

MIHALY vs ASSOCIATION OF PROFESSIONAL
ENGINEERS, GEOLOGISTS AND GEOPHYSICISTS OF
ALBERTA (APEGA), 2016 ABQB 61

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

Case Study Report

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Introduction: The purpose of this report is to develop a better understanding of the rules and regulations involved in becoming a certified professional engineer in Alberta. This involves understanding the importance of such rules and regulations to set a fair method of assessment and upholding the welfare and safety of public. In this case study report, I will provide a detailed analysis of Mihaly vs APEGA which involves Mr. Ladislav Mihaly, Alberta Human Rights Commission (AHRC) tribunal and the Association of Professional Engineers, Geologists and Geoscientists of Alberta (APEGA). Based on a complaint filed by Mr. Mihaly that he was discriminated against based on his place of origin by APEGA after he was denied registration as a Professional Engineer by the association. In this report, I will also summarize the details of the case and provide a personal reflection on the decisions made by the Court of Queen's Bench (ABQB), AHRC and the Alberta Court of Appeal (ABCA). This case provides insight and useful information for accreditation bodies and individuals who want to be recognized as professional engineers. It highlights the requirements that must be satisfied before one's recognized as a professional engineer. This case study emphasises the importance of maintaining standards for public safety and procedural fairness versus ensuring reasonable access for internationally-educated applicants. This report also illustrates the significance of authorities to always prioritize public safety and security even when human rights issues are involved.

Stakeholders: The stakeholders in this case study include the people and the organizations directly involved or affected by Mr. Mihaly's complaint against APEGA's procedural fairness. The following is a list of these stakeholders and the description of their roles in this case:

- APEGA: The Association of Professional Engineers, Geologists and Geoscientists of Alberta was established in 1920. It acts as a regulatory body for practices of engineering and geoscience on behalf of Government of Alberta under the Engineering and Geoscience Professions Act (EGPA) and the Engineering and Geoscience Professions General Regulation, Alta Reg. 150/1999 (EGPR).
- The Court of Queen's Bench: Is the Superior Trial Court for civil and criminal jurisdiction for the Province. It also holds judicial review of government and tribunal action in Alberta.
- The Alberta Human Rights Commission: An independent commission established by the Alberta Humans Right Act to protect Albertans from discrimination. It has a two-fold mandate to reduce discrimination and foster equality through public education and community initiatives. It also serves to resolve and settle complaints of discrimination through court hearings and human rights tribunal.
- Mr. Ladislav Mihaly: A foreign-trained engineer born and educated in former Czechoslovakia. Holds a M.Sc. Diploma with a specialization in Technology of Fuels and Thermal Energy from Slovak Technical University in Bratislava [UBS] in 1975. He also obtained a Certificate in Corrosion Engineering from Institute of Chemical Technology [ICT] in Prague in 1981. After immigrating to Canada in May 1999, he applied to APEGA for registration as a Professional Engineer.
- Dr. David Lynch: The first witness of APEGA, he is the Dean of Faculty of Engineering at the University of Alberta, and holds a statutory position on the Board of Examiners. He is also a member of the Canada Engineering Accreditation Board (CEAB), which assess engineering programs within and outside of Canada.

- Dr. Gary Faulkner: A P.Eng. and the second witness for APEGA, Chair of the APEGA Board of Examiners. He provided evidence regarding the application process and testified about the review of Mr. Mihaly's application.
- Mr. Mark Tokarik: Third witness for APEGA, and a Deputy Registrar for APEGA. He provided further supporting evidence regarding APEGA's application process and a review of Mr. Mihaly's application.
- Court of Appeal of Alberta: The highest appeal court in Alberta, the Chief Justice of Alberta presides over this court. It hears civil and criminal appeals, and can also hear appeals and decisions of other courts.
- Honorable Madam Justice J.M. Ross: The judge presiding over the case of Mihaly vs APEGA in the Court of Queen's Bench.

Case Summary:

In May 1999, Mr. Mihaly applied to register as a professional engineer with APEGA and his application was acknowledged on May 13. He was then requested to submit his transcripts and was required to write the National Professional Practice Exam (NPPE). In addition, he was required to write three confirmatory examinations and take an equivalent course or pass an examination in Engineering Economics. Mr. Mihaly attempted the NPPE exam in January 2000, which he failed. Mr. Mihaly applied to write the NPPE for a second time, on October 16, 2000 but he was absent on the day of the exam and did not write the confirmatory examinations. APEGA advised Mr. Mihaly on June 2001, that his application had been withdrawn as he had not written the required examination within the specified time. Mr. Mihaly requested APEGA to reactivate his application in May, 2002. At this time Mr. Mihaly wrote the NPPE for the third time in July, 2002 and he failed. He attempted the NPPE again on January 2003, and failed for the fourth time. APEGA withdrew his application in August 2003, for not writing the confirmatory examination within the specified time. Mr. Mihaly complained to APEGA's Director of Professional Practice, Mr. Ray Chopiuk in August 2006, about APEGA not recognizing his academic qualifications and the requirement for him to write the confirmatory exams and he was referred to Mr. Tokarik.

On October 3, 2006, Mr. Mihaly requested APEGA to reactivate his application for a third time at this time he was requested to provide an updated resume as well as a list of references, which he did. Based on his third application, in August 2007, the Board of Examiners determined Mr. Mihaly, also lacked a one-year D level Canadian professional engineering experience. Mr. Mihaly did not write the required examination and filed a complain (Mihaly v. APEGA, 2017) in August 2008, with AHRT under the Alberta Human Rights Act, RSA, 2000, c-A-25.5 (AHRA), arguing that he was discriminated based on his place of origin by APEGA (Mihaly v. APEGA, 2014).

The Alberta professional licensure body APEGA, presented three witness who gave evidence before the Tribunal in support of APEGA's registration process. The first witness, Dr. David Lynch, explained APEGA's accreditation process and the reasoning for FE Exam as confirmatory examination. He also mentioned that in Canada the province holds the right to the title "Engineer" and the profession falls under provincial jurisdiction. The second witness, Dr. Faulkner, explained the role of Board of Examiners in APEGA, and to be registered as a Professional Engineer one of the four years of work experience must be Canadian. Mr. Tokarik,

the third witness, described the six requirements to be eligible to submit an application, which are: academic qualifications, good character, English language competency, NPPE and either Canadian Citizenship or permanent residency. He also testified about Mr. Mihaly's absence for NPPE on October 16, 2006.

Upon review in 2014, the AHRC ruled in favor of Mr. Mihaly stating he was indeed discriminated based on the method used for assessing his qualifications and created undue barriers for his registration. The tribunal ordered the association to reassess Mihaly's application and also ordered APEGA to pay him \$10,000 as damages. Further, the tribunal asked the association to consider exempting Mr. Mihaly from exams, providing him a mentor that can support him in integrating into engineering profession and form a committee to review his perceived academic deficiencies. APEGA refused to award Mr. Mihaly damages.

APEGA field an appeal and Mr. Mihaly cross-appealed with Alberta Court of Queen's Bench on November 20, 2014. The appeal hearing proceeded on July 23 and 24, 2015. In the appeal, APEGA requested the decision of Tribunal to be reversed. Based on the judicial review, Justice J.M. Ross concluded that the tribunal's ruling contained errors. Mr. Mihaly's case depended on the finding of *prima facie* discrimination which was not justified under s 11 of AHRA (APEGA v. Mihaly, 2016). Therefore, Mr. Mihaly's cross-appeal was dismissed by ABQB.

Mr. Mihaly's further appealed to the Alberta Court of Appeal, stating that the ABQB refused to accept materials in support of his application. The Honorable Mr. Justice Frans Slatter, from ABCA, after considering a number of factors also denied his appeal as it did not meet the test for restoration. APEGA's CEO, Mark Flint appreciated the judge's ruling as it would not only help protect public safety but also supports that APEGA's application process is fair.

The court of Queen's Bench Decision: In February 2014, the decision of the Alberta Human Rights Tribunal (AHRT), ruled in favour of a Czech trained engineer Mr. Laidslav Mihaly. He succeeded in arguing that APEGA discriminated against him on the grounds of place of origin, by imposing certain requirements before he could be registered as a professional engineer in Alberta. The Tribunal's decision was appealed and cross-appealed by APEGA and Mr. Mihaly, respectively. The appellant raised the issues of procedural fairness, jurisdiction, *prima facie* discrimination and justification. Justice Ross concluded, that the AHRT did not breach the rules of procedural fairness when no supporting documents were asked for its interpretation of the Engineering and Geoscience Professions General Regulation (EGPR).

Justice J.M. Ross further concluded, that the APEGA did not establish that AHRT lacked jurisdiction to hear the case as it was about discrimination based upon the "origin of academic qualification". APEGA wanted to use the case of *Grover v Alberta, Humans Right Commission*, 1999 ABCA 240 (CanLII) as a supportive example. Justice Ross, concluded that the legal test for *prima facie* discrimination was better supported by *Moore v British Columbia (Education)*, 2012 SCC 61 (CanLII). Justice Ross, determined that presence of arbitrariness and stereotyping were not required elements for *prima facie* discrimination. Justice Ross further pointed that AHRT had no specific familiarity with section 8 of EGPR and made unreasonable interpretation. She noted that because there are thousands of engineering programs, it is outside APEGA's capacity to assess all of them and therefore, examination provide a fair assessment of the quality of engineering program undertaken by applicants (McKay-Panos, 2016).

Justice Ross concluded that there was no evidence to support that internationally educated graduates face undue hardship when passing the FE exam. She also mentioned that the request to match Mr. Mihaly with a mentor to help him integrate into the profession went “beyond the scope of any discriminatory conduct found or even alleged” and would require APEGA to act outside its regulatory role. Further, noting that AHRT failed to consider Mr. Mihaly never attempted the three confirmatory examinations or the FE exam. She noted that the AHRT ignored relevant factors in the assessment of undue hardship (at para 149). Thus, the AHRT’s decision regarding APEGA’s failure for accommodating Mr. Mihaly to the point of undue hardship were unjustifiable. APEGA had met its onus to establish that any *prima facie* discrimination was reasonable (McKay-Panos, 2016).

Justice Ross concluded that the tribunals’ decision was “rife with logical errors of findings of fact that are not supported by the evidence, and fails to take into account relevant considerations” (APEGA v. Mihaly, 2016). She said it would be unreasonable to accommodate Mr. Mihaly as the most important aspect is the protection of public safety. Justice Ross reversed AHRT’s decision, and denied to remit the matter back to tribunal.

Reflection and Opinion: I disagree with the decision of AHRT as it overlooked important evidence such as the requirement to write NPPE, is regardless of where an individual received their education. It is not discriminatory to require international applicants to write confirmatory examination to establish entry-level competency to ensure public safety. The tribunal ordered APEGA to establish an alternative approach to assess Mr. Mihaly’s qualification and a mentor to help him integrate into the profession. The AHRT had gone too far in its demands from APEGA, which would be outside of its regulatory role. I agree with ABQB’s decision to reverse the AHRT’s decision as the it was not supported by evidence and was based on unreasonable interpretation of APEGA regulations. It is paramount that an entry level engineer is able to establish his competency for ensuring safe practice and public safety. Mr. Mihaly’s idea of reasonable accommodation fell outside of the scope of the regulatory body.

Mr. Mihaly appealed his case to the highest court, Alberta Court of Appeal where a number of factors were considered when making a decision. Factors such as arguable merit to the appeal, an explanation for the delay which caused the appeal to be taken off the list and the intention to proceed with the appeal. The Alberta Court of Appeal dismissed Mr. Mihaly case for the following reasons (Mihaly v. APEGA, 2017) :

- The appellant failed to point any viable mistake on the decision of court. Mr. Mihaly had also failed to comply with the criteria for restoring an appeal as he did not provide any reason or justification for the delay. Particularly, as the appeal was filed in June but Mr. Mihaly did not work on his paperwork until December.
- He did not show any improvement made to perfect the appeal as he still did not order the transcripts or prepared them to be delivered at the hearing.
- Considering the issue of prejudice, the complaint was filed with the Human Rights Commission in August 2008. It had been outstanding for over eight years as all relevant factors were considered, it was concluded that the appellant has not met the test for the restoration of this appeal.

In my opinion the duty to accommodate foreign-trained engineers and geoscientists doesn't mean that the regulator has to bend the rules or change its fundamental standards that everyone else must follow. The claims by AHRC tribunal made to APEGA was indeed unreasonable as it required APEGA to fundamentally change its standards and not act outside the scope of a regulatory committee. The claims were costly and ineffective which would cause "undue hardship" (James T. Casey QC, 2016) . Also when critically analyzing the decision given by the tribunal, it would be unreasonable for APEGA to individually assess Mr. Mihaly's qualification because the standardized confirmatory exams serve as measuring tool to determine entry-level competency. In most professions, standardized tests are used for regulatory reasons as they showcase one's qualifications, skills, knowledge and language proficiency. It is important to ask applicants to write the standardized tests as they are impartial, transparent and independent. They also serve as a way to ensure one's language fluency.

I strongly believe that the most important aspect is to consider the safety of public. The accessing process should be fair thus to determine one's competency and credentials regulators should conduct individual assessment within reason. However, if the assessment shows that standardized test are required to judge whether the applicant is qualified, then the applicant should cooperate with the authority. In this case Mr. Mihaly should have written the confirmatory tests and not take these as discriminatory.

I also believe that it is an applicant's responsibility to assist the regulator with the accreditation process. In this case, Mr. Mihaly had not facilitated APEGA in finding reasonable accommodation as he refused to even attempt the exams. I personally believe, it is not discriminatory to access education programs of countries differently if it is based on actual knowledge of the programs. Therefore, I agree with the decision of ABQB and ABCA.

References:

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