

**ENGG 513**

# **Mihaly Case Study**

**Murray Bondy & Rebecca Dukart**

**February 16, 2018**

**Denis Onen**

## **Introduction**

This is a case study report created for the course ENGG 513 - The Role and Responsibilities of the Professional Engineer in Society. The case to be examined concerns APEGA (Association of Professional Engineers and Geoscientists of Alberta), several provincial courts, and other stakeholders which will be discussed below. APEGA is a regulatory board for the professions of engineering and geoscience in Alberta, which imposes qualification standards to those who wish to practice these professions in the province [1]. This study is used to educate engineering students on the practices that APEGA uses to qualify members for accreditation, and the perceived discrimination that is involved in this process for foreign-educated persons.

Specifically, this case follows the story of Mr. Ladislav Mihaly, originally born and educated in Czechoslovakia, who accused APEGA of discrimination for making him write confirmatory examinations and gain Canadian engineering experience before being accredited as a professional engineer. The matter went to the Alberta Human Rights Commission (AHRC), where the result was appealed by both Mihaly and APEGA and therefore moved to the Court of Queen's Bench, where the decision made by the AHRC was reversed. This decision was then appealed by Mihaly but was not pursued in the Alberta Court of Appeals. This case, which has been ongoing since 1999 will be explained and discussed in detail within the content of this report.

## **Stakeholders**

### APEGA

The Association of Professional Engineers and Geoscientists of Alberta (APEGA) is a regulatory body that has been serving the public since 1920 by regulating the practices of professional engineering and geoscience in Alberta. APEGA acts through the Engineering and Geoscience Act on behalf of the Government of Alberta [1]. APEGA also maintains a presence on the national level of engineering and geoscience through involvement with Engineers Canada, Geoscientists Canada, and partnership with other technical societies. APEGA's main function is to license individuals and companies wanting to practice engineering and geoscience in Alberta. Along with licensing professional engineers and geoscientists, APEGA sets practice standards, develops code of conduct for members, and determines disciplinary actions and when they are necessary [1]. The designations of Professional Engineer and Professional Geoscientist ensure ethical, professional, and technical requirements set by APEGA have been met.

### The Court of Queen's Bench

The Court of Queen's Bench of Alberta (the Court) is the superior court of civil and criminal jurisdiction in the province of Alberta [2]. The Court is constituted by the Court of Queen's Bench Act and consists of the Chief Justice, the Associate Chief Justice, and other justices who are federally appointed [3]. As a court of inherent jurisdiction, the Court conducts

judicial reviews of government and tribunal action in Alberta and hears appeals from the decisions of other provincial courts [3].

#### The Alberta Human Rights Commission

The Alberta Human Rights Commission is established under the Alberta Human Rights Act to foster equality and to reduce discrimination [4]. It does this through public education and community initiatives, resolving and settling complaints of discrimination, and through human rights tribunal and court hearings. The Chief of the Commission and Tribunals is the head of the Alberta Human Rights Commission, appointed by Order in Council [4]. They review appeals decisions made by the director to dismiss complaints.

#### Mr. Ladislav Mihaly

Mr. Ladislav Mihaly was born and educated in Czechoslovakia. He attended Slovak Technical University in Bratislava from 1970 to 1975 and graduated with a M.Sc. with a specialization in Technology of Fuels and Thermal Energy [5, para. 5]. He later attended the Institute of Chemical Technology in Prague from 1977 to 1979 and graduated with a Certificate in Corrosion Engineering in 1981 [5, para. 6]. Mr. Mihaly immigrated to Canada in 1999 and applied to APEGA as a professional engineer.

#### The Law Society of Alberta

The Law Society of Alberta is the self-regulating body for Albertan Lawyers. They promote and enforce a high standard of professional and ethical conduct [6]. They are governed by the Legal Profession Act of Alberta and set standards through a Code of Conduct. Every lawyer who practices in Alberta must belong to the Law Society. They do not provide legal advice on specific cases but work with members of the justice system to improve the Albertan justice administration [6]. The Law Society acted as an intervener in the Court of Queen's Bench appeal case described within this case study.

#### Chair Moosa Jiwaji

Moosa Jiwaji has practiced law for nearly 26 years. From 2010 to 2014, Chair Jiwaji was a Hearing Officer and Commissioner with the Alberta Human Rights Commission. Moosa Jiwaji faced criticism for his ruling in the 2014 Mihaly vs. The Association of Professional Engineers, Geologists and Geophysicists of Alberta Case. As of 2014, he is no longer a member of the Alberta Human Rights Commission after facing controversy over various tweets he made [7].

#### Internationally Educated APEGA Applicants

Other stakeholders in this case are all engineering or geoscience graduates who received their education in a foreign country who wish to apply to work in Alberta. Because of the vast number of countries in the world, and the number of different engineering schools and accreditation standards, APEGA uses confirmatory examinations to ensure that the competence of foreign-trained engineers meets the standards in Alberta. Since this case addresses a perpetual injustice towards internationally educated engineers who have immigrated to Canada to work, they are considered stakeholders in this case study.

## Background

Ladislav Mihaly has been looking to register as a professional engineer through APEGA since 1999. Mr. Mihaly was born in Czechoslovakia and has a master's degree from the Slovak University of Technology in Bratislava and a Certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague. After immigrating to Canada, Mr. Mihaly first applied to APEGA as a professional engineer in May 1999. APEGA acknowledged Mr. Mihaly's application, informed him about the further information required, and advised him to take the National Professional Practice Exam (NPPE) [5, para. 4-8].

After reviewing Mr. Mihaly's references, transcripts, and experience APEGA notified Mr. Mihaly in February 2000 that he must also complete three confirmatory examinations and take a course, or pass an equivalent exam in engineering economics by May 2001. APEGA also notified Mr. Mihaly that he failed his first attempt at the NPPE, taken in January 2000. Mr. Mihaly applied to rewrite the exam for a second time, which was to be written in October 2000, however Mr. Mihaly failed to attend that day. At the end of June 2000 APEGA withdrew Mr Mihaly's application as he failed to write the required confirmatory exams within the time period set by APEGA [5, para. 9-13].

Mr. Mihaly asked APEGA to reactivate his application for registration in May 2002 and applied to write the NPPE for a third time. His application was reactivated and APEGA informed Mr. Mihaly to write the three confirmatory examinations by May 2003 and the Engineering Economics exam by November 2003 [5, para. 14-15]]. Mr. Mihaly expressed surprise over having to take any exams due to his previous experience. Mr. Tokarik of APEGA, in response sent Mr. Mihaly a Reconsideration and Appeal Sheet but Mr. Mihaly did not appeal. Mr. Mihaly failed the NPPE for the second time in July 2002. APEGA withdrew his application again in August 2003 due to Mr. Mihaly failing to write the required confirmatory exams by the specified time period [5, para. 21-24].

Mr. Mihaly asked APEGA in October 2006 to reactivate his application a third time. It was reactivated and again it was determined Mr. Mihaly had to write the three confirmatory examinations and a course or exam in engineering economics. Mr. Mihaly did not write any required examinations and filed a complaint with the Alberta Human Rights Commission (AHRC) in August 2008.

In February 2014 Mr. Mihaly argued to The Human Rights Tribunals of Alberta (the Tribunal) that APEGA violated the Alberta Human Rights act under Sections 4, 7, and 9 (services, employment, and occupational associations respectively). He argued APEGA discriminated against him based on place of origin [5, para. 30]. The Tribunal criticized the process used by APEGA to evaluate Mihaly's qualifications as it did not individually assess them. They also decided that place of academic qualifications was a delegate of place of origin. The Tribunal declined to award lost wages to Mr. Mihaly due to too many uncertainties and no evidence in support of the claim [5, para. 248]. The Tribunal instead ordered APEGA to pay Mr. Mihaly \$10,000 in general damages and to reconsider his application. APEGA was also ordered to take a more individualistic assessment including: (a) a review of Mr. Mihaly's transcripts and

experience in direct consultation with the schools he went to determine core areas of engineering from which he could be exempted, (b) give Mr. Mihaly the option to challenge certain examinations where he is not exempted, (c) establish a committee, that includes foreign engineers, to investigate options to appropriately assess Mr. Mihaly's qualifications to correct perceived academic deficiencies, (d) attempt to match Mr. Mihaly with a mentor with a similar background, (e) direct Mr. Mihaly to resources in the profession that will allow him to network with other foreign engineering graduates, and (f) direct Mr. Mihaly to community resources to assist with his English [5, para. 249].

APEGA appealed the decision of the Tribunal, and Mr. Mihaly cross-appealed seeking \$1,000,000 and registration with APEGA or \$2,000,000 if not awarded registration [8, para. 1-2]. APEGA raised the issues of procedural fairness, jurisdiction, prima facie discrimination, and justification in the Court of Queen's Bench in January 2016 [8, para. 54]. Justice Ross, of the Court of Queen's Bench, found the Tribunal's ruling to be unreasonable. Justice Ross states that the Tribunal's reasons for APEGA being able to accommodate Mr. Mihaly were "rife with logical errors, findings of fact that are not supported by evidence and fails to take into account relevant considerations" [8, para. 149]. Justice Ross concluded that the Tribunal's decision should be reversed and upheld APEGA's appeal. Justice Ross also dismissed the cross appeal of Mr. Mihaly [8, para. 153-154].

Mr. Mihaly filed an appeal to the Alberta Court of Appeals for the decision made in the Court of Queen's Bench in February 2016 but did nothing further, causing it to be struck off in June 2016. In December 2016, Mr. Mihaly applied to restore the appeal [9, para. 3]. There are a number of criteria that are considered when restoring an appeal, and Mr. Mihaly failed to comply. He lacked arguable merit to the appeal, had no explanation for delay, did nothing to perfect the appeal, and had not ordered the transcripts or prepared the Appeal Record [9, para. 6-8]. As he did not meet the requirements for restoration of an appeal, Mr. Mihaly's application was dismissed in January 2017.

### **The Court of Queen's Bench Decision**

The Court of Queen's Bench acted on the appeal and cross-appeal by APEGA and Mr. Mihaly of the decision made by the Alberta Human Rights Tribunal. APEGA appealed the findings of the Tribunal that they discriminated against Mihaly due to his country of origin by refusing to accredit him as a professional engineer, and forcing him to write general engineering proficiency examinations. The cross-appeal from Mr. Mihaly addresses the Tribunal's refusal to grant him damages for wages lost, and requested an award of \$1,000,000 and registration as a professional engineer with APEGA, or \$2,000,000 if not registered [8, para. 1-2].

There were 4 issues raised by APEGA to the Court of Queen's Bench which they believed were grounds to overturn the decision ruled by the Tribunal:

The first issue raised surrounded procedural fairness and if the Tribunal breached the rules of procedural fairness when it addressed issues that were not raised by or with the parties.

APEGA states that the Tribunal was unjust in basing decisions on grounds that neither of the parties raised, and that they were not given a chance to defend or address these decisions [8, para. 55]. Justice Ross notes that in this particular instance, tribunals and courts are not required to allow parties to address every law that is referred to during a case. They also found that the new grounds that were brought up (Section 8 of the Engineering and Geoscience Professions General Regulation (EGPR)) did not change the grounds of the case and was only used to determine if APEGA's examination standards constitute prima facie discrimination under s 11 of the AHRA. The Court decided that referring to Section 8 did not break any rules of procedural fairness, and therefore this part of the Appellant's appeal was rejected [8, para. 58].

Secondly, the Appellant submitted that the Tribunal did not have jurisdiction over the complaint from Mihaly, since the AHRA does not concern itself against discrimination of the place of academic qualifications [8, para. 60]. Another case, *Grover v. Alberta* (1997), was referenced in which Dr. Grover accused the University of Alberta for discrimination based on the country of origin between Canada-trained PhDs and United States-trained PhDs. The Human Rights Commission refused to hold a hearing for this case [8, para. 62]. The Court also did not accept Grover's appeal of the decision and stated that the place of origin of a person does not include the place where they received their PhD. This example was used by APEGA to illustrate in this appeal that discrimination of a person because of the place of their educational training does not also infer discrimination based on place of origin. Justice Ross stated that the Grover's case is limited and that in this particular case, the location of Mihaly's educational training is directly linked to his place of origin [8, para. 64]. The Court therefore decided to refer to a test set out in the case *Moore v British Columbia* (2012) to demonstrate prima facie discrimination. This test requires complainants to illustrate that they possess a characteristic which is protected from discrimination under the AHRA, that they experienced adversity, and that the characteristic was a driver for the adversity [8, para. 67]. Justice Ross stated that the "Moore test" doesn't deem that place of origin of a person includes their place of education. However, she stated that discrimination can also occur where a practice has a negative impact on a person, and where their place of origin is a factor in that practice. The Court therefore concluded that APEGA did not sufficiently establish that the Tribunal lacked jurisdiction and this part of the appeal was also rejected [8, para. 69].

The third issue raised by APEGA directly concerned prima facie discrimination. They question if the Tribunal reasonably applied the correct test to demonstrate that Mihaly had faced prima facie discrimination. The Tribunal, in determining if prima facie discrimination had been made against Mihaly, said that as per the "Moore test" Mihaly needed to show that he has a characteristic protected from discrimination, that he experienced adversity, and that the characteristic played a role in the adverse impact. The Tribunal ruled that his origin of academic credentials were a "proxy for place or origin" [8, para. 77] and that APEGA's examination requirements demonstrate prima facie discrimination. The Court stated that the Tribunal was correct to use the Moore test in this situation, and it was used properly [8, para. 83]. However, the Court also found that the Tribunal did not have any evidence to support their claim that APEGA assumes that engineers from countries which do

not have MRAs with Canada received lower education and qualifications [8, para. 84]. The Court agreed that Mihaly's place of education is entirely linked to his place of origin because he was born, raised, and educated there [8, para. 100]. Additionally, as noted by the Court, the stipulation that Mr. Mihaly must gain one year of Canadian engineering experience is required for all applicants, independent of place of origin or education. Mr Mihaly also could not demonstrate that his difficulty in finding employment as an engineer due to APEGA not granting him licensure was connected to his country of origin. Therefore, it was found there was no correlation between any discrimination and loss of wages [8, para. 108]. Finally, the Court stated that the Tribunal did not apply the "Moore test" in relation to the NPPE and Canadian experience requirements, two requirements that are required for any applicant independent of place of origin, and for that reason the findings of the Tribunal were found to be unreasonable [8, para. 109].

The final issue raised by the Appellant was focused on the decision of the Tribunal that APEGA's registration requirements were unjustified. The Tribunal found that Mihaly should only have been required to write examinations to correct perceived educational deficiencies, not a standard examination which everybody must take [8, para. 118]. The Court states that APEGA's policy of administering confirmatory examinations is consistent with its purpose and objective of ensuring engineers working in Alberta are qualified and competent. Additionally, it was found that these examinations do not disproportionately adversely impact foreign engineers [8, para. 128]. The directions given to APEGA by the Tribunal were deemed by the Court to be "beyond the scope of any alleged discriminatory conduct", and the justification around the amount of resources and time that APEGA would need to dedicate to these directions were questionable and inconsistent [8, para. 146]. Finally, it was concluded that although the Tribunal found that APEGA had illustrated prima facie discrimination in their requirements to write competency examinations, the Tribunal had incorrectly stated that APEGA had failed to justify the examinations and other requirements under the AHRA.

It was ultimately the decision of Justice Ross of the Court of Queen's Bench to reverse the decision of the Tribunal, thereby accepting the appeal of APEGA. The Court also dismissed the cross-appeal of Mr. Mihaly who sought damages for wages lost, as it was determined that prima facie discrimination by APEGA had been justified.

## **Reflection and Opinion**

In our opinion, the Alberta Human Rights Commission was right in determining that prima facie discrimination had occurred in this particular case with Mr. Mihaly, as well as the process overall used by APEGA to accredit immigrant engineers. Very often, the place of education of people is directly linked to their place of origin or place of birth, and therefore discrimination about place of education should be considered prima facie discrimination. However, in the case of APEGA, an association whose purpose is to protect the safety of the public, they have a duty to ensure that their members are properly trained and qualified to execute work properly. APEGA's methods of assessment in our opinion have been created

to easily allow anybody to pass who possesses the proper qualifications of an equivalent engineering bachelor's degree. Their exam has an 85% pass rate, and can be taken as many times as is needed [8, para. 128]. The decision of the AHRC was unjust towards APEGA and the directions that were assigned were unjustified and unrelated to the purpose of the case.

For the most part, we are in agreeance with the decision made by the Court to reverse the decision made by the Tribunal. One point made by Mr. Mihaly that we agree with is that it may be very difficult for him to find a one year work term as an EIT as someone who already has a lot of experience back in his country of origin. Many companies are probably very accustomed to hiring new graduates for EIT positions, and this would put Mihaly at a disadvantage. However, there was no real evidence for this argument to be presented as fact in the Court, and therefore it was not accepted. Mr Mihaly should have come prepared with proof that he had been unable to be hired as an EIT because of his previous experience. We do believe that APEGA should have a program in place which offers support and mentorship to foreign-trained engineers because they may be more likely to experience hardship when trying to find work in Canada and obtaining their professional accreditation. It turns out that APEGA in fact does have a mentorship program which pairs experienced professional engineers with less experienced APEGA members [10]. It is for the reasons stated above that we agree with the decision made by the Court of Queen's Bench to reverse the decision made by the tribunal.

When Mihaly filed yet another appeal for the decision made by the Court of Queen's Bench to the Alberta Court of Appeal, he did not pursue the appeal and therefore the appeal was closed. The decision made by the Court of Appeal to reject the restoring of the appeal we believe was appropriate since by not pursuing the appeal, Mihaly clearly did not show enough interest in pursuing it either. A lot of resources are put into reviewing appeals made to the Alberta Court of Appeal, and wasting time on an appeal for which the Appellant does not show interest is a waste of their resources.

In 2016, APEGA adopted the World Education Services (WES) into part of their application process for international graduates [11]. WES is an international academic credential assessment agency that ensures APEGA can be confident in the academic credentials presented from internationally educated applicants. Part of APEGA's obligations is to protect the public and we believe this includes the need to ensure internationally educated engineers are held to Canadian, and Albertan standards. Anyone who wishes to be a professional engineer or geoscientist in Alberta should be required to meet the same standards set by APEGA, no matter where they are educated. Therefore, we believe that it is not reasonable for APEGA to fully accommodate foreign trained engineers and geoscientists, especially in the case of Mr. Mihaly.

Around 30% of APEGA applicants were graduates from international engineering programs in 2016 [11]. They are all required to write the National Professional Practice Exam which Mr. Mihaly failed three times. As everyone who applies to become a professional member with APEGA must pass this exam it is not reasonable for APEGA to accommodate foreign educated engineers who do not pass this exam. APEGA needs to withhold a level of



knowledge and skill required of its members to keep the profession of engineering trusted by the public.

The process to become a professional member of APEGA is objectively straightforward. It was also very clearly stated to Mr. Mihaly the requirements that he needed to meet to gain accreditation. This being said, it might not always be easy to successfully meet these requirements. Becoming a professional member requires meeting high standards which can be challenging. One challenge Mr. Mihaly faced was obtaining one year of acceptable North American engineering experience. Coming from another country this can be challenging, as he would be competing against new graduates to find an entry level engineering position. One way APEGA could have accommodated Mr. Mihaly would have been to help him in find an acceptable position and inform him if the position received would be accepted as credible experience early on. Instead Mr. Mihaly's experience working under a professional engineer at a gas company was not accepted.

Additionally, APEGA can form a community for internationally trained applicants and members to network and connect with each other from similar backgrounds and experience. This would be different from their mentorship program already in place as it would be specifically for internationally trained engineers. This could be as simple as a forum on part of their website, where applicants and professional engineers can discuss issues and meet on their own terms. Having someone who has successfully become a professional member with APEGA guide internationally educated applicants could help them feel more confident in the process.

## References

- [1] "About APEGA", APEGA, 2018. [Online]. Available: <https://www.apega.ca/about-apega/>. [Accessed: 11- Feb- 2018].
- [2] "Court of Queen's Bench of Alberta", Alberta Justice and Solicitor General, 2018. [Online]. Available: [https://www.justice.alberta.ca/programs\\_services/courts/Pages/queen\\_bench.aspx](https://www.justice.alberta.ca/programs_services/courts/Pages/queen_bench.aspx). [Accessed: 12- Feb- 2018].
- [3] "Jurisdiction & Governance", Court of Queen's Bench of Alberta, 2018. [Online]. Available: <https://albertacourts.ca/qb/about/jurisdiction-and-governance>. [Accessed: 12- Feb- 2018].
- [4] "About the Commission", Alberta Human Rights Commission, 2018. [Online]. Available: <https://www.albertahumanrights.ab.ca/about/Pages/about.aspx>. [Accessed: 12- Feb- 2018].
- [5] Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta. 2014, AHRC 1.
- [6] "Who We Are", Law Society Alberta, 2018. [Online]. Available: <https://www.lawsociety.ab.ca/about-us/>. [Accessed: 14- Feb- 2018].
- [7] K. Schneider, "Controversial Alberta Human Rights commissioner out", Edmonton Sun, 2014. [Online]. Available: <http://edmontonsun.com/2014/03/20/controversial-alberta-human-rights-commissioner-let-go/wcm/dd7ad47c-c7ae-453d-81ec-603772089dd5>. [Accessed: 15- Feb- 2018].
- [8] The Association of Professional Engineers and Geoscientists of Alberta v. Mihaly. 2016, ABQB 61.
- [9] Mihaly v. The Association of Professional Engineers and Geoscientists of Alberta. 2017, ABCA 15.
- [10] "Mentoring Program", APEGA, 2018. [Online]. Available: <https://www.apega.ca/members/mentoring/>. [Accessed: 14- Feb- 2018].
- [11] APEGA, "APEGA Annual Report", The Association of Professional Engineers and Geoscientists of Alberta, 2016.