

ENGG 513
Mihaly Case Study
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Introduction

The purpose of this report is to gain greater insight into the requirements to become registered as a professional engineer, APEGA's (Association of Professional Engineers and Geoscientists of Alberta) regulatory process, and the legal and quasi-legal environment in which APEGA operates. To accomplish this task, the case involving APEGA, the Alberta Human Rights Commission (AHRC), and Mr. Ladislav Mihaly will be summarized and analyzed. Relevant opinions and reflections upon the case will be discussed in order to extend past the summary of the case and dive into and explore the ethical ramifications and realizations of what it means to become registered as a professional engineer.

Stakeholders

APEGA

The Association of Professional Engineers and Geoscientists of Alberta is a self-regulating body that regulates the practices of engineering and geoscience in Alberta on behalf of the Government of Alberta through the *Engineering and Geoscience Professions Act*. It is their responsibility to ensure that all licensed Professional Engineers and Geoscientists are meeting the necessary requirements to ensure the safety of the public. (1)

The Court of Queen's Bench

The Court of Queen's Bench is the Superior Trial Court for the province of Alberta. Their main purpose is to hear trials in civil and criminal matters and appeals from decisions of the Provincial Court. In addition, the Court may confirm, reverse or vary the order of the Alberta Human Rights Tribunal (AHRT) and make any order that the Tribunal may make.(2)

The Alberta Human Rights Commission

The Alberta Human Rights Commission is an independent commission of the Government of Alberta. The main objective of the commission is to foster and equality and reduce discrimination. They can be there to act as a voice of the public or individuals on issues that they feel are unjust or discriminatory. (3)

Mr. Ladislav Mihaly

Mr. Ladislav Mihaly is an engineer who was born and educated in the former Czechoslovakia. He holds two Master's degrees and gained years of experience in piping design and fabrication before emigrating to Canada. To continue on his engineering career in Canada, Mr.Mihaly applied to be licensed as a Professional Engineer by APEGA. However, not being able to meet APEGA's licensing standards, Mr. Mihaly was unable to acquire a suitable engineering job which left him unemployed for three years and for five years he worked in a low paying job. His family, as of 2014, is on low income and relies on the income of his wife.

The Public

Based on the structure of our current society, the decisions made by engineers and geoscientists heavily influences what the public encounters everyday. One of the

key things that the public entrusts engineers and geoscientist in Alberta is their ability to make decisions based on integrity/safety. Since major decisions made by engineers and geoscientists are those who have been licensed by APEGA, the requirements to become licensed is crucial for the public.

Foreign Engineers

Similar to Mr. Mihaly, there may be foreign engineers who hold a degree that belongs to the Foreign Degree List and/or has international engineering experience that wishes to pursue a career in Alberta. However, as seen with Mr. Mihaly, the standards set by APEGA may be seen as too harsh. This issue may cause foreign engineers to reconsider their pursuit of an engineering career in Alberta.

Canadian Engineers

Students who graduate from accredited engineering programs in Canada are typically well equipped to take on the standards/requirements set by APEGA. However, despite this seemingly advantage that Canadian engineers may have, it is important that the standards set by APEGA to be licensed as a Professional Engineer/Geoscientist is fair for all to avoid any sense of bias.

Background

The case began when Mr. Mihaly, a native Czechoslovakian, filed a complaint with the Alberta Human Rights Commission on August 5, 2008 indicating that he was discriminated against on the grounds of place of origin by APEGA when he was denied registration as a Professional Engineer. (4)The events of the case itself took place over the course of 9 years, dating back to May 1999 when Mr. Mihaly first applied for registration as a Professional Engineer in Alberta. Based on his engineering experience and foreign academic qualifications APEGA assigned Mihaly the National Professional Practice Exam (NPPE) and after further review of his references and experience additionally assigned him 3 confirmatory examinations and an Engineering Economics exam (4)The NPPE is an exam that is used by 11 engineering and geoscience self-regulatory organizations across Canada and is used to assess knowledge on professionalism, law and ethics. (5)

Mihaly wrote his first attempt of the NPPE and in February 2000 was notified that he had failed the examination. Mihaly then signed up for the next attempt of the exam in October 2000 and failed to show up for the exam due to a car accident and health related issues. (4)Later in 2001, APEGA withdrew Mihaly's application because he did not complete all of his exams in the timeframe specified. Mihaly applied for his application to be reactivated the next year and signed up for his third attempt of the NPPE. Throughout this year Mihaly had multiple conversations with APEGA regarding his concern with how his education in Czechoslovakia was being evaluated and the requirements being imposed upon him. APEGA responded that since his degree was on the Foreign Degree List he was assigned the confirmatory examinations to confirm his technical experience(4)Later in the year Mihaly found out that he had failed his latest attempt at the NPPE and subsequently had his application withdrawn again because of his failure to complete the examinations given to him again. In 2006, a couple of years

later, Mihaly reactivated his application again and also submitted updated transcripts and resume information due to the passage of time. APEGA requested that he still had to complete the three confirmatory examinations, and either the Engineering Economics Exam or the Fundamentals of Engineering Exam. (4) It was at this point in 2008 that Mihaly filed an official complaint with the Alberta Human Rights Commission and proceeded to represent himself against APEGA. (6)

Through the trial, the Alberta Human Rights Commission Tribunal found that Mihaly had successfully proved that the Examination Standard and Experience Standard used by APEGA to assess his credentials were considered discrimination without anymore individualized assessment or exploration of other options. (4) This decision came about through the examination of multiple factors including the foreign degree list, international agreements (Mutual Recognition Agreements (MRA's)), the negative impact on Mihaly's life/family and discussions with multiple experts of international agreements and evaluation of engineers such as Dean David Lynch and Dr. Gary Faulkner. The decision by the Tribunal also awarded Mihaly \$ 10,000 in general damages and mandated APEGA to look again at Mihaly's application. In addition to this, APEGA had to provide an individualized assessment of his application, a mentor to guide him with the integration, language courses and opportunities to look into different examination methods. (6) Upon receiving the decision made by the Tribunal, APEGA issued an appeal against the decision through the Court of Queen's Bench for the following reasons: procedural fairness, jurisdiction, prima face discrimination and justification. (4) Mihaly issued a cross-appeal against the Tribunal's refusal to not award him in compensation for his loss of income while not practicing as an engineer. He demanded an award of \$1,000,000 and a designation as a professional engineer or \$2,000,000 if no designation was offered (4) Additionally, another stakeholder entered the legal proceedings. The Law Society of Alberta joined as an intervenor in the case, as a professionally regulated society they had a stake in the outcomes of the appeal.

With the appeal made by APEGA against the decision from the Alberta Human Rights Tribunal, the Court of Queen's Bench carefully examined the key arguments that the Tribunal had made. After completing the extensive analysis on the Tribunal's arguments, such as the Foreign Degree List, APEGA's need to negotiate agreements with other institutions, and the citing of Meiorin, the Court sought a "reversal of the decision of the Human Rights Tribunal" due to the lack of evidence and the Tribunal's lack of consideration in regards to the impact on APEGA by their decisions. (4)

In an attempt to render the decision made by the Court of Queen's Bench, Mr. Mihaly filed an appeal on February 22, 2016 to the Alberta Court of Appeal. To justify his appeal, he argued that the Foreign Degree List presented by APEGA was based on the 2010 assessment whereas his assessment should have occurred from 2000 to 2006. However, the court revealed that there was no indications of differences between the 2010 assessment and the years prior. Additionally, it was also found that the Foreign Degree List worked in Mr. Mihaly's favor since it proved that his degree was equivalent to a Canadian's Bachelor's degree. Mr. Mihaly also referred to the Agreements made by Canada and the European Union and UNESCO Convention, however, he did not demonstrate anything in those Agreements or the Convention that required his

European credentials as equivalent to Canadian credentials. Unfortunately, Mr. Mihaly was unable to complete the appeal and it was struck on June 23, 2016. On December 15, 2016, Mr. Mihaly attempted to restore the appeal, however, the application was finally dismissed on January 10, 2017. (4)

The Court of Queen's Bench Decision

The appeal made by APEGA against the decision made by the Alberta Human Rights Tribunal was looked upon by Madam Justice June Ross. Through her assessment of the Tribunal's decisions, Justice Ross addressed whether the Tribunal had used and applied the correct *prima facie* discrimination and whether it was reasonable in concluding that APEGA registration requirements were unreasonable.

To test whether the Tribunal had used the correct *prima facie* discrimination, the Tribunal used the test set out by the Supreme Court of Canada in *Moore*. In the *Moore* test, it is required that a complainant to show that they have a characteristic that is protected from discrimination and that the protected characteristic was a factor in the adverse impact (source). By applying the *Moore* test, the Tribunal concluded that Mr. Mihaly was discriminated against on the basis of "place of origin" and through this discrimination, he was adversely impacted by APEGA's requirements to complete confirmatory examinations or the Fundamentals of Engineering exam. No dispute was made about this finding, however, Justice Ross clarified that the disadvantages originating from the requirements to pass the NPPE exams and possessing one year of Canadian experience was not linked to the discrimination based on the "place of origin". Therefore, it was found that the requirements to write the confirmatory exams or the FE Exam was related to Mr. Mihaly's "place of origin". (7)

Next, under *AHRA* section 11, the *prima facie* discrimination was analyzed to see if the discrimination was reasonable and justifiable. The Tribunal concluded that the requirement was not justifiable on two reasons:

- Mr. Mihaly should have only wrote an exam to correct the perceived academic deficiencies following an individual assessment of his credentials rather than a confirmatory exam or the FE Exam,
- Mr. Mihaly should not have been required to write a "one size fits all" test instead of an individual assessment. (4)

Justice Ross concluded that the first reason was based on the Tribunal's misinterpretation, by ignoring the "or", of the following:

The Board of Examiners has required the applicant to complete one or more confirmatory examinations or examinations for the purpose of correcting a perceived academic deficiency (4)

Furthermore, she recognizes that APEGA does not have the capacity or the resources to negotiate agreements with all foreign engineering programs. Therefore, she acknowledges that with the lack of evidence to determine the competency of applicants APEGA's policy of assigning confirmatory exams was justified.

In regards to the one size fits all approach, the Tribunal perceives the FE Exam to be unreasonable because it is a standardized test that does not take into account an individual's background, specific training, and experience. To support their argument, the case of Tawney Meiorin, a female firefighter who was laid off because she was not able to meet the standard of running 2.5 km in 11 minutes, was used as justification. However, Justice Ross found this deeply flawed. The standards set in Meiorin's case was unreasonable because: (7)

- a disproportionate number of women were unable to meet the standard because of their general aerobic capacity
- passing the standard was not shown to be reasonably necessary to the safe and efficient performance of the work of a forest firefighter
- the employer did not establish that it would experience undue hardship if a different standard was used.

Based on these reasons, Justice Ross believes that the Tribunal assumed the FE exam would be disadvantageous to foreign applicants as there was no evidence to support this claim. In fact, the FE exam has a pass rate of 85% and it was possible to retake the exam. Therefore, she agreed with APEGA that there was no evidence as to whether an internationally educated graduates would have difficulty in passing the FE exam. In response to the second point of Meiorin's case, Justice Ross concludes that confirmatory exams or the FE Exam cannot be compared to the same degree since the these exams were made by experts in the field to test the knowledge that all entry level engineers are expected to possess. In other words, an entry level competence that is equivalent the with graduates of accredited engineering programs. Justice Ross also address that, if APEGA was to carry out the order made by the Tribunal to individual asses the qualification of Mr. Mihaly the assessment would be costly and inefficient. Whereas in the case with Meiorin, it was suggested that the employer could determine her competency in an individual assessment. She recognizes, however, that APEGA does assess applicants individually to decide whether an exam may be waived by looking at where the applicant had received their degree from or if they have ten years of progressive responsible engineer experience. The Tribunal claimed that this individual assessment was "on very narrow ground" and was "quite difficult for most foreign engineers because they come to Canada they usually early in their careers". Regardless, Justice Ross did not find this as a supporting evidence because Mr. Mihaly's had more than ten years of experience but it was the quality that was insufficient.

In conclusion, Justice Ross found the reasons leading up to the Tribunal's decision are rife with logical errors, findings of fact that are not supported by the evidence, and failures to take into account relevant considerations.

Reflection and Opinion

The most recent outcome of the Mihaly and APEGA case was that APEGA was able to successfully appeal the Alberta Human Rights Tribunal's (AHRT) decision towards Mihaly. This case and decision was very important to a lot of the other

professional associations across Canada as the outcome of this case would provide precedence for others in the future to potentially argue that they were discriminated against in their individual applications and registration process. Between the decision of the AHRT and the Court of the Queen's Bench there are two outcomes to develop opinions on. The one case is that Mihaly was discriminated based on his country of origin and the other was that the evaluation methods used by APEGA on Mihaly's application were fairly in place to ensure the standard of professional engineers in Alberta was kept.

Exploring the one side of the argument, the AHRT's decision, Mihaly was an engineer trained in the Czechoslovakia who was trying to come over to Canada to progress and access new opportunities. Registering as a professional engineer was important to him to achieve these goals and support his family, and from his point of view having his experience and schooling deemed not sufficient enough was a big blow to his pride. This blow coupled with the trials and tribulations he experienced while settling into Canada with his family might have been enough to push him to feel that the cause of a lot of this hardship was APEGA's additional requirements for his application. With Mihaly's view on his education, the APEGA's decision to assign the exams could have been seen as an insult and aimed directly at his place of origin. Human rights issues can frequently arise when blanket statements are used to make decisions for groups of people. Without individual assessment each person may be lost and discriminated within a defining feature of themselves held by the collective, such as their place of origin.

Looking at the case from APEGA's point of view, we can see that they followed every rule or act that they had in place during the situation, which is why they were quite surprised at the initial decision by the AHRT. Professional associations have to ensure that the work that their members do is ethical and that the qualified persons who make decisions that impact the wellbeing of society are educated and responsible enough to make informed and correct decisions. The utmost importance of any self regulating profession is the interest of the public. In the interest of the public, APEGA must maintain that every applicant go through the same rigorous process to become a member so that everyone has the required knowledge to not compromise the safety of the public,. The examinations required are not discriminating against the country of origin but the education received by the applicant.

Examining these two sides we have come to agree with the decision made by the Court of Queen's Bench. The importance of a standard quality of work by professionals that hold the safety of society in their decisions is paramount. One could argue that the NPPE examination assigned by APEGA had cultural relativism and may have proved to be more difficult for individuals with certain culture or belief backgrounds. But making sure that the individuals who make these decisions are technically competent, professionally responsible and ethically sound is the duty of the governing body of a self regulating profession such that APEGA is. Although this is the decision that is agreed upon, having access to individualized assistance with the application requirements and navigating the introduction to a foreign world would prove beneficial to the uptake of

foreign members, bringing in diversity as well as a high standard of professionalism and skill.

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