

Mihaly Report: An Evaluation of Reasonable Accommodation

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

Prepared By: Daniela Da Costa and Dana Tucker

Prepared For: Denis Onen

Due: February 16, 2018

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1.0 Introduction

Since 1920, engineering has been regulated as a profession in Canada with the aim to protect public safety by elevating the competency of practitioners to the same level as that of law and medicine (Andrews, 2014). As the Canadian economy continues to expand in a globalized world, regulatory bodies must address the controversial ethical topics of reasonable accommodation, due diligence, and undue hardship, when licensing an increasing number of foreign-trained professionals striving to join Canada's workforce. The following case study concerning Mr. Mihaly vs APEGA expands upon these controversial topics. The Association of Professional Engineers and Geoscientists of Alberta, APEGA, is the licensing body in Alberta responsible for the admission and self-regulation of the engineering and geoscience professions (APEGA, 2018a). Mr. Ladislav Mihaly is a foreign-educated engineer who applied for, and was denied, licensing to practice as Professional Engineer in Alberta on the basis of failing to meet APEGA's registration requirements. After multiple withdrawn applications, Mihaly filed a complaint of discrimination under the Human Rights Act to the Alberta Human Rights Commission (the Tribunal). The complaint identified APEGA as an occupational association and service provider excluding Mihaly from membership due to his place of origin. The Tribunal confirmed unjustified discrimination against Mihaly, ordering APEGA to alter its procedures and extensively accommodate foreign engineers (Mihaly, 2014). However, both parties further appealed to the Court of Queen's Bench (the Court). Upon finding logical errors, lack of evidence, and missing considerations, the Court sought a "reversal of the decision of the Human Rights Tribunal" (Association, 2016). Nevertheless, Mihaly attempted to restore this appeal through the Court of Appeal of Alberta, which was dismissed on the basis of lack of appeal merit and absence of judicial flaws (Mihaly, 2017). Ultimately, this case study evaluates the extent to which the regulatory process and licensing requirements of the self-regulating engineering profession in Alberta is fair and reasonable within its operational legal environment.

2.0 Stakeholders

2.1 Mr. Mihaly

Mr. Ladislav Mihaly was born and educated in Czechoslovakia before moving to Canada with his family. He had obtained a M. Sc. Diploma at Slovak Technical University and a Certificate in Corrosion Engineering from the Institute of Chemical Technology. Mihaly first applied for licensing with APEGA in 1999. Prior to his registration, he had experience for over 10 years in the technical industry of piping design and fabrication, but his role had not escalated in complexity over time. Additionally, Mihaly had obtained more than a year of experience working for a gas company in Calgary in a C-level position, equivalent to a technician. Through long-term complications with APEGA, Mihaly "suffered injury to his dignity" due to his inability to "perform at a high level and develop new standards," as stated by the Tribunal (Mihaly, 2014). His motive for pursuing the case was to succeed in his career so that he could provide for his family.

2.2 APEGA

APEGA's purpose as a self-regulatory body is to serve the public interest by ensuring the "ethical, professional, and technical competency" of professional engineers and geoscientists in Alberta (APEGA, 2018a). Only APEGA members may use the title of P. Eng. or the professional seal. Registration requirements are based on education, work experience, language, good character, and knowledge of professionalism, ethics, and local practices (Andrews, 2014). According to APEGA

Registrar Carol Moen, the application process has “fair, equitable, and transparent” standards for domestic and internationally-educated engineers alike (APEGA, 2016). While APEGA’s diversity statement encourages a business culture of “belonging, inclusion, and diversity for equity” (2018), APEGA CEO Mark Flint expressed his paramount commitment to protect public safety (APEGA, 2016). As a key stakeholder in the Mihaly case, APEGA’s registration process and eligibility requirements are fundamentally questioned, ultimately risking association’s ability to protect public safety while accommodating foreign-trained engineers without incurring undue hardship.

2.3 The Alberta Human Rights Commission

The Alberta Human Rights Commission is an independent commission of the Alberta government, focused on administering the solution and settlement of human rights complaints. Resolution of complaints follows the Alberta Human Rights Act, adopting the processes of conciliation, investigation, dismissal, and discontinuance (Alberta Human Rights Commission, 2012). The Tribunal evaluated Mihaly’s complaint of *prima facie* discrimination, concluding that APEGA’s assessment standards constituted discrimination based on place of origin (Mihaly, 2014). As a key stakeholder, the Commission had a significant influence on Mihaly’s hopeful progression towards being a licensed practitioner, as they were the first individuals in the court of law to order a remedy to Mihaly’s complaint of discrimination (Mihaly, 2014).

2.4 The Court of Queen’s Bench

The Court of Queen’s Bench is a superior court in Alberta with jurisdiction over high-profile criminal cases, civil proceedings, government action review, and Tribunal appeals (Alberta Court of Queen's Bench, 2017). Honorable Madam Justice J.M. Ross from the Court evaluated APEGA’s appeal on the decision made by the Tribunal. During the proceedings, the Court evaluated the Tribunal’s jurisdiction, procedural fairness, justification, and legal test choice (Association, 2016). During the evaluation process, the Court’s mission was to provide an impartial and just decision while preserving the rule of law and protecting the rights and dignity of all stakeholders involved (Alberta Courts, 2018a). In accordance to their constitutional obligation to administer the rule of law, the guiding vision behind the Court of Queen’s Bench disposition in the Mihaly case was to provide “innovative, responsible, and accessible justice” (Alberta Courts, 2018a).

2.5 Alberta Court of Appeal

The Alberta Court of Appeal is the highest court in Alberta with jurisdiction over appeals from tribunals and the Court of Queen’s Bench, as well as referrals from the Lieutenant Governor. (Alberta Courts, 2018b). The Court of Appeal was not responsible for re-evaluating the Mr. Mihaly vs APEGA case. Instead, it reviewed trial records to discover factual errors or flaws in the application of law behind the decision by the Court of Queen’s Bench. Appointed by the federal government, the justices have a duty to conduct “impartial, informed, and open-minded decisions” (Alberta Courts, 2018b). According to Chief Justice of Alberta, Catherine A. Fraser, the main goal of the Court of Appeal is to upkeep the rule of law by ensuring all judicial and government proceedings are fair, open, and maintain a “free, peaceful, and democratic society” (2018b).

2.6 Canadian Engineering Accreditation Board

The Canadian Engineering Accreditation Board (CEAB) is a committee of Engineers Canada responsible for accrediting Canadian engineering programs in order to provide reliable information

to provincial regulatory bodies (CEAB, 2016). The board also collaborates with international institutions to examine foreign programs. According to the Board's terms of reference, its guiding principles are effectiveness and efficiency while striving to set national standards of excellence (CEAB, 2016). The Mihaly case questions the integrity and credibility of CEAB's procedures, possibly raising the level of effort and collaboration expected in order to expand the number of accredited programs across the world.

2.7 Other Foreign Applicants

APEGA receives 1500 international applicants annually, of which 25% undergo Examination and Experience requirements identical to Mihaly. Depending on the level of accreditation of their engineering program, foreign-trained professionals must invest additional time, effort, and money to meet additional eligibility requirements depending if their program is covered by an MRA, the FD list, or classified as a CEAB Substantially Equivalent Program. Mihaly's request for further individualized assessment of his credentials by APEGA may bring rise to conflict with the other 25% of applicants alike, as they would be entitled to the same individualized treatment (Mihaly, 2014). Similar to Mihaly, they would benefit from a decision in his favour, as their main motive is also to succeed in their career in Canada.

3.0 Background

3.1 APEGA Registration Requirements

APEGA's Academic Examination and Experience Examination boards decide to enrol, defer, or refuse applicants based on an evaluation of education, work experience, language, good character, and knowledge of professionalism, ethics, and local practices (Andrews, 2014). Every APEGA applicant must pass the National Professional Practice Exam (NPPE), which "confirms knowledge of professionalism, law, and ethics" (APEGA, 2018c). A Character Declaration Form discards professional misconduct or negligence, while ESL applicants must prove English Language Competency (APEGA, 2018c). The Experience Standard requires at least four years of D-level engineering experience, with one in North America. All applicants must have acceptable engineering credentials under the Examination Standard. Further examination is not required for CEAB-accredited domestic applicants, nor international applicants with a Mutually Recognized Agreement (MRA) or a CEAB "Substantially Equivalent Program". The Foreign Degree (FD) List summarizes other verified engineering programs. Applicants covered by the FD List must pass three confirmatory exams or a Fundamentals of Engineering (FE) exam, while all other applicants must pass five confirmatory exams or the FE exam. These exams may be waived, provided sufficient experience of progressively increased complexity.

3.2 Mihaly's Application to APEGA

Mr. Mihaly applied to APEGA for the title of P. Eng in 1999. Mihaly's degrees were listed on the FD List, therefore he was assigned three confirmatory exams and an Engineering Economics exam in addition to the NPPE exam. Mr. Tokarik, APEGA's Director of Registration at the time, explains that Mihaly's education was found equivalent to a chemical engineering degree. In 2000, Mihaly failed his first attempt at the NPPE and was absent to his second attempt. His application was withdrawn in 2001 by APEGA because he had not written his confirmatory exams by the assigned date. In 2002, Mihaly reactivated his application for registration but once again failed his

NPPE and had his application withdrawn in 2003. Upon this final reactivation, Mihaly requested a waiver of the Examination Standards based on his previous experience at C-level, but was denied due to his lack of sufficient experience at D-level. In 2008, Mihaly's application was withdrawn shortly before his complaint to the Alberta Human Rights Commission (Mihaly, 2014).

3.3 Complaint Under the Alberta Human Rights Act

Mihaly, self-represented, filed his complaint to the Tribunal under ss. 4, 7 and 9 of the AHRA. Section 4 interpreted APEGA as providing a service to Mihaly and discriminating against him based on his place of origin. Section 7 discussed discrimination in employment practices, but was disregarded by the Tribunal because there was no employment relationship between Mihaly and APEGA. Section 9 interpreted APEGA as an occupational association excluding Mihaly from membership because of his place of origin. Mihaly focused on evidence as to why the Examination and Experience Standards constituted discrimination. He expressed that he had worked for 25 years as an engineer in Czechoslovakia and that he did not attempt the confirmatory exams because he was being treated differently than engineers from other European countries. Testifying for APEGA's defense, Dr. Faulkner of the Board of Examiners explained that his experience was denied for being at only C-level. Dr. Lynch justifies that Slovakia, as opposed to other European countries, had never initiated a review by CEAB to obtain an MRA, and that the Slovak Technical University never applied to be a CEAB "Substantially Equivalent Program." Furthermore, Faulkner testified that the FD List benefited Mihaly by implying his "education was considered to be good," and that "getting onto the FD List was not just a trivial matter" (Mihaly, 2014). Mihaly argued he had received a letter from APEGA stating that he had passed the NPPE in 2000, but Tokarik confirmed he was in fact absent on this date (Mihaly, 2014).

3.4 Summary of Decision by the Alberta Human Rights Commission

Mihaly was required to establish a *prima facie* case of discrimination. He had to show he had a characteristic protected from discrimination under the Human Rights Act, had experienced an adverse impact with respect to APEGA's services, and the protected characteristic was a factor in the adverse impact (HRLSC, 2018). The Tribunal successfully established a case of discrimination by confirming that Mihaly's place of origin is a protected characteristic contributing to the adverse impact of additional experience and examination requirements that engineers from Canada and MRA countries are not assigned. The Tribunal expresses that internationally educated graduates are discriminated against as "they have a barrier they have to overcome before they are granted membership by APEGA" (Mihaly, 2014). Consequently, the Tribunal ordered APEGA to reconsider Mr. Mihaly's application and appoint a committee to individually accommodate him. APEGA was ordered to provide meaningful and non-discriminatory support, mentorship, examination exemptions, networking opportunities, and program referrals to correct language and academic deficiencies. Mihaly received an award for general damages of \$10,000, but his petition to receive wage loss compensation was declined due to lack of evidence (Mihaly, 2014).

3.5 Summary of Decision by the Court of Queen's Bench

Both APEGA and Mihaly filed an appeal to the Court of Queen's Bench in 2014 regarding the Tribunals' decision. APEGA disputed that the Tribunal had no jurisdiction over the discrimination, as the Act did not consider the "place of origin of academic qualifications" as a protected characteristic. Additionally, APEGA submitted that Mihaly could not actually establish an adverse

impact because he never actually wrote the confirmatory exams, and therefore it is unknown whether he would have passed. APEGA also requested a review of reasonableness based on the fact that individualized assessment and accommodation instills undue hardship and falls out of their regulatory role. The Court of Queen's Bench concluded that Mihaly had established *prime facie* discrimination, but the extent of accommodation expected of APEGA was unreasonable. Thus, the Tribunal's decision was reversed and Mihaly's request for wage loss compensation was dismissed, as it was not a protected characteristic (Association, 2016).

3.6 Summary of Decision by the Alberta Court of Appeal

Once again, Mihaly appealed to the Alberta Court of Appeal for the restoration of his appeal to the Court of Queen's Bench. He was required to show reasonable promptness and arguable merit for restoring the appeal. Mihaly could not justify any valid error on the decision made by the Court of Queen's Bench. It is inevitable that all educational institutions must demonstrate equivalency of their programs if credentials are to be directly accepted, including other Canadian institutions. Additionally, Mihaly did not show intention in having the appeal restored because he had not even managed to prepare the Appeal Record in time for the appeal. Therefore, The Alberta Court of Appeal dismissed his application (Mihaly, 2017).

4.0 The Court of Queen's Bench Decision

4.1 Grounds for Evaluation

Following the appeals from both parties, the Court of Queen's Bench of Alberta evaluated the case based on four central issues: procedural fairness, jurisdiction, legal test choice, and justification for accommodation (or lack thereof). Ultimately, the Court evaluated the extent to which the Tribunal's interpretation of law and undisputed evidence was justifiable in concluding that APEGA discriminated against Mihaly. The court evaluated whether APEGA's Examination and Experience Standards are discriminatory and analyzed the extent to which APEGA should reasonably accommodate Mr. Mihaly within its regulatory role.

4.2 Procedural Fairness

APEGA argued that the Tribunal breached procedural fairness since the judge delivered on issues that were not addressed by either party. Upon closer evaluation of the proceedings, the Court found that APEGA had an opportunity to respond to all evidence and submissions for the case. Thus, the Court deemed the Tribunal's methodology for evaluating the evidence as fair.

4.3 Jurisdiction

The appeal stated that the Tribunal did not have jurisdiction to rule over the "place of origin of academic qualifications" based on the argument that "place of origin" was synonymous with "place of birth," not "place of education." (Association, 2016) Therefore, APEGA argued it did not breach the Alberta Human Rights Act because place of education is not a protected characteristic. Conversely, The Court found that Mihaly's place of education is "inextricably linked" to his place of origin, thus serving as a "proxy place of origin" (Association, 2016). Therefore, the case constituted *prima facie* discrimination is within the jurisdiction of the Tribunal.

4.4 Choice of Legal Test

Prima facie discrimination is defined under section s 4 of the AHRA, which states that “no person shall discriminate against any person or class of persons with respect to any goods, services.... because of... place of origin” (Association, 2016). Through the Moore test, the Court deemed that indeed Mr. Mihaly’s place of education is a protected characteristic under the AHRA as it is “inextricably linked to his place of origin,” directly contributing to the adverse impact of time and money concerning the exams (Association, 2016).

Through a reasonableness standard test, the Court established that the Tribunal failed to justify conclusions with evidence and neglected to analyze all adverse impacts other than the FE exam. The undisputed evidence presented by APEGA’s three witnesses regarding the accreditation process proved that additional requirements are based on the level of information known about foreign engineering programs. Thus, Mihaly was required to write the FE exam because APEGA “simply does not have the information to know” the level of accreditation of his degree, despite the “significant investment of resources” invested in the system of MRAs, CEAB Substantially Equivalent Programs, and the FD list (Association, 2016). The Court dismissed the Tribunal’s unjustified conclusion the Examination Standard is based on the discriminatory assumption that foreign credentials are “inferior” to Canadian programs. The Tribunal failed to examine the impact of the NPPE exam and Canadian experience requirements. The Court found that the NPPE exam is not an adverse impact because it is “required of all applicants, wherever they were educated” and there is no evidence demonstrating poor exam performance by foreign-trained engineers, despite the fact that Mr. Mihaly failed this exam three times (Association, 2016). The APEGA requirement of at least one-year Canadian level-D experience was also deemed non-discriminatory because unemployment is not related to place of origin.

4.5 Justification

Lastly, the Court of Queen’s Bench evaluated the extent to which APEGA fulfilled its duty to reasonably accommodate Mr. Mihaly. Under Section 11 of the Alberta Human Rights Act, APEGA’s additional registration requirements for foreign-trained engineers must be justified, as they would otherwise constitute of *prima facie* discrimination. The Court agrees with the Tribunal that APEGA’s requirements are justifiable under s 11 because they were “adopted for safety and competency reasons” in order to fulfil the “statutory responsibility” to protect public safety (Association, 2016). However, the Court dismissed the Tribunal’s conclusion that APEGA did not reasonably accommodate Mihaly because his accreditation evaluation process was not individualized and APEGA did not take a “more proactive approach and negotiate agreements with other institutions.” The Court concluded that the FD list actually benefited Mr. Mihaly by reducing the number of confirmatory exams required. Furthermore, there was no evidence found by the Court to prove that APEGA has the time and resources to negotiate with each of the thousands of institutions on the FD List, thus relying on information available through the CEAB and FE exams. Evidence proved that the FE exam to be an “independent, objective, fair, and impartial” assessment of the accreditation standard by means of a “valid and reliable method.” Since Mr. Mihaly never took the exam, he was not deemed as negatively impacted by this requirement, considering it has an 85% pass rate (Association, 2016).

The court concluded that “individual testing would be costly and inefficient and would not provide a consistent, standardized, and objective evaluation.” There was no evidence that APEGA had the

resources for the individualized assessment committees, mentorship, networking opportunities, and language support proposed by the Tribunal, which were deemed to “go beyond the scope” of *prima facie* discrimination. Such extent of accommodation forces APEGA to “fundamentally alter its standards” and “act outside its regulatory role” (Association, 2016).

4.6 Final Decision

The Alberta Court of Queen’s Bench reversed the decision by the Tribunal based on the presence of logical errors, unsupported conclusions, lack of evidence, and missing considerations detailed above. Mr. Mihaly’s cross-appeal was also denied based on lack of justification.

5.0 Reflection and Opinion

Based on the definition of reasonable accommodation, undue hardship and due diligence, it was concluded that the decision of the Tribunal should be disregarded to some extent. As verified by the Court of Queen’s Bench, the applied Moore test justly identified the presence of *prima facie* discrimination. APEGA’s additional experience and exam requirements do not apply to graduates from Canada or MRA countries, thus imposing extra hurdles for international engineers to overcome. While the Tribunal’s determination of *prima facie* discrimination is viable, the degree of expected accommodation instills responsibilities on APEGA that are outside its regulatory scope and would cause undue hardship. According to the Canadian Human Rights Commission, employers and service providers such as APEGA are obliged to provide alternative treatment in order to prevent discrimination (Association, 2016). It can be argued that APEGA’s procedures already provide reasonable accommodation by providing countries with the opportunity to establish equivalent credentials with Canada through an MRA, or for an institution to be “Substantially Equivalent” with the CEAB. Moreover, APEGA considers appropriate 10 years of work experience at D-level to exempt foreign engineers from the examination standard.

However, the Tribunal proposed that APEGA act outside its regulatory role of checking the competency of professional engineers in Alberta by further accommodating foreign engineers. The individual correction of academic and language deficiencies, employment search assistance, networking, and mentorship expected for each applicant are beyond APEGA’s capabilities. It must be considered that APEGA receives 1500 applications each year with a processing time of 6-12 months and fee of \$500 for new applicants (APEGA, 2018b). Therefore, the cumulative time and cost related to assessment to this individualized extent would negatively impact other applicants by delaying the review process and increasing membership fees. Further extensive investment of resources would be required if APEGA were to initiate contact with countries lacking sufficient “open-source” information to establish an MRA or assessment by the CEAB. Moreover, the acceptance of the Tribunal’s decision establishes grounds for more cases like Mihaly against APEGA to arise. The Tribunals’ proposed extent of accommodation would require nation-wide adoption in order to maintain consistency throughout all regulatory bodies. Therefore, the Tribunal unreasonably ordered APEGA to expand their accommodation services.

The decision by the Court of Queen’s Bench is deemed as valid because the Court’s position expands on the Tribunal’s correct assessment of discrimination and further states why APEGA has fulfilled due diligence. The duty to accommodate requires contribution from both parties to reach a reasonable consensus for preventing discrimination. While APEGA attempted to accommodate Mihaly by considering his work experience, albeit deemed an insufficient C-level, Mihaly did not

attempt the confirmatory exams, arguably not contributing to the accommodation process. Therefore, APEGA should not be expected to accommodate further by granting the correction of academic deficiencies, without clear intent by Mihaly to reach accommodation. Canada's justice system must adjudicate in a fair and impartial manner (Alberta Courts, 2018b). The Court's conclusion that the Tribunal's decision has missing considerations, logical errors, and lack of evidence further proves that the Tribunal's decision should be rejected (Association, 2016). Tribunal "failed to consider relevant factors in the assessment of undue hardship" (Association, 2016); neglectant to the time, costs, and effort imposed upon APEGA to expand the procedures of accommodation. Furthermore, the Tribunal's opinion that the FD list placed Mihaly at a disadvantage was logically incorrect. The FD list reduced the number of confirmatory exams required and could not further benefit Mihaly due to a lack of information regarding his education. Even Canadian institutions must undergo a rigorous accreditation process, and "there is no legal right to accreditation," according to the CEAB (CEAB, 2016). Thus, even a Canadian graduate may have to prove their competency if the CEAB decides to revoke the institution's accredited status. Overall, the decision by the Court of Queen's Bench is justified, highlighting flaws in the orders by the Tribunal and promoting the reasonable accommodation already provided by APEGA.

As the decision by the Court of Queen's Bench is supported as accurate, the validation of this decision by the Court of Appeal is also deemed accurate. The Court of Appeal strives to provide impartial decisions supported by factual and accurate evidence. Thus, Mihaly's restoration plea should be dismissed based on lack of promptness, evidence, and questionable merit.

Within the context of Canada's multicultural society, APEGA should develop feasible registration procedures that recognize the training of foreign-educated professionals while ensuring the competency of the professionals and safeguarding the public interests. Thus, APEGA should accommodate foreign-trained engineers and geoscientists to the extent of providing fair and unbiased grounds for evaluation without incurring undue hardship. According to the CEAB, "there is no legal right to accommodation," but APEGA has an obligation to meet "due diligence" requirements. Thus, they must provide foreign engineers with the opportunity to be accredited, but are not required to guarantee licensing. For example, the FE exam provides a standardized, impartial, and unbiased process for evaluating academic equivalency. Further efforts to ensure the applicant's success in the exam would go beyond the responsibilities of APEGA.

As confirmed by the Court of Queen's Bench, APEGA's existing procedures already provide an appropriate level of accommodation and should thus not invest in providing further assistance. Extensive accommodation is outside their regulatory role and may fundamentally risk APEGA's purpose to protect public safety. Exempting all exams risks public safety by allowing unqualified engineers to practice. Individualized correction of academic deficiencies risks a timely and affordable licensing process. Extensive detail in assessment of credentials for applicants with complex backgrounds, such as foreign engineers, may compromise the quality of assessment for other applicants due to budget and schedule restrictions. Therefore, APEGA's regulatory role, combined with cost, effort, and time constraints justify their current accommodation techniques are sufficient. The aforementioned measures proposed by the Tribunal, in addition to mentorship, networking opportunities, and language correction programs should be available, but satisfied by third parties. If APEGA would like to further accommodate foreign engineers, an external organization should cover these measures.

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