

Course Name: ENGG 513

Report Title: Mihaly vs APEGA Report

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## Introduction

This is a case study report which will carefully dive into the different perspectives regarding registering as a Professional Engineer in Alberta with foreign credentials. Currently, APEGA has a set of regulations that a person with foreign engineering credentials must meet in order to be licensed as a professional engineer in Alberta. To further investigate these regulations, a case study based on The Court of Queen's Bench of Alberta judgement involving APEGA, the Human Rights Commission, and Mr. Ladislav Mihaly will be considered. This is a case where Ladislav Mihaly, who has been working as an engineer in Czechoslovakia since the 1970s, was seeking accreditation as an engineer in Alberta. However, he refused to submit to any of the technical examinations and failed a required ethics examination twice. As a result, APEGA refused to give him accreditation as an engineer in Alberta. In 2008, filed a complaint with The Alberta Human Rights Commission for discrimination by APEGA, which ruled in 2014 that APEGA must pay Mihaly \$10000, provide him with a personal mentor and form a committee to re-evaluate his credentials. APEGA proceeded to appeal to The Court of Queen's Bench of Alberta. In 2016, the court upheld APEGA's appeal and reversed the decision made by the Alberta Human Rights Commission.

## Stakeholders

**APEGA** - The Association of Professional Engineers and Geoscientists of Alberta (APEGA) regulates the practices of professional engineering and geoscience in Alberta. This includes registering, setting practice standards, and determining disciplinary actions, when necessary, for its members. Without obtaining a license from APEGA, any practice of engineering in Alberta is illegal.

**The Court of Queen's Bench** - The Court of Queen's Bench is the Superior Trial Court for the Province, hearing trials in civil and criminal matters and appeals from decisions of the Provincial Court.

**The Alberta Human Rights Commission** - The Alberta Human Rights Commission (AHRC) is a quasi-judicial human rights body in Alberta. It was established under the *Alberta Human Rights Act* to 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.

**Mr. Ladislav Mihaly** - Ladislav Mihaly was an engineer in Czechoslovakia who attempted to obtain accreditation as an engineer in Alberta but failed due to APEGA's regulations. He filed a complaint with the AHRC for discrimination by APEGA, which ruled in favor of him but the decision was reversed in 2016 by The Court of Queen's Bench.

**Madam Justice June Ross** - Madam Justice June Ross was the judge of The Court of Queen's Bench and she reversed AHRC's decision that the APEGA had discriminated against Mr. Mihaly based on his country of origin.

**Mr. Mark Tokarik** – Mr. Mark Tokarik was a Director of Registration of APEGA and appeared as one of the witnesses on behalf of APEGA. He was responsible with Mihaly's application to APEGA and required Mihaly to complete several confirmatory exams.

**Dr. David Lynch** - Dr. David Lynch appeared as an expert witness for APEGA to provide testimony on international agreements and the evaluation of credentials of engineers by APEGA, but in particular as it relates to the evaluation of engineers educated outside Canada.

## **Background**

Mr. Ladislav Mihaly was born in Czechoslovakia and has two Masters degrees. One was obtained from Slovak University of Technology in Bratislava and the other was obtained from the Institute of Chemical Technology in Prague. Mr. Mihaly first applied to APEGA for registration as a Professional Engineer in May 1999. In his application, he described that he graduated from the Slovak University of Technology with a specialization in Technology of Fuels and Thermal Energy. He described his qualifications from the Institute of Chemical Technology in Prague as a Certificate in Corrosion Engineering. He also provided the names of three references who he had worked for in Bratislava so that APEGA could send them reference questionnaires for completion. APEGA acknowledge his application in 1999 and requested transcripts, visa and Landed Immigration form from him. APEGA also advised that he was required to write the National Professional Practice Exam (NPPE). In 2000, the Board of Examiners from APEGA considered the documents that Mr. Mihaly provided and decided that his experience was long but narrow and that the references were from supervisors with short exposure. APEGA advised Mr. Mihaly on February 2000 that he must, in addition to passing the NPPE, complete three confirmatory examinations and take a course or pass an equivalent exam in Engineering Economics by May 2001. However, Mr. Mihaly failed his first attempt at the NPPE on February 2000 and proceeded to fail his second attempt on October 2000 because he did not show up for the test. As a result, APEGA advised Mr. Mihaly that it had withdrawn his application for registration as a Professional Engineer since he had failed to write the required confirmatory exams by May 2001.

On May 2002, Mr. Mihaly asked APEGA to reactivate his application for registration and APEGA reactivated his file and advised Mr. Mihaly that he should write the three confirmatory examinations by May 2003 and the Engineering Economics exam by November 2003. In response to APEGA, Mr. Mihaly mentioned that the information was very surprising and did not have any prior experience of this information. APEGA responded by explaining that his credentials did not meet APEGA's requirements and that he needed to take three confirmatory exams. Mr. Mihaly then proceeded to fail the NPPE which he wrote on July 2002. On August 2003, APEGA again withdrew his file because Mr. Mihaly had not written the required confirmatory exams within the period specified by APEGA.

On October 2006, Mr. Mihaly asked APEGA to reactivate his application for a third time. APEGA requested from him an updated resume and a list of updated references. He submitted the

names of a Professional Engineer he had worked for more than a year in Calgary, a name of a Gas company owner and a name of a co-worker for consideration. On August 2007, the Board of Examiners reconsidered Mr. Mihaly's application and again determined that Mr. Mihaly had to complete the three confirmatory exams plus a course/exam in Engineering Economics or the Fundamentals of Engineering Examination. The Board also determined that Mr. Mihaly had not acquired the one year required North American professional engineering in the position where he had worked because it was not at a D level. He was therefore required to obtain one-year acceptable D level North American engineering experience. Mr. Mihaly did not write the required examinations. On August 5, 2008, he filed a complaint with the Alberta Human Rights Commission for discrimination by APEGA.

On February 2014, the Alberta Human Rights Commission (AHRC) determined that Mr. Mihaly did in fact establish a discrimination case towards APEGA on the grounds of place of origin, as he was being treated as a foreign graduate based on where he completed his post-secondary education. The AHRC stated that APEGA did not provide Mihaly with an individualized or meaningful assessment of his qualifications and his education and APEGA was not supportive of Mihaly after the difficulty he had experienced during the registration process. The AHRC awarded him \$10000 in general damages and ordered APEGA to reconsider his application. The commission ordered APEGA to appoint a committee to properly assess future applications to APEGA of people outside of Canada. APEGA was directed to consider and provide options and support, including possible examination exemptions, review Mihaly's transcripts and qualifications directly with the universities, matching Mihaly with a mentor to guide him in integrating into the engineering profession, provide resources to Mihaly to connect with other foreign engineers and assist him in increasing his English fluency. However, the commission declined to award lost wages stating that "there are too many uncertainties involved".

On November 2014, APEGA filed its appeal and Mihaly filed a response statement the same day. The Alberta Human Rights Commission filed limited submissions, relating to the standard of review on November 2014. The appeal hearing then proceeded on July 23 and 24, 2015.

On January 27 2016, The Court of Queen's Bench reached a decision which upheld APEGA's appeal and reversed the decision made by the Alberta Human Rights Commission. Mihaly proceeded to file an appeal, but the Alberta Court of Appeal dropped it in June 2016 when he failed to follow up.

### **The Court of Queen's Bench's Decision**

Madam Justice June Ross was the judge of The Court of Queen's Bench and she reversed the human rights commission's decision that APEGA had discriminated against Mr. Mihaly based on his country of origin.

Justice Ross's decision mostly surrounded on disagreeing that AHRC's point of discrimination based upon the "place of origin of academic qualifications." Ross questioned whether the AHRC

had used and applied the correct test for prima facie discrimination, and whether the AHRC was reasonable in concluding the APEGA registration requirements to be unreasonable. The AHRC relied on the Moore test for prima facie discrimination as set out by the Supreme Court of Canada. Using the definition of the Moore test (under paragraph 73 of 2016 ABQB 61), Ross concluded that the presence of arbitrariness and stereotyping may support a finding of discrimination but they are not required elements of a finding of prima facie discrimination.

The AHRC applied the Moore test and concluded that Mihaly was discriminated against based on place of origin. Mihaly needed to complete confirmatory examinations or the Fundamentals of Engineering Exam (FEE), which Mihaly claimed to have been adversely impacted by APEGA. Therefore, place of origin was a factor in the adverse impact experienced by Mihaly.

In paragraphs 104 to 105 of 2016 ABQB 61, Justice Ross emphasized that while the AHRC found the requirement to write confirmatory examinations or the FEE was an adverse impact related to Mihaly's place of origin, any substantive disadvantage flowing from the requirements to pass the National Professional Practice Exam (NPPE) exams and possess one year of Canadian experience was not linked to the prohibited ground of discrimination (place of origin). AHRC concluded that APEGA assumed engineers with qualifications from foreign countries with which APEGA had no Mutual Recognition Agreements had qualifications which were not at par with Canadian engineering accreditation standards. Ross found this conclusion to be unreasonable.

In paragraph 105, Ross agreed that AHRC's finding based on the Moore test may be relevant, but not sufficient to establish discrimination. The evidence did not demonstrate that Mihaly's national origin was a factor in relation to any disadvantage that he may have experienced because of APEGA's requirements.

In paragraph 106, Ross stated that there was no finding that the requirement to pass NPPE constituted adverse impact discrimination. The NPPE was required for all applicants to take, regardless of their origin. Even Mihaly failed this exam three times, it cannot be concluded that he failed it because of his place of origin.

In paragraph 107, Ross believes that the requirement that registered professional engineers must have four years' experience, one year of which must be in Canada, did not have an adverse impact on Mihaly based on his national origin.

In paragraph 109, Ross concluded that AHRC failed to apply the Moore test in relation to the NPPE and Canadian experience requirements, and the lack of evidence to support a finding that these elements were present, rendered the AHRC's finding of prima facie discrimination in relation to those elements to be unreasonable.

In the justification section of 2016 ABQB 61, AHRC concluded that the requirement to write confirmatory examinations or the FEE was demonstrated to be related to Mihaly's place of origin, constituting prima facie discrimination. In paragraphs 120 to 122, Ross disagreed AHRC's conclusion and noted that because there are several thousand engineering programs, APEGA

does not have the capacity or resources to discuss and negotiate agreements with all of them, and must therefore assign examinations to assess the quality of engineering programs that are undertaken by applicants. In paragraph 130, Ross concluded that there was no evidence internationally applicants with entry-level competence would have any difficulty passing the FEE.

In paragraph 142, although APEGA has the option to individually assesses applicants to determine whether certain exams may be waived, Mihaly did not meet the requirements of a waiver and he did not pursue an internal appeal of APEGA's waiver decision. In paragraph 148, Ross emphasized that AHRC failed to consider that Mihaly had never attempted the three confirmatory exams or the FEE.

Finally, in paragraphs 149 to 150, Ross concluded that the AHRC had failed to consider relevant factors in the assessment of undue hardship. Therefore, AHRC's conclusions with respect to APEGA's alleged failure to accommodate Mihaly to the point of undue hardship were unreasonable. As a result, Ross reversed the decision of the AHRC and did not remit the matter back to them.

## **Reflection and Opinion**

I personally disagree AHRC's decision in 2014 and agree with the Court of Queen's Bench and the Alberta Court of Appeal's decision in 2016. I believe that in this case, Mr. Mihaly did not fulfill his duties and obligations when he was applying for an engineering license in Alberta. I understand that coming from another country, it might be hard to adjust to the rules and regulations of Alberta, but there is no other way around it. In other words, you either adhere and conform to these rules, or you won't obtain an engineering license. I personally believe that these rules are very reasonable and any international applicants with an entry-level competence should be able to pass all the exams required. Although some people may need extra work and effort to pass the required exams, they are not impossible to pass.

Looking back at Mr. Mihaly's application history, I believe that he did not put enough effort into writing and passing the required exams. He had a total of three applications. All of which ended because he did not pass or complete all the confirmatory exams within the given period. He did not even attempt some of those exams. This shows that although he might have the competency in passing those exams, he simply did not have the self-discipline to prepare, show up, and complete those exams. Because of him failing to meet APEGA's requirements, he turned to AHRC for help with the reason that he was being discriminated against, which was eventually ruled to be unreasonable by the Court of Queen's Bench.

In my opinion, APEGA should accommodate foreign-trained engineers and geoscientists by using its current rules and regulations. I believe these rules and regulations are fair and does not need to change. This is because there are thousands of institutes internationally which provides engineering and geoscience accreditations. It is possible that not all institutes meet

the standards of Alberta's. Therefore, a form of verification is needed to make sure everyone working in Alberta has the same basic skill set and ethics. Having these regulations will also protect local citizens or residents who have obtained an accreditation locally so that they won't have their jobs "stolen" from a person overseas.

## References

- [1] Human Rights Commission Decision. (2014). [online] Available at: <http://www.canlii.org/en/ab/abhrc/doc/2014/2014ahrc1/2014ahrc1.html?search> [Accessed 16 Feb. 2018].
- [2] Court of Queen's Bench Decision. (2016). [online] Available at: <http://www.apega.ca/assets/PDFs/mihaly-decision.pdf> [Accessed 16 Feb. 2018].
- [3] Canadian Consulting Engineer. (2018). *Alberta court rules that engineering association did not discriminate - Canadian Consulting Engineer*. [online] Available at: <https://www.canadianconsultingengineer.com/business-professional/alberta-court-rules-that-engineering-association-had-not-discriminated/1003401788/> [Accessed 16 Feb. 2018].
- [4] McKay-Panos, L. (2016). *Alberta Court of Queen's Bench Overturns Discrimination Decision on Foreign Trained Engineer* /. [online] Ablawg.ca. Available at: <https://ablawg.ca/2016/03/23/alberta-court-of-queens-bench-overturms-discrimination-decision-on-foreign-trained-engineer/> [Accessed 16 Feb. 2018].