

Case Study Report: APEGA vs. Ladislav Mihaly

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Introduction:

The case of Mr. Ladislav Mihaly versus the Association of Professional Engineers and Geoscientists (APEGA) provides insight into APEGA's membership requirements and its regulatory process for screening new applicants. These requirements and regulatory processes are defined in the legislative framework that governs APEGA's decision making. The study of Mr. Mihaly's circumstances and pursuit of professional membership is especially significant as it introduces the issue of membership standards and requirements for applicants with foreign education and accreditation. Additionally, this case-study highlights the legal domain in which APEGA operates, and the legal actions that may be taken by affected parties when membership disputes arise. The dispute between Mr. Mihaly and APEGA resulted from the applicant's belief that the education, knowledge, and professional competency requirements of the Association were discriminatory in nature, due to his place of origin. The alleged discrimination became a topic of disagreement between the Alberta Human Rights Commission and the Court of the Queen's Bench of Alberta. This report explores the dispute between Mr. Mihaly and APEGA by summarizing the facts and evidence provided by multiple stakeholders, and the subsequent decisions made regarding this case.

Stakeholders:

Mr. Ladislav Mihaly:

Mr. Ladislav Mihaly is the subject of this case study and a trained Czechoslovakian engineer with two Masters degrees obtained in his home country. Upon initial review of his application for membership, the APEGA Board of Examiners concluded that, based on his education and level of experience, Mr. Mihaly would be required to pass the National Professional Practice Exam (NPPE). He would also be required to pass three confirmatory examinations and a course in engineering economics in order to gain professional accreditation. Mr. Mihaly failed to meet APEGA's registration requirements through multiple reviews of his application and was subsequently refused membership. This led to Mr. Mihaly filing a complaint with the Alberta Human Rights Commission, claiming that the treatment of his application demonstrated discrimination based on his place of origin.

APEGA:

The Association of Professional Engineers and Geoscientists of Alberta regulates the professional practice of engineering and geoscience in Alberta. APEGA includes a Board of Examiners who are responsible for reviewing the applications of individuals seeking a professional membership in the Association. The Board awards membership based on criteria that is defined in the legislative framework. This includes academic qualifications, character and reputation, and the demonstration of knowledge of the practice of engineering by passing one or more prescribed examinations (i.e. the NPPE). Mr. Mihaly's membership application was subject to review by the APEGA Board of Examiners.

Alberta Human Rights Commission:

The Alberta Human Rights Commission (herein called AHRC) was established under the Alberta Human Rights Act, and is the governing body for human rights in the province. The AHRC is responsible for reviewing cases from a quasi-legal perspective to identify and respond to any offenses that occur in Alberta. A complaint was directed at the AHRC by Mr. Mihaly regarding a

potential human rights violation by APEGA for withdrawing his membership application. The AHRC was tasked with reviewing the complaint, and identifying if a human rights violation had occurred. Furthermore, the AHRC was responsible for deciding whether or not to award Mr. Mihaly with lost wages associated with the alleged discrimination.

The Court of the Queen's Bench:

The Court of the Queen's Bench of Alberta (herein called the Queen's Bench) is the superior court in the province, and thus holds the jurisdiction to hear any criminal or civil law case that is presented before it. APEGA filed a formal appeal with the Queen's Bench in response to the AHRC's conclusion that Mr. Mihaly was discriminated upon. The Queen's Bench was tasked with reviewing the justifications outlined by the AHRC, as well as evidence provided by APEGA, to reach a legally justified resolution to APEGA's appeal. The Queen's Bench was also responsible for assessing a cross-appeal, issued by Mr. Mihaly, as a result of the AHRC's refusal to award him damages for his perceived loss of income.

Dr. David Lynch:

Dr. David Lynch, a member of the Canadian Engineering Accreditation Board, appeared in front of the AHRC as an expert witness on behalf of APEGA. He was responsible for explaining APEGA's evaluation of engineers who received their education credentials outside of Canada. More specifically, Dr. Lynch outlined several international agreements, including the Foreign Degree List (FD List), which APEGA took into consideration when identifying Mr. Mihaly's accreditation criteria.

Dr. Gary Faulkner:

Dr. Gary Faulkner, the Chair of the APEGA board of examiners, appeared on behalf of APEGA to testify in front of the AHRC. Dr. Faulkner was highly experienced in evaluating new APEGA applicants, and provided an explanation of the overview of the Board of Examiners' roles. In addition, he outlined the process that was followed by the Board when assessing Mr. Mihaly's education and credentials, as well as APEGA justifications for withdrawing Mr. Mihaly's application.

Mr. Mark Tomarik:

Mr. Mark Tomarik, the APEGA Director of Registration, was called to testify in front of the AHRC to communicate that all individuals seeking registration as a Professional Engineer in Alberta must meet six distinct requirements. He explained in detail how this standard was applied in APEGA's assessment and subsequent decision regarding Mr. Mihaly.

Background:

Prelude:

Mr. Ladislav Mihaly began his pursuit for APEGA Professional Engineer registration in May 1999. Trained as an Engineer in Czechoslovakia, Mr. Mihaly's APEGA application noted his Masters education in Technology of Fuels and Thermal Energy, and his certificate in Corrosion Engineering. He also provided three references from his experience practicing in Czechoslovakia, in accordance with APEGA application standards. The application was acknowledged by APEGA later that month.

APEGA's Board of Examiners reviewed his application and transcripts, but questioned the quality of Mr. Mihaly's work experience as 'long but narrow' (Mihaly, 2014). Additionally, APEGA recognized Mr. Mihaly's supervisor references to be relationships of 'short exposure' (Mihaly, 2014). APEGA deemed that Mr. Mihaly lacked the required qualifications for a Professional Engineer in Alberta and required him to pass the NPPE. This was standard for international applicants. Mr. Mihaly was also required to pass three confirmatory examinations in order to prove his competence as an Engineer. On January 17, 2000, Mr. Mihaly wrote the NPPE exam, and was later notified by APEGA that he had failed the exam. Mr. Mihaly applied to write his second attempt at the NPPE on October 16, 2000, but failed to attend the exam on this date. On June 29, 2001, Mr. Mihaly was advised that his registration for Professional Engineer status in Alberta was withdrawn due to his failure to write all confirmatory exams by May 2001.

Mr. Mihaly proceeded to reactivate his application on two separate occasions. In both cases the end result followed a similar pattern to his first application. APEGA required Mr. Mihaly to pass the NPPE and confirmatory exams, and he failed to do so. On August 5, 2008, Mr. Mihaly filed a complaint with the AHRC regarding APEGA's unjust admission requirements.

Human Rights Commission:

Mr. Mihaly's complaint to the AHRC highlighted APEGA's application process as discriminatory based on "race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons" (Alberta Human Rights Act, 2018). Mr. Mihaly represented himself at the Human Rights Tribunal, and provided himself as the sole witness. The tribunal was oriented around Mr. Mihaly's belief that he had suitable accreditations for Professional Engineering status in Alberta. Mr. Mihaly testified that APEGA's lack of inclusion of Czechoslovakia in its list of countries to assess foreign credentials signified discrimination based on country of origin.

In the Human Rights Tribunal, APEGA brought three key witnesses to the stand who were instrumental to the rejection of Mr. Mihaly's application. Dr. David Lynch acted as a member of APEGA's Board of Examiners and the Canadian Accreditation Board (CEAB). Dr. Lynch described APEGA's evaluation process for engineers who had received their education credentials outside of Canada and provided details on the Foreign Degree (FD) list which was used to evaluate Mr. Mihaly's application. Dr. Gary Faulkner testified to the processes used by the Board of Examiners when evaluating an applicant's academic and experience credentials. Finally, Mr. Mark Tokarik was the third witness to testify for APEGA and provided detail on the registration requirements that foreign applicants are expected to meet. Mr. Trokarik outlined how APEGA's Board of Examiners declined Mr. Mihaly's request to have the confirmatory examinations waived based on his work experience. Mr. Tokarik also made note of the reconsideration request provided to Mr. Mihaly on behalf of APEGA. Mr. Mihaly neglected to submit this request.

The tribunal consistently focused on APEGA's unfair treatment of non-western immigrants. Moosa Jiwaji (Human Rights Tribunal Chair) deemed that Mr. Mihaly successfully proved the examination and experience standards required by APEGA constitutes discrimination due to the lack of individualized assessments. On February 6, 2014, the Human Rights Tribunal ruled the application process discriminatory. APEGA was to reconsider Mr. Mihaly's application and required the association to pay \$10,000 in general damages (Alberta Human Rights Ruling on Czech-trained Engineer's Accreditation Reversed, 2016).

Summary of the Court of the Queen's Bench Decision:

On January 26, 2016, the Court of Queen's Bench of Alberta filed its conclusions on the appeal and cross-appeal by APEGA and Mr. Mihaly respectively regarding the ruling from the Human Rights Commission. APEGA had appealed to the Queen's Bench due to the Tribunal's procedural fairness, jurisdiction, Prima Facie, and justification. These issues will be elaborated further in the of the 'The Court of the Queen's Bench Decision' section of the report. A cross appeal was also filed by Mr. Mihaly due to the Tribunal's refusal to award damages for loss of income. Honourable Madam Justice Ross deemed that the Tribunal's ruling was "rife with logical errors, findings of fact that [were] not supported by evidence, and [failed] to take into account relevant considerations" (Alberta Human Rights Ruling on Czech-trained Engineer's Accreditation Reversed, 2016). Therefore, the Queen's Bench sided with APEGA and justifiably ruled that the decision of the Tribunal should be reversed, and Mr. Mihaly's cross-appeal was dismissed.

Alberta Court of Appeals:

After the ruling made by the Queen's Bench in January of 2016, the disputes between APEGA and Mr. Mihaly continued. After his direct appeal to the Queen's Bench was dismissed, Mr. Mihaly filed an appeal on February 22, 2016, to the Alberta Court of Appeals. He complained that the Queen's Bench failed to accept the suitable materials which he presented in his APEGA applications (Mihaly, 2017). It was deemed that the Queen's Bench was not required under mandate to consider Mr. Mihaly's appeal. Additionally, his appeal was ruled unrestorable as it did not meet a number of standards required by law. The appeal was dismissed and the case was filed on January 12, 2017.

The Court of the Queen's Bench Decision:

APEGA's appeal on November 20, 2014, regarding the Tribunal's ruling was brought to the Court of Queens Bench of Alberta. The appeal was initially set to occur in 2014, but was postponed to 2015 in order to allow the Tribunal to submit responses to the Legal issues raised by APEGA, on behalf of Mr. Mihaly. Both the Tribunal, and Mr. Mihaly himself submitted these responses. The legal issues which were raised by the Appellant (APEGA) included Procedural fairness, Jurisdiction, Prima Facie, and Justification. Each issue was considered in the Court of Queens Bench.

Procedural Fairness:

APEGA submitted that the Tribunal breached its duty of fairness by neglecting to allow parties to respond to any 'new ground' brought to trial (Mihaly, 2016). APEGA noted that during the Tribunal, it was perceived that the confirmatory exams were used for "correcting a perceived

academic deficiency” (Mihaly, 2016). APEGA did not have the opportunity to respond to this perception and clarify that the confirmatory exams were standard practice when considering international engineers for registration. Honourable Madam Justice Ross rejected this legal issue raised by the Appellant on the basis that the Tribunal did not breach the rules of procedural fairness. In fact, it was deemed that this topic had already been discussed during the tribunal and could not be considered ‘new grounds’. Thus the Tribunal was not obligated to hear a response from APEGA.

Jurisdiction:

APEGA stated that the Tribunal lack jurisdiction regarding discrimination based on country of education. APEGA argued that country of origin does not encompass place of education (Mihaly, 2016). The Court of Queens Bench ruled that there was no connections made between the country of education and country of origin. Thus, the Tribunal justifiably operated within their jurisdiction when considering discrimination based solely on country of origin.

Prima Facie:

The Tribunal found that Mr. Mihaly’s application was rejected based on country of origin. Furthermore, the Tribunal noted that APEGA treated Mr. Mihaly as a foreign graduate, which is a proxy for discrimination based on country of origin. In order to prove a case of Prima Facie discrimination, it is required that an individual proves they have characteristics which are protected from discrimination, and have experienced adverse impacts related to this protected characteristic (Mihaly, 2016). The Queen’s Bench ruled that the Tribunal lacked evidence of discrimination in this regard. APEGA stated that Mr. Mihaly was unable to establish adverse impacts as he never wrote the confirmatory exams. This means that APEGA was unable to judge whether or not Mr. Mihaly would have passed these exams, and it cannot be determined if Mr. Mihaly would have experienced adverse impacts (ie. loss of wage). The Court of Queen’s Bench ruled the Tribunal's findings of Prima Facie discrimination unreasonable.

Justification:

The Tribunal found that requiring Mr. Mihaly to write the confirmatory exams and Fundamentals of Engineering exam (FE exam) was not justifiable. The Tribunal recognized that Mr. Mihaly should not be assessed with a generalized exam, rather he should be individually assessed. As Mr. Mihaly’s educational institutions did not fall under the list of recognized APEGA institutions (FD list), it was standard procedure for APEGA to require Mr. Mihaly write the confirmatory exams. It was evident that these confirmatory exams test knowledge that any individual from an accredited engineering program should be able to pass, and are therefore, an adequate method to assess the quality of Mr. Mihaly’s education. Honourable Madam Justice Ross ruled that the registration exams imposed on Mr. Mihaly were justifiable.

APEGA sought to have the decision of the Human Rights Tribunal remitted. The Queen’s Bench concluded that the Tribunal’s decision should be reversed. APEGA’s CEO Mark Flint endorsed the ruling as it helps to protect public safety and the regulation of the profession. “The public knows a licensed engineer or geoscientist has a certain level of knowledge and skills and can practice independently and will not put them at jeopardy when they make decisions” (Alberta Human Rights Ruling on Czech-trained Engineer's Accreditation Reversed, 2016).

Reflection and Opinion:

It is difficult to entirely support the decision of the Alberta Human Rights Commission regarding the treatment of Mr. Mihaly's application by APEGA. However, some aspects of the Commission's justification are equally difficult to argue against. The AHRC conducted a thorough review of the facts and evidence of the case, and identified that APEGA had displayed discrimination against Mr. Mihaly, according to the definition taken from *Andrews v. Law Society*. It is important to distinguish the differences between country of origin, and country of education. Country of origin is a characteristic protected from discrimination, and does not necessarily have an impact on the quality of an individual's education. Country of education may have a significant impact on quality of education based on the institutions available in that country (Mihaly, 2016). Thus, it is required by APEGA in the interest of public safety to consider quality of education, which naturally has close ties to the country of education. APEGA was not discriminatory as the association did not base its application process on characteristics which are protected from discrimination.

The decision of the Court of the Queen's Bench of Alberta to reverse the ruling by the AHRC was justified. The Queen's Bench conclusions were the result of thorough and impartial analysis of the relevant facts and evidence. The Queen's Bench found several clear logical errors in the justifications provided by the AHRC, as well as flaws in their interpretations of the Engineering and Geosciences Professions General Regulation. Additionally, based on APEGA's governing legislation, the Court deemed that the AHRC was unreasonable in arguing that APEGA's standard testing requirements for new applicants (i.e. passing the NPPE) discriminated against foreign-trained engineers, such as Mr. Mihaly. No conclusive evidence existed that indicated that engineers with foreign academic credentials would not be capable of passing the NPPE. Therefore, Mr. Mihaly's inability to meet APEGA's most fundamental examination standard on multiple attempts proved that he was not competent to practice as a Professional Engineer in Alberta. For this primary reason, the final ruling of the Queen's Bench is undeniably agreeable.

Based on the legal evidence outlined by the Alberta Court of Appeal, the Queen's Bench's decision to dismiss Mr. Mihaly's appeal was reasonably justified. It is clear that Mr. Mihaly did not comply with several of the points outlined in the Queen's Bench's criteria for restoring an appeal. As the appellant, Mr. Mihaly neglected to provide adequate reason for the delay in his action to restore the appeal. After declaring his intentions to have the appeal restored, Mr. Mihaly did not take action on the issue for several months. In addition, Mihaly failed to file the Appeal Record, and the transcripts from the hearing of the appeal application were not ordered. Therefore, it was clear that nothing was done to perfect the appeal, and that the Court of Appeal had little choice but to dismiss the application entirely.

APEGA should strive to recognize and clearly establish *all* possible degrees and credentials that are to be considered academically equivalent to the APEGA standard. Although this may not be entirely realistic, making strides towards this objective could result in the avoidance of several accreditation disputes and complaints from foreign-trained applicants in the future. If an individual received their education from a recently evaluated foreign institution, which offers

programs that do not entirely reflect APEGA's standards for academic equivalency, it is reasonable to request that the applicant fulfill additional requirements (e.g. confirmatory exams, additional courses, etc.). In such cases, it is necessary that applicants prove their professional competency and suitability to obtain a membership in APEGA.

In conclusion, APEGA should be willing to accommodate foreign-trained engineers and geoscientists, as they may bring valuable diversity in knowledge and experience to the province's workforce. If APEGA applicants do not have difficulty demonstrating sufficient academic qualifications, experience, good character, English language competency, and the knowledge to pass the NPPE, they should be allowed to practice within the province, regardless of their country of origin. However, it is important that APEGA maintain distinct requirements and standards that all engineers and geoscientist must abide by in order to ensure their professional licensing. In general, APEGA's current system for evaluating foreign-trained applicants is relatively fair. However, to best accommodate foreign professionals, APEGA should ensure its continued involvement in comprehensive international academic equivalency agreements, which involve the consistent and constant review of academic programs throughout the world.

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