has not been otherwise established is consistent with the EGPR, and consistent with its objective of ensuring the competency of professional engineers.”

On the other hand, the Human Rights Tribunal ordered APEGA to form a committee “that preferebly includes engineers who received their qualifications in institutions and countries outside of Canada” to review any of Mr.Mihaly’s perceived academic deficiencies, in order, to consider exempting Mr.Mihaly from writing exams and to provide him with a mentor to guide him into the engineering profession. Madam Justice Ross found that the Tribunal’s orders were unfair to APEGA writing: “These directions go beyond the scope of any discriminatory conduct found or even challenged,” in

addition, Madam Justice Ross stated that appointing a committee and providing assistance as outlined by the Tribunal would require significant amount of resources; then she wrote, “More significant than the Tribunal’s assessment of cost, is his [Mihaly’s] failure to consider the impact that this form of accommodation would have on APEGA, fundamentally altering its standards and being required to act outside of its regulatory role.”

Finally, Madam Justice Ross discredited the findings of the Tribunal writing: “The Tribunal’s reasons leading to his conclusion that APEGA could have accommodated Mr.Mihaly and others sharing his characteristics are rife with logical errors, findings of fact that are not supported by the evidence, and failures to take into account relevant considerations. From the Tribunal’s unreasonable interpretation of the EGPR, to his unsupported assumption that the FE Exam disproportionately excludes foreign trained engineers from being registered with APEGA, to his failure to appreciate that demonstrated entry level engineering competence is reasonably necessary to safe practice as professional engineer, and his failure to consider relevant factors in the assessment of undue hardship, it is clear that his conclusion regarding accommodation falls outside of the range of acceptable outcomes that are defensible in light of the facts and law; and as such was unreasonable.” Therefore, she concluded writing: “I conclude that the decision of the Tribunal should be reversed. There is no need, in the circumstances, to remit the matter back to the Tribunal.”

Reflection and Opinion

When Madam Justice Ross of the Court of Queen’s Bench reversed the decision of the Tribunal; the appellant (Mr.Mihaly) has filed an appeal to the Court of Appeal of Alberta on time on February 22, 2016, but subsequently failed to take further steps to perfect his appeal, therefore, Mr.Mihaly’s appeal was struck down under R.14.16(3) on June 23, 2016. Subsequently, the appellant tried to restore the appeal on December 15, 2016.

Below are some factors that the Court of Appeal of Alberta would consider before restoring an appeal:

- (a) arguable merit to the appeal;
- (b) an explanation for the defect or delay which caused the appeal to be taken off the list;
- (c) reasonable promptness in moving to cure the defect and have the appeal restored to the list;
- (d) Intention in time to proceed with the appeal;
- (e) lack of prejudice to the respondents (including length of delay),

The appellant tried to have the decision made by the Court of Queen's Bench to be reconsidered. The appellant claimed that some of the materials that he tried to submit in support of his application were turned down by the Court of Queen's Bench. In which, Mr. Justice Frans Slatter of the Court of Appeal of Alberta found that the Court of Queen's Bench decision to not accept some of the materials submitted by the appellant was not erroneous and writing: "Decisions of trial courts are generally final, and once an appeal is filed the mandate of the trial court is spent. It was not an error for the Court of Queen's Bench to refuse to reconsider the decision once the appeal was commenced." On the other hand, Mr. Justice Frans Slatter found that the appellant have failed to find any patent error in the decision of the Court of Queen's Bench and writing: "As far as the merits of the appeal, the appellant does not point to any patent error on the face of the decision under appeal. Even Canadian educational institutes must demonstrate the equivalency of their programs, and Canadians who receive foreign training must also demonstrate equivalency. The appellant argues that the Foreign Degree List presented by the respondent is dated 2010, whereas his assessment should have occurred in 2000-2006. This document operated in the appellant's favour, because it showed that the degrees he had received were considered equivalent to a Canadian bachelor's degree in engineering. There is, in any event, no indication that the qualifications from the Czech Republic and the Slovak Republic were assessed any differently in 2010 than in that prior period." In addition, the appellant have failed to provide sufficient evidence to justify the next three criteria for restoring an appeal. Finally, Mr. Justice Frans Slatter dismissed the application by writing: "When all the relevant factors are considered, the appellant has not met the test for restoration of this appeal, and the application is dismissed."

We do not agree with the decision of the Alberta Human Rights Commission because the Tribunal failed to correctly interpret or seek assistance from knowledgeable parties regarding interpretations of section 8 of EGPR; and that is where we believe the Tribunal's biggest mistake lies. Furthermore, approximately 55 percent of the 9,500 people who applied for an engineering licence with APEGA in 2015 were from outside Canada. Moreover, the FE Exam has a pass rate of 85%, therefore, this begs the question, why Mr. Mihaly was unable to pass an exam? That has 85% of pass rate, and why did he subsequently fail to show up for his rewrite exam? It seems that the Tribunal did not take these facts into account, or perhaps ignored them when they were making their decision. Furthermore, the Tribunal failed to realize that all foreign-trained engineers are required to prove their competency by writing the confirmatory exams, and that Mr. Mihaly was not the only foreign-trained engineer who was required to write a confirmatory exam.

On the other hand, we completely agree with the decisions of the Court of Queen's Bench and the Alberta Court of Appeal because they point out all the above mentioned errors made by the Tribunal.

Finally, we do not believe that APEGA should accommodate foreign-train engineers because APEGA cannot assume the competency of the foreign-trade engineers without proving their competency first. Furthermore, APEGA is a regulatory body that sets certain standards to be met by all engineer whether foreign-train or Canadian train. It befalls on the foreign-train engineers to meet those standards. APEGA as its capacity as a regulatory body does not have any obligation towards foreign-train engineers except to confirm that foreign-train engineers are in par with Canadian train engineers because doing otherwise will result an unacceptable increase in risk to public safety and well-being.

References

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