

ENGG 513

The Role and Responsibility of the Professional Engineer in Society

Report 1: Case Study

Mihaly v. APEGA

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Introduction

The Alberta Human Rights Act states the following: “No trade union, employers’ organization or occupational association shall exclude any person from membership in it, expel or suspend any member of it, or discriminate against any person or member, because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or member. [1, Sec. 9]”

This report deals with a dispute between two parties over alleged discrimination in the application to membership of an occupational association. The above section of the Human Rights Act and the concepts it applies are central to this dispute over what constitutes unlawful discrimination. The Mihaly v. APEGA case is centered around the application process of The Association of Professional Engineers and Geoscientists of Alberta for foreign educated graduates and whether in a particular instance, they unjustly discriminated based on a protected characteristic. Even if discrimination existed in this case, it is not always unjust. Discrimination can be justified if it occurs in good faith or would cause undue hardship to make accommodation. This dispute went through a Tribunal case and two appeals before finally coming to an end in favour of the defendant that unjust discrimination was not proved.

Stakeholders

APEGA

The Association of Professional Engineers and Geoscientists of Alberta (APEGA) is the defendant in this dispute. APEGA is the gatekeeper and regulator of the professions of engineering and geoscience in Alberta. Without becoming a member or licensee, no practitioner has the right to practice engineering independently or use the title of Professional Engineer. APEGA has a duty to ensure that engineering is practiced safely and ethically in Alberta. Their requirements for membership ensure that an applicant has the education, experience, and character necessary for the adequate practice of engineering. APEGA’s gatekeeping and regulation of engineering is designed to protect the public interest and to foster the public’s trust in the profession. APEGA receives its mandate and bylaws from the Engineering and Geoscience Professions Act (Act) and the Engineering and Geoscience Professions General Regulation (EGPR).

The Court of Queen’s Bench

The Court of Queen’s Bench of Alberta is the superior court of Alberta. It hears matters of both a civil and criminal nature. This court hears numerous types of cases from serious criminal offenses, to commercial matters, to divorce cases. Appeals made from decisions of the Alberta

Human Rights Tribunal are heard by this court. Decisions made in this court can be appealed to the Court of Appeal of Alberta.

The Alberta Human Rights Commission

The Alberta Human Rights Commission is an organization whose mandate is “to foster equality and to reduce discrimination [2].” One of the main methods to accomplish this goal is through human rights tribunals and court hearings of complaints brought forth. The Human Rights Commission receives its mandate and powers from the Alberta Human Rights Act. In this dispute, the Human Rights Tribunal is responsible for the resolution of the complaint. If the Tribunal rules that the complaint has merit, a remedy is ordered. The remedy can range from stopping the discriminatory behaviour or situation, stopping the offender from committing the same violation of human rights in the future, providing the complainant with the rights denied, financially compensating the complainant, or any other action the Tribunal deems necessary to place the complainant in a position where the discrimination would not have occurred [2]. The decision has the same force as a court decision, and a defendant can appeal to the Court of Queen’s Bench.

Mr. Ladislav Mihaly

Mr. Ladislav Mihaly is the complainant in this dispute. Mr. Mihaly accused APEGA of discrimination based on his place of origin in violation of the Alberta Human Rights Act. Mr. Mihaly was born and educated as an engineer in Czechoslovakia and applied for membership in APEGA after immigrating to Canada. As standard practice, he was asked to write confirmatory exams and gain Canadian engineering experience in order to qualify for membership. After a process of multiple exam attempts, application withdrawals and reactivations over the period from 1999 to 2008, Mihaly filed a complaint with the Human Rights Commission against APEGA.

The Alberta Court of Appeal

The Court of Appeal of Alberta is a court that takes appeals from the other Alberta courts and tribunals. Not all appeals are allowed to be brought before the Court of Appeal, but this court is the highest court in Alberta if they do succeed in obtaining an appeal. It is possible to appeal the Court of Appeal’s decision by petitioning the Supreme Court of Canada. However, such an appeal is unlikely to succeed. The Court of Appeal reviews previous court decisions to ascertain whether the law was followed and whether the facts presented were in error. It does not retry cases brought before it [3].

Dr. Dean David Lynch

Dr. David Lynch was the Dean of the Faculty of Engineering at the University of Alberta at the time of the Mihaly v. APEGA Tribunal case. As such, Dr. Lynch was a member of the Board of Examiners of APEGA. The Board of Examiners is the group within APEGA that assesses an applicant for membership. They decide whether an applicant has reached the minimum requirements for membership, and if not, they determine the necessary steps the applicant must take to obtain membership [4, Sec. 30]. As an administrative member of APEGA, Dr. Lynch would have had a vested interest in the proceedings and outcome of the case. Dr. Lynch was called upon by APEGA as an expert witness in the Tribunal case.

Mr. Mark Tokarik

Mr. Tokarik has experience and degrees in both engineering and law. He joined APEGA as an Assistant Director of Registration before becoming the Director of Registration. In 2012, he was appointed the Deputy Registrar. Mr. Tokarik has been responsible for the registration process in APEGA in his capacity as Director of Registration. He has functioned as a member of numerous other national bodies devoted to engineering admission. He was called upon by APEGA as an expert witness in the Tribunal case. As a member of APEGA who works intimately with the registration process, Mr. Tokarik would also have a vested interest in this case and what the Tribunal would have to say about its registration process.

Background

Mr. Mihaly originally applied to APEGA as a professional engineer in May of 1999. He was born and educated in Czechoslovakia. He received a Master's Diploma with a specialization in Technology of Fuels and Thermal Energy in 1975. He also received a Certificate in Corrosion Engineering in 1981. Mihaly stated that he had close to 12 years of experience, he used to teach his colleagues, and he worked for years at a research institute. APEGA assessed Mihaly's record and found his degree to be on the Foreign Degree (FD) List, meaning that he would be required to write three confirmatory exams, as well as an exam in engineering economics to qualify for membership. Mihaly was also notified that he was required to write the NPPE exam. Mihaly failed the NPPE in January 2000. He applied to write the NPPE again, but was absent from the test. His application was deactivated in 2001 and reactivated in 2002. Mihaly then claimed to be very surprised and unaware that he was required to write confirmatory exams, especially since he possessed a Master's Degree. However, APEGA responded by reminding Mihaly that a letter had been sent to him outlining the exam requirements he needed to meet. Mihaly was sent an appeal sheet to fill out and send back to APEGA, but APEGA never received an appeal. Mihaly failed the NPPE again in July 2002 and January of 2003. His application was deactivated and reactivated again in 2006. Mihaly sent APEGA an updated resume and

reference list. In August 2007, APEGA decided that Mihaly could either write the three confirmatory exams and economics exam, or write the Fundamentals of Engineering (FE) exam. Mihaly's recent Canadian engineering experience was also rejected as not being at the acceptable D level. He did not write any further exams and in August 2008 he filed a complaint with the Alberta Human Rights Commission. In February 2014, the Alberta Human Rights Tribunal came to a decision on Mihaly's complaint against APEGA [5, Sec. 4-29].

In the Tribunal case, Mihaly needed to prove a *prima facie* case that he was personally discriminated against by APEGA based on his place of origin. The Tribunal established that Mihaly had to prove that he possessed a characteristic protected against discrimination, that he experienced an adverse impact with respect to the service, and that his protected characteristic was a factor in the adverse impact he experienced [5, Sec. 170]. The Tribunal found that Mihaly was discriminated against based on the origin of his education, not his place of origin. However, origin of education was considered a proxy for place of origin, so the first requirement was met. Second, Mihaly was adversely impacted by being required to write confirmatory exams and the FE exam, which was not universally required of all applicants. Third, the requirement to write exams was influenced by the origin of Mihaly's education. The Tribunal found that foreign institutions that do not possess a Mutual Recognition Agreement (MRA) are assumed to fall short of parity with Canadian institutions. It was decided that stereotyping or motive as part of the discrimination was not necessary to establish for a *prima facie* case of human rights violation. In the *prima facie* case, the Tribunal found that the requirements for licensure perpetuated disadvantage in Mr. Mihaly as well as immigrants from Eastern Europe, Africa, and Asia generally.

APEGA argued that their membership requirements were not based upon the assumption that foreign qualifications are subpar compared to domestic ones, but on the evaluation of educational programs. The Tribunal then argued that APEGA's FD List was unreliable and failed to take into consideration institutions with less open source information about their programs. APEGA was criticized for not being proactive in establishing relationships with institutions outside of the MRA category. The Tribunal pointed out that the NPPE exam is not specifically mentioned in the EGPR, and as a result, alternatives could be considered to accommodate foreign applicants. It was also stipulated that more could be done to assess the background of foreign applicants with questionable credentials and that doing so would not be prohibitively burdensome for APEGA. Lastly, the Tribunal posited that the requirement for one year of Canadian engineering experience often forced immigrant engineers into low-paying jobs to obtain it. It was also found that companies often refuse to hire unlicensed immigrant engineers, and with the necessary Canadian experience denied, it would not be possible to obtain APEGA membership. The Tribunal granted an award of \$10000 to Mihaly and ordered APEGA to reassess his credentials and to offer him various other supports in his attempt to obtain membership.

In 2004, APEGA filed an appeal of the Tribunal's decision to the Court of Queen's Bench of Alberta (ACQB). Mihaly filed a cross-appeal. The ACQB investigated the four following issues: procedural fairness, jurisdiction, *prima facie* discrimination, and justification. As to the first issue, no problem with procedural fairness was found with the Tribunal's proceedings. The grounds that the Tribunal introduced into the proceedings were substantially connected to the original grounds that were brought forth. For the argument against the Tribunal's jurisdiction, the ACQB did not find a problem here either. The ACQB agreed that "place of origin of academic qualifications" and "place of origin" were close enough that the Tribunal was right to claim jurisdiction over the case. For the third argument, the ACQB sided with APEGA. It was determined that the Tribunal's test for judging whether discrimination had occurred was the correct test, but it was not used correctly. There was no evidence given that the requirement to have one year of Canadian experience and to pass the NPPE constituted discrimination. For the last argument, the ACQB sided with APEGA. APEGA was found to be justified in discriminating by requiring foreign applicants to pass the FE exam. Individualized assessment would amount to undue hardship towards APEGA, which is unnecessary under the law.

After weighing the evidence, it was determined that the conclusions drawn by the Tribunal were "rife with logical errors, findings of fact that are not supported by the evidence, and failures to take into account relevant considerations [6, Sec. 149]." The decision of the Tribunal was reversed, and Mihaly's cross-appeal was dismissed.

Mihaly filed an appeal with the Court of Appeal of Alberta in February of 2016. However, he did not take the additional steps necessary in the appeal process, so it was struck down. In December of 2016 Mihaly attempted to start the appeal again. The Court then weighed the merits on whether to proceed with the appeal. Mihaly's complaint against the ACQB for rejecting evidence was dismissed. The Appeal Court found nothing persuasive in Mihaly's complaint against APEGA. Mihaly provided no explanation for failing to perfect his appeal, and he took a long time to restore his appeal. On these grounds, the Appeal Court dismissed the case [7]. With that decision, the dispute between Mihaly and APEGA appears to be over.

The Court of Queen's Bench Decision

APEGA asked the ACQB to answer the following questions; "Did the Tribunal breach the rules of procedural fairness when he decided issues that were not raised by or with the parties? Did the Tribunal err when he held that he had jurisdiction to determine whether discrimination based on the place a person receives their education constitutes discrimination based on place of origin? Did the Tribunal rely on the correct legal test, and reasonably apply that test, to determine whether Mr. Mihaly had demonstrated *prima facie* discrimination? Was the Tribunal's decision that APEGA's registration requirements were unjustified unreasonable [6, Sec. 54]?"

By procedural fairness, APEGA meant that the Tribunal based its decision on grounds that neither party had brought forth. In addition to that, the Tribunal did not grant APEGA the

opportunity to respond to the new grounds brought forth in the proceedings. The ACQB did not find a breach of procedural fairness in the Tribunal's decision. This was because the new ground that was brought up, namely EGPR section 8, was still part of the grounds of the original case against APEGA [6, Sec. 57].

APEGA then tried to argue that the Tribunal was wrong to equate "place of origin of academic qualifications" with "place of origin". The ACQB found that "discrimination is not limited to rules or practices that are directly based on the listed grounds in the AHRA. Discrimination will also occur where a neutral rule or practice has an adverse impact [6, Sec. 68]." As such, the Tribunal was justified in using "place of origin of academic qualifications" as a proxy for "place of origin".

APEGA also argued that the test for discrimination used by the Tribunal was incorrect and incomplete. The test used required that Mihaly had a characteristic protected from discrimination, that he experienced an adverse impact from this discrimination, and that the protected characteristic was a factor in the adverse impact [6, Sec. 73]. APEGA claimed that an additional requirement that the discrimination must include arbitrary or stereotypical treatment was not considered. As a result, the Tribunal was not justified in accepting a *prima facie* case. The ACQB said that the Tribunal applied the correct test, namely, that arbitrariness and stereotyping are often present but not necessary to establish. The ACQB then turned to the question of whether the Tribunal applied the correct test in the correct way. The Tribunal claimed that the discrimination of programs from foreign institutions was based on an arbitrary assumption that their programs were not on par with Canadian ones. However, the ACQB agreed with APEGA that the distinction made between accredited program and non-accredited program is based on knowledge of those programs and not assumption. In other words, APEGA does in-depth evaluations of programs to determine their adequacy for accreditation. It makes no assumptions about the adequacy of foreign programs it has not evaluated. It simply does not have the required knowledge of those programs to make an assessment [6, Sec. 86]. It was found that there was a close link between Mihaly's place of origin and his place of education, and that he had no way around the adverse impact in his discrimination. Therefore, Mihaly's place of origin was a factor in the adverse impact [6, Sec. 103]. The ACQB also pointed out that the requirement to write the NPPE and to obtain one year of Canadian experience were claimed as discriminatory by the Tribunal. There was no evidence presented that would lead to that conclusion. In reality, the NPPE is required of all engineers regardless of origin. There was no indication that the required one year of Canadian experience had an adverse impact on Mihaly. Consequently, the ACQB found that the Tribunal incorrectly applied the test for wrongful discrimination [6, Sec. 109].

The final topic of analysis the ACQB judged was whether APEGA's alleged contravention of the Human Rights Act was reasonably necessary to avoid incurring undue hardship. Discrimination is acceptable if the affected person cannot be accommodated without incurring undue hardship to the offender. The Tribunal argued that Mihaly should not have been given a one size fits all

exam to pass but that he could have been accommodated by having been evaluated in other ways. The ACQB ruled that the Tribunal misinterpreted section 8 of the EGPR, which allows for confirmatory exams to be required [6, Sec. 119], [8]. The Tribunal advised that APEGA should be more involved in negotiating equivalency agreements with international institutions. No evidence was given that such an initiative was reasonably within APEGA's budget or resources. The Tribunal suggested that the FE exam would disproportionately hinder foreign graduates, but no evidence of this claim was given. The ACQB stated that the pass rate of the FE exam is actually quite high at 85% and that there is no evidence that foreign graduates have difficulty passing it [6, Sec. 128]. It also argued that if the Tribunal's order to provide individual "assistance and guidance to progress gradually in the engineering profession" were consistently applied to all 375 international applicants a year who need individual consideration, it would likely constitute undue hardship [6, Sec. 146]. Finally, the ACQB found that APEGA met the bar of a reasonable and justifiable defence, and the final decision was to reverse the decision of the Tribunal.

Reflection and Opinion

Mr. Mihaly failed the NPPE three times [5, Sec. 66]. That exam is required of all applicants to APEGA, whether foreign or domestic. That failure alone disqualified him from membership into APEGA. The only reason for claiming discrimination relied on the requirement that Mr. Mihaly wrote confirmatory exams to prove that his education was equivalent to Alberta standards. This is exactly what Mr. Mihaly claimed in the Alberta Human Rights trial [5, Sec. 168].

I side with the ACQB in this dispute. APEGA was not discriminating against foreign graduates when it required them to write confirmatory exams. It is simply acknowledging that it does not know the quality of education their foreign institution provides. In order to both rectify that lack of knowledge, and to fulfill its mandate to make sure that applicants meet the stated requirements, APEGA is justified in asking for confirmatory exams to be passed.

The Tribunal argued that the FE exam requirement was unreasonable as it did not attempt to individualize the assessment of foreign applicants. Instead, the FE exam was a one size fits all approach to assessing credentials and did not consider the specific training and background of the applicant. However, a standardized exam assesses an individual in a way that previous training and experience cannot. Other nations can have a different understanding of what their engineers do and what their training ought to be. Passing a standardized exam proves that regardless of what an applicant has done in another country, their understanding of engineering is equivalent to the understanding of what constitutes engineering in Canada. I believe the process of a standardized exam is in conformity with the EGPR section 13(1)(c) which states, "the applicant has a knowledge of ... general knowledge related to the practice of engineering or geoscience, which has been demonstrated by passing an examination that is prescribed by the Board of Examiners [8]." I agree with the decision of ***LPG v. College of Audiologists and Speech Pathologists of Ontario***, 2009 which stated, "widely used and

recognized tests helps ensure that the process of determining fluency is independent, objective, transparent, fair and impartial. Individual testing would be costly and inefficient such that it would impose undue hardship on the College [6, Sec. 138].”

Standard examination requirements are necessary to judge competency when international standards and terminology vary so much. When a nation has not entered into an agreement with Canada and has not had its engineering programs scrutinized, there are too many unknowns to be able to simply accept the education pedigree as adequate for Alberta standards.

The Tribunal claimed that APEGA only provided assistance to applicants by offering a study kit, and such assistance is insufficiently helpful for foreign engineers [5, Sec. 222]. However, as of the writing of this report, APEGA provides a list of recommended textbooks, practice tests, and free study materials to prepare for the NPPE [9]. I believe the resources already available are sufficient to pass the NPPE and satisfy the mandate for applicants to understand the Act and its regulations [10].

I do not think that APEGA should accommodate foreign-trained engineers more than it currently does. The current process allows foreign engineers to become accredited with the passing of confirmatory exams, granted that the appropriate work experience requirement is also met. I think the solution to enable greater recognition of foreign education and experience lies at the national level. My concern is that attempting to accommodate foreign engineers based on perceived discrimination will lower the quality and standards expected of engineers in Alberta. The work of engineers and their perception in society may suffer as a result. Creating further MRAs like the Washington Accord, and getting more institutions on the CEAB Substantially Equivalent Program is the safest and most comprehensive way to accommodate foreign engineers. Focusing on allowing foreign engineers to be recognized on a larger scale is a more consistent solution, and it ensures that the quality of APEGA membership does not suffer. Additionally, putting the focus on the assessment of foreign equivalency may promote a greater standardization of engineering internationally. Greater international standardization will reduce the issues and confusion that arise when terminology and programs are used differently among different jurisdictions. It may not be feasible for APEGA to conduct equivalency negotiations and assessments. However, other groups such as the CEAB could be modified to take on a new role of seeking out institutions who are willing to become “substantially equivalent.”

References

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