

ENGG 513 Report 1: Mihaly vs. APEGA

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Introduction

In Canada, where engineering is a self-regulated profession, the regulating Associations need to be diligent in their scrutiny of the engineers it licenses. This report explores the pursuit of an APEGA Professional Engineering License by Czechoslovakian engineer Ladislav Mihaly, and the legal discrimination cases that occurred in that pursuit. The story begins with Mihaly's rejected series of applications to APEGA, and travels through the Alberta Human Rights Commission, who ruled that APEGA discriminated against Mr. Mihaly based on his place of origin. Facing the demands from the human rights tribunal, APEGA appealed the decision to the Alberta Court of Queen's Bench, who then ruled in favour of APEGA, saying Mihaly's place of origin was not the grounds for discrimination ^[4]. The case had been appealed to the Alberta Court of Appeal, who dismissed the appeal in January 2017 ^[5]. To this date, Mr. Mihaly has still not received a Professional Engineering License from APEGA and this case remains an important, precedent-setting event that helps define the power and jurisdiction held by Canadian Professional Engineering and Geoscience Associations.

Stakeholders

APEGA (Association of Professional Engineers and Geoscientists of Alberta) ^[1]

APEGA is the main regulating body for professional engineers and geoscientists in Alberta. Their mission is to regulate the practice of engineering to serve the public interest in Alberta ^[1]. This service includes protecting society and the environment from harm by holding their member professionals to high standards of practice. In this case, they rejected the P.Eng application of Mr. Mihaly in the 2000s and were accused of discrimination.

The Court of Queen's Bench of Alberta ^[2]

The Court of Queen's Bench is the Superior Trial Court for Alberta, dealing with trials in civil and criminal matters and appeals from Provincial Court and Tribunal decisions. Their mission is "To 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]

The Alberta Human Rights Commission ^[3]

The Alberta Human Rights Commission is concerned with the protection of Albertans against discrimination in certain areas. Deriving their power from the *Alberta Human Rights Act*, they are significant in this case for their role in tribunal hearings. They seek to protect people like Mr. Mihaly when they have reason to believe that those people were unfairly discriminated against. ^[3]

Mr. Ladislav Mihaly

Ladislav Mihaly is an engineer who was trained and certified in Czechoslovakia in the 1970s. He moved to Canada and applied to APEGA to receive a membership and become a Professional Engineer in Alberta 3 times, beginning in 1999. His applications were rejected following 3 fails and 1 absence of a National Professional Practice Examination (NPPE) ^[4]. His accusation of discrimination by APEGA was the beginning of this legal case and the involvement of the human rights commission.

Licensed and Aspiring Professionals in Alberta

Even the other members of APEGA who do not hold a position on APEGA's elected council, and those who wish to join APEGA in the future also have a stake in this case. Mihaly vs. APEGA is a precedent-setting decision that helps define the minimum standards to hold membership in the association. Thus, the value and regard of each existing membership can be affected and possibly jeopardized if the standard of admission is compromised.

The Albertan/Canadian Public

Every Canadian citizen who interacts with the works and products of engineers must place a great amount of trust in those engineers to act in the interest of safety of the public. For this reason, the general public must also be aware of the standards that their engineers are being held to. If the profession is jeopardized by poor standards and safeguards, so too are the automobiles, bridges, buildings, and other potentially hazardous structures that exist in Canadians' day-to-day lives.

Licensed Professionals in Other Countries

Like Mihaly, there are engineers abroad that were deemed to be qualified engineers in their place of origin, but may encounter the same difficulties that Mr. Mihaly has. The outcome of this case and the resulting precedent set for licensing associations greatly affects their ability to practice their career abroad and thus limits their freedom to practice.

Background

Ladislav Mihaly moved to Canada and first applied to register as a P.Eng with APEGA in 1999 and he applied again in 2002. Per attempt, APEGA prescribed the National Professional Practice Exam (NPPE), 3 confirmatory examinations, and an additional economics exam or course. In each attempt to apply, Mihaly failed the NPPE, totalling 3 fails and one absence. The NPPE is an ethics exam that all Professional Engineers in Alberta are required to take to receive a license ^[7] ^[4]. Mr. Mihaly applied a 3rd time to APEGA in 2006, and APEGA again found that Mihaly would need to complete the same exams, but given the amount of time that had passed, requested updated references and a new resume from Mihaly. Upon review, APEGA indicated that Mihaly had not acquired the 1 year of D level Canadian professional engineering experience required to obtain a professional license ^[4]. In 2008, Mihaly filed a complaint with the Alberta Human Rights Commission on the grounds that APEGA discriminated against him due to his Czech origins.

The Alberta Human Rights commission agreed with Mihaly's complaint and found that the examination standards employed by APEGA were not individualized and would inherently favour other groups more than others; a basis for discrimination ^[4] ^[6]. They awarded Mihaly \$10,000 in general damages, but nothing for lost wages and ordered APEGA to create a committee with the purpose of helping Mihaly receive more individualized support and criteria for licensure. This included mentorship in the profession, networking, and language ^[4]. On the basis of consistency, and as stated in paragraph 250 of the Tribunal decision ^[6], the order to APEGA to accommodate foreign trained engineers would need to be extended to all foreign applicants like Mr. Mihaly ^[4].

In November 2014, APEGA appealed to The Court of Queen's Bench about the decision about discrimination, and Mihaly appealed to the same body about the lack of compensation for lost wages. The Court of Queen's Bench upheld APEGA's appeal, saying that the basis for the Tribunal's decision was illogical and unreasonable ^[4]. Specifically, the Tribunal determined that Mihaly was discriminated against based on his place of origin, but The Court of Queen's Bench disagreed. Their decision was that, while Mr. Mihaly did have a protected characteristic (foreign place of origin), the basis for rejecting his license was his educational quality and his inability to demonstrate a knowledge of Canadian engineering ethics. Their full decision contains much more detail and will be discussed in the next section.

Mihaly filed an appeal with the Alberta Court of Appeals in February 2016. This initial attempt to appeal was cancelled in June of the same year due to Mihaly's negligence to further the appeal or file the Appeal Record. He applied to restore this appeal in December 2016. The content of this appeal was mainly concerned with the Court of Queen's Bench not accepting his evidence and his degree allegedly being equivalent to a Canadian bachelor's degree in engineering ^[5]. To the former, it was not an error for the Court of Queen's Bench to reject his documentation due to the state of the appeal and decision. The latter point cited the foreign degree list presented by APEGA, the *Canada/EU Agreement for Cooperation in Higher Education and Training*, and the 1979 UNESCO *Convention of the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region*. Mr. Mihaly did not prove that any of those documents obliged APEGA to equate his degrees to an equivalent Canadian bachelor's degree in engineering. Additionally, the Human Rights Commission's mandate does not include violations of Canada's international obligations. For this reason, and Mihaly's lack of compliance of appeal process criteria, the appeal was dismissed on 12 January, 2017 ^[5].

The Court of Queen's Bench Decision ^[4]

When presented with the appeals of APEGA and Mr. Mihaly, the Court of Queen's Bench ultimately decided to rule in favour of APEGA to reverse the Tribunal's decision.

APEGA raised the following issues to the Court of Queen's Bench in their appeal ^[4]:

Procedural Fairness ^[4]: APEGA felt that the Tribunal had incorrectly concluded that APEGA's assigned examinations were not "for the purpose of correcting a perceived academic deficiency" as prescribed in the Engineering and Geosciences Professions General Regulation (EGPR). APEGA argued that the full text of the EGPR states that these exams may also just be confirmatory in nature, and do not automatically indicate an academic deficiency. APEGA also argued that the Tribunal breached procedural fairness by bringing up the EGPR, since neither Mihaly nor the Tribunal brought it up during the hearing. The Court of Queen's Bench did not accept this particular argument, and stated that APEGA did not prove a breach in fairness since APEGA had the opportunity to respond to all evidence and submissions made.

Jurisdiction ^[4]: APEGA felt that the Tribunal was not entitled by the Alberta Human Rights Act to decide if the discrimination was based on the place of origin of the person or if it was based on the place of origin of the person's education. The Court of Queen's Bench also did not accept this argument, deciding that APEGA did not establish that the Tribunal did not have jurisdiction.

Prima facie discrimination ^[4]: The Alberta Human Rights Acts states (paraphrased) that no person shall discriminate against any person with respect to and goods and services that are customarily available to the public because of the place of origin of that person. APEGA disputed the claim that they had discriminated against Mihaly at face value. However, APEGA did require that Mihaly write the FE Exam, something that would not have been required of Canadian graduates or those from nations with Mutual Recognition Agreements, and the Court of Queen's Bench agreed that this constituted *prima facie* discrimination. But, since *all* engineers are required to complete the NPPE, which Mihaly failed 3 times, the court found that there was a reasonable basis for rejection that was not based directly on his Czechoslovakian origins.

Justification ^[4]: It was the responsibility of APEGA to establish that their discrimination was reasonable and justifiable, per the AHRA ^[4]. APEGA submitted that the purpose of the FE exam is to establish that the applicant is knowledgeable of the field that they are applying for their license in if their experience does not confirm that knowledge. The Court of Queen's Bench

agreed that the requirements set by APEGA were consistent enough amongst applicants and that foreign applicants had a high enough success rate that the test was not unreasonably difficult for them. They agreed with APEGA for this point in that his failure was due to his failure to demonstrate entry level engineering competence.

A key point of the Tribunal that The Court of Queen's Bench disputed was that APEGA did not do all that they could have done to accommodate Mr. Mihaly and similar foreign engineers. The Court of Queen's Bench determined that the reasons supporting this conclusion were "rife with logical errors, findings of fact that are not supported by the evidence, and failures to take into account the relevant considerations." On these grounds, and a lengthy summary supporting them, The Court of Queen's Bench decided to reverse the order of the Tribunal, releasing APEGA of the obligation to assist Mihaly in receiving his license if he was unable to exceed the baseline standards that APEGA requires ^[4].

Reflection and Opinion

On 12 January 2018, The Alberta Court of Appeals dismissed the case again, providing another ruling in favour of APEGA in this saga. The appeal was brought to them by Mihaly and was found not to contain any proof that the Court of Queen's Bench decision was erroneous and that APEGA was not required to equate his European credentials to Canadian credentials ^[5]. Based on the legal findings and in keeping with the purpose and nature of APEGA's work, it appears that APEGA stands in the right, so I agree with the decisions of the Court of Queen's Bench and the Alberta Court of Appeals. To be fair to Mr. Mihaly, it is understandable how it can *feel* extremely unfair when your education and 20+ year career is deemed to be insufficient for you to continue your work in another country. However, personal feelings of unfairness cannot be used as a justification to circumvent the procedure employed by APEGA. Engineering is a profession that can have a profound, but catastrophic impact on innocent human life if it is not practiced with the utmost care and respect. The role and duty of the Professional Engineering Associations to society is to ensure that the dangers of engineering and technology are never unleashed upon the public and workers. Consider the two Quebec Bridge collapses where a total of 88 workers were killed due to negligence of engineers ^[8]. As well, evaluating

and policing the educational quality of engineers from all around the world is an extraordinary and expensive task that is far beyond the capability of an engineering and geoscience association. This sentiment is mirrored by Justice Ross in paragraph 121 of the Court of Queen's Bench decision ^[4]. It is far more feasible for an Association to establish a baseline set of requirements of practice in their province or territory of jurisdiction that they will feel confident judging candidate engineers against. In the Mihaly case, APEGA simply applied their standards consistently by requiring Mr. Mihaly to complete the NPPE that he failed thrice and by requiring him to have a level of education and experience of which they can be certain of quality. The basis for his rejection was not necessarily the country he came from, but was the same basis that any applicant from any location could be rejected for. One argument that could be made in favour of Mihaly is that the application process is inherently favoured towards people from Canada or other English-speaking nations with a similar code of engineering ethics. This could lead to a systematic rejection of foreign people, without individual basis. While this does tip the scales disproportionately against non-English and foreign people, it can still be argued that to practice engineering safely and effectively in an English-speaking world, an engineer must be able to communicate effectively and without significant barriers. Thus, the cause of rejection is related, but only indirectly with the national origin of the applicant. If Mr. Mihaly does not possess the English communication skill and the knowledge of Canadian engineering ethics requisite to complete the NPPE, then irrespective of the cause for such deficiency, it is extremely likely that he does not have the ability to practice engineering *safely* in Canada.

Foreign trained engineers and geoscientists are capable of producing great works just as locally trained professionals are. And as long as there is a fair, structured, and safety-conscious standard for admission that holds everyone to the same standards and ensures that only those that respect the profession are admitted, there should not need to be extraordinary accommodations made for foreign trained professionals. While an ideal world would have only one's technical merit before them in judgement, the reality is that it requires far too many resources to treat every foreign trained applicant as a special case to review. It is possible for accommodations to be made to assist foreign-trained engineers and geoscientists, but it must be stressed that those accommodations should be made with the aim of making applicants

more qualified, not changing qualifications requirements. Further, it must also be stressed that these accommodations need to be funded in-part by the applicant or subsidized in another fashion as such a scheme could be prohibitively expensive. The reach and resource of the professional Associations are limited and it is not worth compromising the safety of society to try to remain more inclusive.

References

- [1] "About APEGA," *APEGA*, [Online]. Available: <https://www.apega.ca/about-apega/> [Accessed: 10 Feb. 2018].
- [2] "Court of Queen's Bench of Alberta," *Alberta Courts*, [Online]. Available: <https://albertacourts.ca/qb/home>. [Accessed: 12 Feb. 2018].
- [3] "About the Commission," *Alberta Human Rights Commission*, 24 Oct. 2012. [Online]. Available: <https://www.albertahumanrights.ab.ca/about/Pages/about.aspx> [Accessed: 11 Feb. 2018].
- [4] Justice J. M. Ross, "Citation: Association of Professional Engineers and Geoscientists of Alberta v Mihaly, 2016 ABQB 61," *APEGA*, 2016. [Online]. Available: <http://www.apega.ca/assets/PDFs/mihaly-decision.pdf> [Accessed: 16 Feb. 2018].
- [5] Justice F. Slatter, "Citation: Mihaly v Association of Professional Engineers and Geoscientists of Alberta, 2017 ABCA 15," *APEGA*, 12 Jan. 2017. [Online]. Available: <https://www.apega.ca/assets/news-releases/2017-milhaly-court-decision.pdf>. [Accessed: 16 Feb. 2018].
- [6] M. Jiwaji, "Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1," *The Canadian Legal Information Institute*, 06 Feb. 2014. [Online]. Available: <https://www.canlii.org/en/ab/abhrc/doc/2014/2014ahrc1/2014ahrc1.html?search> [Accessed: 16 Feb. 2018].
- [7] "National Professional Practice Exam," *APEGA*. [Online]. Available: <https://www.apega.ca/apply/exams/national-professional-practice-exam-nppe/> [Accessed: 13 Feb. 2018].
- [8] J. H. Marsh, "Quebec Bridge Disaster," *The Canadian Encyclopedia*, 28 Aug. 2018. [Online]. Available: <http://www.thecanadianencyclopedia.ca/en/article/quebec-bridge-disaster-feature/> [Accessed: 16 Feb. 2018].