

A Summary of The Case of Mr. Ladislav Mihaly vs. APEGA

ENGG 513: Roles and Responsibilities of Professional
Engineers in Society

Instructor: Dr. Denis Onen

Student: Hayden Vander Ploeg (30010591)

Date Submitted: February 16, 2018

Introduction

In Alberta, individuals are protected against forms of discriminations based on the following, but not limited to, age, race, gender, sexuality, disability and place of origin. These are protected characteristics under the Alberta Human Rights Act (AHRA), and it is illegal for any individual to face an adverse impact that is directly linked to one of these characteristics when attempting to use a service that is provided to the public. At first glance, the issue of discrimination may seem unambiguous, when in fact many cases are quite complex and require court cases and many levels of appeals. The purpose of this report is to explore one such case, Mr. Ladislav Mihaly vs. the Association of Professional Engineers and Geoscientists of Alberta (APEGA).

Mr. Ladislav Mihaly is a Czechoslovakian educated engineer who immigrated to Canada and first applied for accreditation from APEGA in May of 1999. APEGA informed him that he would have to write examinations as his degree was on the list of recognized educational degrees and that this practice was relatively routine and standard. However, Mr. Mihaly failed to write these exams numerous times and on August 5, 2008 filed a complaint with the Alberta Human Rights Commission on the grounds of discrimination due to place of origin. The Alberta Human Rights Tribunal eventually found in 2014 that APEGA had discriminated and that they were required to review Mr. Mihaly's case and pay him \$10,000. However, in January of 2016, this decision was overturned by the Court of Queen's Bench after an appeal from both parties (Mr. Mihaly appealed for an increase in compensation, and APEGA for a decision reversal). Mr. Mihaly again attempted to appeal this decision to the Court of Appeals but failed to take required steps to advance the appeal so it was dismissed. Finally, in 2017 Mihaly's appeal is not allowed to proceed after requests of renewal and APEGA gains confidence that its procedures and requirements are not discriminatory.

Stakeholders

Mr. Ladislav Mihaly

Mr. Mihaly is obviously a primary stakeholder in this case as he is the individual who applied for accreditation from APEGA. Mihaly's life was impacted profusely numerous times as a direct result of the actions of all parties involved. He claims adverse effects on his life were a direct result of his protected characteristic, constituting discrimination on the grounds of place of origin. Mihaly is a born and educated Czechoslovakian, with, as he claims in his complaints, two Masters degrees. The first being from the Slovak University of Technology in Bratislava and the other from the Institute of Chemical Technology (ICT) in Prague. Mihaly first applied for accreditation in May of 1999, and after failing numerous exams and having his application reactivated files a complaint with the Alberta Human Rights Commission in 2008. The Commission would eventually award him \$10,000, however this decision was over ruled by the Court of Queen's Bench in 2016. Finally, in 2017 Mihaly's final appeal to the Court of Appeals was also denied as he did not take the required actions to keep the appeal active.

APEGA

APEGA is the regulatory body for the engineering and geoscience professions in the province of Alberta. APEGA's main role is the licensing of individuals and companies that would like to practice engineering or geoscience in the province. [1] The purpose of licensing and regulating the engineering and geosciences practices, is to ensure public safety and that only qualified individuals can carry the title of 'professional'. In this case APEGA is a primary stakeholder as they were in direct communication with Mr. Mihaly and their practices, reputation, and regulatory power were directly impacted because of the court cases and subsequent appeals. In other words, the result of this case was either an affirmation of APEGA's system to evaluate international credentials, or a direct dispute of their system.

The Alberta Human Rights Commission

The Alberta Human Rights Commission was established under the Alberta Human Rights Act and works to provide all individuals with equal opportunity to make a living, find a place to live and to enjoy public services without discrimination. The Commission has a two-fold mandate, one to foster equality and two, to reduce discrimination. [2] The Alberta Human Rights Commission formed the tribunal that first investigated the complaint of Mr. Mihaly that he had been discriminated against due to his place of origin, and for this reason they are a key stakeholder in the case. In addition to having a direct impact on the outcome of the case, the actions, views and procedures of the tribunal were extensively reviewed by the Court of Queen's Bench. The Court found that the Tribunal did not reach a decision based on evidence and that mistakes were made in the investigation, directly impacting the reputation and public opinion of the Commission.

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. [3] The Court of Queen's Bench is an especially important stakeholder in this case as both parties (Mr. Mihaly and APEGA) appealed the decision of the Tribunal. For this reason, it was important for the Court to carefully investigate the case for themselves as well as review exactly how the Tribunal reached a decision to ensure justice for all. Additionally, the Court had a vested interest in the outcome of the case because of the way future cases could be presented and argued to them. For instance, if it was decided that confirmatory exams were discriminatory in this case, then they could be considered discriminatory for all future internationally educated engineers.

Dean David Lynch

Dr. David Lynch is the Dean of the Faculty of Engineering at the University of Alberta and appeared as an expert witness for APEGA during the proceedings of the Alberta Human Rights Tribunal. Mr. Lynch as Dean of the University of Alberta has a statutory position on the APEGA

board of examiners who assess the qualifications of all applicants. Mr. Lynch is a stakeholder in this case as he is directly impacted by the final rulings of all courts. For instance, when the ruling of the Tribunal was announced Mr. Lynch's credibility was impacted. In addition, if the decision had been upheld by the Court of Queen's Bench, the processes for evaluating applicants would have changed impacting the way Mr. Lynch does his job.

Court of Appeal of Alberta

The Court of Appeal of Alberta hears civil and criminal appeals from cases that have been tried by the Court of Queen's Bench. It is important to note that the Appeal Court does not re-try cases, but rather reviews the record to determine if errors in law or fact were made in a decision. [4] The Court of Appeal of Alberta is a minor stakeholder in this case as they were the final level of court through which Mr. Mihaly's case rose to. Although they were not involved in the case for very long, nor did they need to reverse a decision, they were still directly involved in the case and were impacted by the results of the Court of Queen's Bench Decision. In addition, the decision of the Court of Appeal to not uphold Mr. Mihaly's appeal directly impacted him and the outcome of the case. When a governing body dismisses a case with the finality that was seen here, they have to be considered a stakeholder.

Alberta Energy Regulator

The Alberta Energy Regulator (AER) is the regulatory body for all energy projects within the province. [5] The AER is a stakeholder in this case as their work is centered around monitoring the work of engineers and geoscientists that have been licensed by APEGA. If APEGA had to change the ways that foreign trained engineers and geoscientists are accommodated the regulatory work for the AER may have gotten more difficult. An influx of people entering the profession of engineering and geoscience would lead to an influx in energy projects, especially in Alberta which would increase the workload of the AER. In addition, the outcome of the Mihaly case had implications for the future of regulatory bodies and their uses of power. If the decision of the Tribunal had been upheld, processes in place by the AER may have been changed.

Background

Mr. Ladislav Mihaly was born in Czechoslovakia and educated at two different post secondary institutions, receiving two different Masters degrees. The first from the Slovak Technical University in Bratislava, where he graduated in 1975, obtaining a M.Sc. with a specialization in Technology of Fuels and Thermal Energy. [8] The second degree being from the Institute of Chemical Technology in Prague, where he obtained a certificate in Corrosion Engineering upon graduating in 1981. Mihaly first applied to APEGA for registration as a professional engineer in May of 1999. APEGA reviewed his application and found that his degrees held many parallels to chemical engineering although his experience was long it was, narrow in

scope and that his references from supervisors were of short exposure. For these reasons he was assigned to write the National Professional Practice Exam (NPPE), three confirmatory exams, as well as complete a course in economics by May of 2001. After failing the NPPE in January of 2000, missing the exam in August of the same year, and failing to complete the other requirements by May of 2001, APEGA informed him his application had been withdrawn in June of 2001.

In June of 2002 Mihaly's application was reactivated for the first time with the same conditions as above to be completed by November of 2003. Mr. Mihaly again, failed the NPPE in July of 2002. In August of 2003, Mihaly's application was withdrawn by APEGA again as the requirements specified were not completed in the specified time. In October of 2006 APEGA reactivated the application for a second time upon the request of Mihaly. Mihaly submitted an updated resume and a reference under which he had worked for more than a year for in Calgary. APEGA specified that he was either supposed to write three confirmatory exams, an economics exam or the Fundamentals of Engineering Exam (FE Exam), as well as obtain one year of North American D Level engineering experience. Mr. Mihaly refused to write the required exams and on August 5, 2008 filed a human rights complaint with the Alberta Human Rights Commission on the grounds of discrimination due to place of origin.

The complaint was initially investigated without a hearing and dismissed. Mr. Mihaly appealed to the Chief Commissioner who directs that the complaint proceeds to a hearing. [2] In 2013, the complaint is heard before the Alberta Human Rights Tribunal (the tribunal). In February of 2014 the tribunal found that "Mr. Mihaly had succeeded in establishing that the Examination Standard used by APEGA constituted discrimination not justifiable under the AHRA," [8] and awarded him \$10, 000 in general damages. In, addition APEGA is required to direct Mihaly to resources to help integrate himself into the engineering profession in Canada as discussed below. It is important to note here that because of unknown factors and other variables that the tribunal did not award Mihaly any compensation for lost wages. This decision was appealed to the Court of Queen's Bench by APEGA for a reversal, and subsequently cross appealed by Mihaly for an increase in damages.

As will be discussed below, the Court of Queen's Bench found that the findings of the tribunal were illogical, not supported by evidence, and involved interpretations of legislation that were unreasonable. In fact, in more than one finding of the tribunal, the Court found that evidence available to the tribunal actually supported the opposite of their ruling. For instance, the tribunal found that standardized testing in the form of the FE Exam would be too difficult to pass unless exams were individualized for all applicants. However, this is simply not true as the exam has an 85% pass rate with an option to retake the test. For these reasons the Court reversed the decision of the tribunal and dismissed the cross appeal of Mr. Mihaly in January of 2016. Mr. Mihaly did appeal this decision to the Alberta Court of Appeals in 2016, but did not take required steps to advance the process so the appeal was struck. Later in the year Mihaly did request that the appeal be restored. In 2017, the Court of Appeals dismisses the appeal, stating that APEGA is entitled to some finality regarding its procedures for evaluating international applicants.

The Court of Queen's Bench Decision

The Court of Queen's Bench of Alberta functions as the primary forum for judicial review of government action in Alberta and hears statutory appeals from the decisions of certain provincial administrative tribunals. [3] In this case the tribunal decision that is under review is that of the Alberta Human Rights Commission who found that Mr. Ladislav Mihaly did indeed experience systemic discrimination and awarded damages in the sum of \$10, 000 and that his application be reconsidered. In addition, APEGA was ordered to set up a committee of preferably, internationally educated engineers who successfully integrated themselves into their profession in Canada, to "specifically explore and investigate options to appropriately and individually assess the qualifications of Mr. Mihaly." [8] Finally, APEGA was also required to connect Mihaly with a mentor of similar background, direct him to resources to connect him with a network of other engineers who faced similar challenges, and "to assist him to increase his fluency and facility in the use of the English Language." This decision was appealed by APEGA for a reversal in this decision, whereas, Mr. Mihaly filed an appeal for greater compensation. The decision of the tribunal was ultimately reversed by the court due to findings "rife with logical error," "findings of fact unsupported by the evidence", "failures to take into account relevant considerations", and "unreasonable interpretations" of the legislation. [8]

To determine if discrimination had taken place the tribunal considered three factors, having a characteristic protected from discrimination (place of origin here), an appellant experiencing an adverse impact, and that the protected characteristic was a factor in the adverse impact. The tribunal applied this test in a similar manner to the *Moore vs British Columbia (Education)* case as they also considered arbitrariness and stereotypical thinking. The tribunal found that Mr. Mihaly's place of education is linked to his place of origin which is a protected characteristic under the AHRA, and that he did experience an adverse effect directly related to this characteristic, of having to write examinations, that APEGA's framework of accrediting foreign trained engineers was discriminatory by nature. The selection and use of the *Moore* test here is not disputed by the Court. What is disputed is its application and finding. The Court agrees with APEGA that there are no discriminatory assumptions underlining APEGA's procedure for accrediting internationally educated engineers. This finding by the tribunal is unsupported by any evidence. In fact, evidence available supports the contrary. APEGA does not assume that internationally educated engineer degrees are inferior, and neither does it assume their superiority. They simply do not have enough information to know. For this reason, standardized testing is not discriminatory in nature.

The tribunal also found that APEGA did not reasonably accommodate Mr. Mihaly in the requirements to write confirmatory exams or the Fundamentals of Engineering exam (FE exam), the National Professional Practice Exam (NPPE), or the year of Canadian experience before being licensed. This reasoning was based on a few different factors. The first being an unreasonable interpretation of language within the Engineering and Geoscience Profession General Regulation (EGPR). A disjunctive "or" was disregarded, disconnecting confirmatory exams from exams to correct deficiencies in knowledge. The tribunal also ascertained that APEGA could do more in terms of "discussing and negotiating agreements with other institutions." The Court rejects this argument as there is a lack of evidence to show that APEGA has or could be expected to have the

resources and ability to do this on an individual basis for all applicants. Again, the evidence shows the opposite in the sense that APEGA has thousands of degrees on the FD list, based upon knowledge about the programs at many schools. In fact, Mr. Mihaly's degrees were on this list and for this reason, he was only assigned three exams rather than five, making the tribunal's suggestion of being more proactive illogical. In summary, the Court found that, APEGA requires experience and proficiency exams to assess the individual knowledge and to ensure the safety of the public, and not to correct any perceived academic deficiencies. This is opposite to the findings of the tribunal.

In addition, the Court disagrees with the tribunal's findings on individual assessments and standardized testing. The tribunal ascertained that standardized testing (for instance the FE exam), is that it is a "one size fits all approach" and fails to consider an individual's background, experience, and specific training. The tribunal seems to think that standardized testing would have a disproportionate effect on the amount of internationally educated engineers that could become engineers in Canada. The evidence points to exactly the opposite this as the FE exam has an 85% pass rate with the option to complete the test again. In addition, the Court finds that standardized testing is the best way to determine if an individual possesses the competency of an individual that was educated at an accredited University or College. The tribunal, went on to suggest that APEGA can have tests more individualized that specifically test an applicant's experience and knowledge. The Court rejects this argument as it would place undue hardship on APEGA to individually assess all applicants to a greater degree than they already do and force them to allocate a large amount of resources to create tests for all applicants.

Finally, we also see from the decision of the Court of Queen's Bench that the penalties imposed upon APEGA by the tribunal were far beyond the scope of any discriminatory conduct found or alleged. [8] In addition, the instructions would have consumed a huge amount of resources, again placing undue hardship on APEGA. For instance, if APEGA were required to give this kind of assistance to Mr. Mihaly, they would be expected to for 375 other applicants every year. It is for these reasons that the Court of Queen's Bench ruled in favour of APEGA and reversed the decision of Alberta Human Rights Tribunal. The court also found that there was no reason to remit the matter back to the tribunal. In addition, due to the finding of APEGA's appeal and that Mihaly's cross-appeal was for further remedy only, the cross appeal of Mihaly was dismissed by the Court.

Reflection and Opinion

Do you agree with the decisions of the Alberta Human Rights Commission, the Court of Queen's Bench, and the Alberta Court of Appeal? Why or why not?

Firstly, I will discuss the decision of the Alberta Human Rights Commission in finding of favour of Mr. Mihaly. I have issue with this ruling for one main reason. This is the way evidence was blatantly ignored and not used in the decision-making process of the tribunal.

As discussed above it seems the tribunal formed by the Alberta Human Rights Commission ignored evidence when making decisions. For instance, the tribunal ascertained that APEGA did not complete a rigorous enough individual assessment of Mihaly's educational and experiential background. However, the evidence shows that all cases are individually assessed by APEGA before deciding if the applicant can be licensed or if exams are needed. It was found that Mr. Mihaly's degrees were on the Foreign Degrees list (FD list), showing APEGA was knowledgeable of his education, and that for this reason he was only assigned three confirmatory exams rather than five. Mihaly's experience was also analyzed by APEGA and they found that although he had many years of experience, it was narrow in scope and he had not progressed professionally by handling higher responsibility projects. It was for these reasons he was required to complete one year of North American D level engineering experience. In addition, the tribunal stated that where Mihaly was not granted "exception by APEGA" he should be allowed to "challenge specific examinations," but failed to consider Mihaly's failure of the NPPE twice and his refusal to even sit the three confirmatory exams or the FE exam. This contradictory reasoning and decision-making process absent of evidence shows that the ruling of the tribunal is flawed.

Secondly, the rulings of the Court of Queen's Bench and the Alberta Court of Appeals will be reflected upon. I believe the decision of both bodies was justified because the ruling of the tribunal was deeply flawed. It is obvious to me that APEGA has procedures and standards in place to protect the safety of the public and that these practices are not discriminatory in any way. Despite this, the tribunal ascertained that APEGA's licensing procedure had discriminatory underlining's and that requiring internationally trained engineers to take confirmatory exams would cause a disproportionate amount of people like Mr. Mihaly to not pursue their profession in Canada. This is simply not true. As discussed above, the FE Exam has a very high pass rate and many individuals are registered with APEGA with no issue. In fact, only 25% of applicants are assigned examinations. [8] It is my opinion that the ruling of the tribunal was quite surprising as APEGA was only following procedures that are in place to promote safety. It is also important to note that the ruling of the Court is appropriate because the evidence presented in the case was appropriately considered and used to come to a decision. This is how justice is supposed to work.

When analyzing the rulings of the Court of Queen's Bench and the Court of Appeals it is also important to consider the actions of Mr. Mihaly himself. For instance, in the initial application 1999, APEGA clearly outlined the requirements that Mihaly would have to complete to become a registered engineer. Mr. Mihaly failed his first two attempts at the NPPE and did not even try to write his other exams. In addition, APEGA was more than reasonable in that his application was re-instated twice and Mihaly still did not complete the specified requirements. This is similar to the way in which his appeal to the Alberta Court of Appeals was rejected once, renewed once, and then finally dismissed as he did not take the required steps to advance the appeal. In other words, Mihaly has a history of not completing the requirements specified to him and for this reason, as well as the others discussed above, I believe that the rulings of these two bodies were completely justified.

Should APEGA accommodate foreign-trained engineers and geoscientists? Why or why not? If yes, how should APEGA accommodate foreign-trained engineers and geoscientists?

I believe that it is important for APEGA to accommodate foreign-trained engineers as Canada is a country built upon diversity. In addition to being in line with national policies, diversity in a professional field can only bring positives. A person's experiences and background are what allow them to develop unique and innovative solutions to problems. If APEGA only allowed engineers and geoscientists from Alberta or Canada to be licensed, the province would be deprived of a wealth of knowledge. However, it is also important for anyone working in these fields to be properly qualified. For this reason, APEGA assigns confirmatory exams to applicants who have not been educated at an accredited facility. As discussed, this is not discriminatory, it is only done to ensure competency.

A second reason to accommodate foreign-trained graduates is the pursuit of a dream. What I mean by this is that if an individual wants to pursue engineering or geoscience in Alberta or Canada as a career there should be resources available to them to help them reach their goal. In my opinion, barring an individual from pursuing a dream just because of where they were educated is highly ethnocentric and contradictory to the values that Canada promotes. In other words, children in most parts of the world are taught that they can grow up to be anything they want and that Canada is a 'free country.' Barring individuals from pursuing their passion is highly contradictory to these values. However, as discussed there is a need to ensure professional competency to ensure the safety of the public is not compromised.

Although I believe it is important to accommodate foreign trained engineers and geoscientists it is important to consider the methodology of accommodation. This case study has given valuable insight into how international applications are processed by APEGA. Although it may be difficult for some people to achieve I think the current practice for accommodating foreign trained engineers and geoscientists is more than adequate. As discussed above, APEGA evaluates all applicants individually and carefully analyzes their expertise, experience, and educational background. APEGA has a list of foreign degrees that assist in the decision in assigning examinations or not, as well as an analysis process for engineering experience. This list is based on knowledge of the programs through which the degrees were obtained. I believe that requiring foreign trained individuals that are not experienced enough to write an examination is appropriate to protect the public. If an individual is qualified, meeting these requirements should not be an issue, and they would be free to pursue their passion in Alberta and help create many unique and technologically advanced solutions to engineering problems that will ultimately better the lives of the public.

References

- [1] "About APEGA | APEGA", Apega.ca, 2018. [Online]. Available: <https://www.apega.ca/about-apega/>. [Accessed: 09- Feb- 2018].
- [2] "About Us", Albertahumanrights.ab.ca, 2018. [Online]. Available: <https://www.albertahumanrights.ab.ca/about/Pages/about.aspx>. [Accessed: 07- Feb- 2018].
- [3] "Court of Queen's Bench of Alberta", Albertacourts.ca, 2018. [Online]. Available: <https://albertacourts.ca/qb/home>. [Accessed: 10- Feb- 2018].
- [4] "Role and Operation of the Court of Appeal of Alberta", Albertacourts.ca, 2018. [Online]. Available: <https://albertacourts.ca/ca/about/role-and-operation>. [Accessed: 12- Feb- 2018].
- [5] "What we do", Aer.ca, 2018. [Online]. Available: <https://www.aer.ca/about-aer/what-we-do>. [Accessed: 13- Feb- 2018].
- [6] M. Jiwaji, "Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 (CanLII)", Canlil, 2018. [Online]. Available: <https://www.canlii.org/en/ab/abhrc/doc/2014/2014ahrc1/2014ahrc1.html?search>. [Accessed: 06- Feb- 2018].
- [7] J. Casey, "Mihaly vs. APEGA: Lessons Learned and Strategic Responses by Regulators", Engineerscanada.ca, 2017. [Online]. Available: <https://engineerscanada.ca/sites/default/files/board/01-Sept-2017-Mihaly-APEGA-Open-Forum-en.pdf>. [Accessed: 09- Feb- 2018].
- [8] J. Ross, "Association of Professional Engineers and Geoscientists of Alberta v Mihaly", Apega.ca, 2016. [Online]. Available: <http://www.apega.ca/assets/PDFs/mihaly-decision.pdf>. [Accessed: 07- Feb- 2018].