


The University of Calgary
ENGG 513 The Role and Responsibilities of the Professional Engineer in Society

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Report #1
Mihaly Case Study


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Introduction

As a foreign trained engineer from Czechoslovakia, Mr. Ladislav Mihaly immigrated to Canada and started the registration process with the Association of Professional Engineers and Geoscientists of Alberta (APEGA) in 1999. Mihaly was required by APEGA to complete various tests and work experience prior to being registered as a Professional Engineer. After multiple failed attempts, Mihaly filed a discrimination complaint with the Alberta Human Rights Commission (AHRC). The Alberta Human Rights Tribunal (AHRT) decision was appealed by APEGA and Mihaly to the Court of the Queen's Bench where a final decision was reached. Although Mihaly filed another appeal to the Alberta Court of Appeal, he did not follow up with it and the appeal was dropped [1].

This report will explore a detailed timeline of events leading up to the final court ruling by the Court of Queen's Bench. The decisions made at various stages of the case will be analyzed to determine whether or not we agree with the outcome of the case. As well, the accommodation of foreign trained engineers by APEGA will be discussed to determine to what extent accommodation should be expected.

Stakeholders

APEGA

APEGA regulates the practise of engineers and geoscientists for the Government of Alberta through the Engineering and Geoscience Professions Act. As a regulatory body, it is the duty of APEGA to license professionals and ensure standards, ethics, and codes of conduct are being followed [2]. As a stakeholder in the Mihaly case, APEGA had the duty to protect the public as well as support its members in their practice. While Mihaly expected APEGA to license him as an engineer, APEGA was responsible to determine the competency and character of Mihaly in an unbiased procedure. Mihaly found the actions taken by APEGA to be discriminatory, which resulted in legal action against APEGA.

The Court of Queen's Bench

The Court of Queen's Bench is the Alberta Superior Trial Court. It deals with appeals on a provincial level, such as the Mihaly case [3]. The Court was responsible for reviewing the Alberta Human Rights Tribunal's decision regarding the Mihaly case, and determining if the conclusion was just and fair. The Court has a duty to uphold the law and not be influenced by the Tribunal's decision. Due to it being a higher power of authority, the Court has to deal with a larger amount of press and inquiry from the public that escalates the case outcome.

The Alberta Human Rights Commission

The Alberta Human Rights Commission was established by the Alberta Human Rights Act (AHRA) to “foster equality and to reduce discrimination” [4]. When Mihaly filed a complaint against APEGA, it was the AHRC’s job to investigate and determine if the complaint had enough merit to proceed to a tribunal. These quasi-judicial administrative tribunals have the potential to stop any actions that are proven to be discriminatory and compensate the complainant [5]. Tribunal decisions are legally binding, but may be appealed to the Court of Queen’s Bench. The Tribunal’s decision affected both Mihaly and APEGA.

Mr. Ladislav Mihaly

Mr. Ladislav Mihaly immigrated to Canada from Czechoslovakia with his family, and desired to register as an engineer with APEGA. He was required to complete various written exams before registration, however he failed to pass or show up to them. This meant he was not able to practice as a Professional Engineer, which Mihaly declared impacted his ability to provide for his family. Mihaly felt discriminated against and took APEGA to trial for compensation for missed work and injury to dignity [6]. The outcome of the case could have affected Mihaly through monetary compensation and the potential to work as a registered APEGA engineer.

The Public

The public was also affected by the Mihaly case. The examinations APEGA required Mihaly to complete were set in place to ensure the safety of the public. As determined in the Tribunal, the examination standard of APEGA was adopted in good faith [6]. If APEGA had registered Mihaly as an engineer, and Mihaly was negligent or incompetent in his engineering work it could have affected the health, safety, and finances of the public.

The Mihaly Family

Mr. Ladislav Mihaly’s wife and son immigrated with him to Canada. Mihaly stated that his lack of engineering work impacted his family due to his unemployment and low income jobs during his ten years in Canada. They relied on his wife’s income for the majority of their expenses, and Mihaly indicated that their family challenges caused mental issues for his son [6]. The decision of the court case affected the finances and job prospects for the Mihaly family.

Practicing Professionals in Canada

Various professions across Canada have self regulating bodies such as APEGA to enforce and uphold standards of practice. These bodies also have duties to protect the public and ensure competency among its members such as APEGA tried to do with Mihaly. The outcome of the Mihaly case could affect other court cases between professionals and their respective regulatory bodies through case law, which is law resulting from previous court rulings [7]. Someone with

similar circumstances as Mihaly, wishing to practice as a professional in Canada, would be able to use the outcome of Mihaly's case as arguments and contextual background.

Professional Engineers

By being a registered Professional Engineer with APEGA, or another engineering association in Canada, engineers gain credibility and decision making authority in their respective fields. This credibility is backed by the expectations upheld by APEGA. If APEGA were to change its expectations for Mihaly, it would have to re-evaluate its expectations for engineers across Alberta. This potentially would have a large impact on the way APEGA registers engineers, through processes such as the administration of the National Professional Practice Exam (NPPE) [2].

Background

Mr. Ladislav Mihaly was born and educated in the former Czechoslovakia, where he received a Master's of Science Diploma and a specialization in Technology of Fuels and Thermal Energy from the Slovak Technical University. He also received a Certificate in Corrosion Engineering from the Institute of Chemical Technology. He later immigrated to Alberta, Canada and in 1999 applied to be a Professional Engineer through APEGA [8].

Due to there not being a Mutual Recognition Agreement (MRA) between Canada and Slovakia, Mihaly was notified by APEGA that he needed to complete the NPPE and submit further documentation. After APEGA's Board of Examiners reviewed Mihaly's application and supporting documents they determined he needed to complete three confirmatory examinations and either take a course or pass an equivalent examination on engineering economics by May 2001. Unfortunately, Mihaly failed his first attempt writing the NPPE in January 2000 [8].

Mihaly applied for a second opportunity to write the NPPE but failed to attend on the day of the exam in October 2000. In June 2001, APEGA notified Mihaly that they had withdrawn his application to become a Professional Engineer because he had not completed the three confirmatory examinations by the date assigned. Mihaly submitted a reactivation request for his application in May of 2002. APEGA reactivated his file in June 2002 and set the new deadline for the confirmatory exams to be completed by May 2003 and the engineering economics requirements by November 2003. In July 2002, he failed the NPPE exam again, and once more in January of 2003 [8].

In August of 2003, APEGA again withdrew his application and Mihaly requested it be reactivated in October 2006. His application was reactivated but outdated, so he was asked to update his resume and references. After he completed this, Mihaly was notified that he still

needed to take the three confirmatory exams and the engineering economics course/exam, but he was also given an alternative option of doing the Fundamentals of Engineering Examination (FE exam). Mihaly was also notified that he was required to obtain one year of acceptable D level Canadian engineering experience under a licensed professional, a requirement that applies to all applicants [8].

Mihaly did not comply with these requirements, and in 2008 he filed a complaint against APEGA with the AHRC in accordance with the AHRA. He claimed that APEGA had discriminated against him based on his place of origin. After a lengthy case, the Tribunal ruled in favor of Mihaly awarding him \$10,000 for injury to dignity. On top of this APEGA was ordered to create a committee to reconsider Mihaly's application. APEGA was also ordered to find a mentor for Mihaly with a similar background to help him integrate, network, and find language resources. Mihaly was not awarded any money for lost wages because the Tribunal decided there were "too many uncertainties involved in the licensure and employment...to find that there was a causal connection between the discrimination and any loss of wages" [8].

After the Tribunal's ruling, APEGA filed an appeal with the Court of Queen's Bench which took place in June 2015. The Judge reversed the Tribunal's decision on the basis that prima facie discrimination had not been justified [8].

Mihaly filed a cross-appeal with the Alberta Court of Appeal in February 2016, asking for \$1,000,000 for lost wages and registration with APEGA or \$2,000,000 if he was not registered [9]. Mihaly did not follow up with the appeal causing it to be dropped in June 2016 from failure to file the Appeal Record. In December 2016, Mihaly applied to restore the appeal but the Honourable Mr. Justice Frans Slatter ruled that he had not met the criteria and it was dismissed in January 2017 [10].

The Court of Queen's Bench Decision

After the AHRT came to the conclusion that APEGA's registration requirements were unjustifiable and Mihaly's discrimination claim was successful, APEGA appealed the decision. The appeal was filed in November of 2014, and Mihaly filed a response on the same day. The Appeal hearing took place July 23 and 24, 2015. The Honourable Madam Justice June M. Ross oversaw the appeal, where APEGA brought into question the procedural fairness, jurisdiction, prima facie discrimination and justification of the Tribunal's decision [8].

The point of dispute was whether or not the Tribunal acted in a way that was procedurally fair when they made decisions on issues that were not brought up by the involved parties. This was specifically in regards to the Tribunal's decision that the examinations APEGA assigned Mihaly

were not to correct an academic deficiency, as decided by the Engineering and Geoscience Professions General Regulations (EGPR). This specific section of the EPGR was never brought up by Mihaly; APEGA argued that the Tribunal's decision was unfair and that they were not given an opportunity to address this decision. The Court ruled that while the Tribunal should have allowed each party to express their interpretation of this section, failing to do so did not constitute a breach of the rules of procedural fairness [8].

The second claim examined was APEGA's argument that the Tribunal did not have jurisdiction over Mihaly's case, because the AHRA does not protect against discrimination based on an individual's place of origin of academic qualifications. Ross found that there was a clear correlation between Mihaly's place of origin, his place of education and APEGA's registration requirements and thus, that the Tribunal acted within its jurisdiction [8].

The third claim investigated was that the Tribunal did not use the correct legal test, and did not apply it correctly in order to accurately determine if prima facie discrimination occurred. APEGA claimed that arbitrariness or stereotyping were required elements of prima facie discrimination but Ross clarified that while they are relevant elements they are not required [8].

During the Tribunal, to determine if prima facie discrimination occurred, the Moore test was used, which was developed from a previous trial and consists of three parts. First, Mihaly needed to show that he had a characteristic that is legally protected from discrimination, in this case his place of origin. Next he needed to show that he experienced an adverse impact. Mihaly claimed that APEGA treated him as a foreign graduate and required him to complete the confirmation exams or the FE exam because his place of education was directly influenced by his place of origin. Lastly, he needed to show that there was a connection between the adverse impact and the characteristic. Mihaly's evidence that they were connected was the fact that the requirements he needed to comply with were not applied to engineering graduates from Canadian institutions or countries where APEGA had MRAs. In their appeal, APEGA claimed that the adverse impact could not be determined because Mihaly had not actually complete the exams. Ross decided that the preparation for the exams, regardless of actually writing them was enough to constitute an adverse impact. Ross also confirmed that the adverse impacts were linked to Mihaly's place of origin, as APEGA assumes foreign graduates that come from countries with no MRAs, do not have qualifications that meet the same Canadian accreditation standards. Ross acknowledged that the requirements may have disadvantaged Mihaly and thus constituted discrimination; however, she recognized that the intent is to "ensure competency and safety in professional fields" [8].

Ross went on to further explain that APEGA's process is not based on discriminatory assumptions. Rather, APEGA refrains from making assumptions regarding the qualifications of Canadian or foreign engineering institutions until they have gone through the CEAB

accreditation process. Ross also focused on the fact that the Moore test was not applied to the NPPE exam or the required one year of Canadian experience. These requirements apply to all applicants regardless of their origin of education. Ross decided that by failing to apply the Moore test to these requirements, the Tribunal's finding of prima facie discrimination in relation to these requirements was unreasonable [8].

Finally, the Tribunal's decision that APEGA's registration requirements were unjustified was examined. APEGA appealed the Tribunal's finding that APEGA did not reasonably accommodate Mihaly in regards to the confirmatory exams or FE exam he was required to write, but also in regards to the NPPE exam and the one year of Canadian engineering work experience. Since the later two requirements were not determined to constitute prima facie discrimination by Ross, it was determined that the Tribunal's finding of the requirements to be unjustified, were outside of this role and thus unreasonable. Ross also found the Tribunal's directions for APEGA to assemble a committee responsible for finding ways to individually assess Mihaly and match him with a mentor, were unjustifiable as they went beyond the scope of the organization's responsibilities and required APEGA to act outside of its regulatory role [8].

After reviewing these four elements of the appeal, Ross on behalf of the Court of Queen's Bench had the ability to confirm, reverse or vary the Tribunal's decision or remit the case back to the Tribunal. Ross chose to reverse the Tribunal's ruling and decided that there was no need to remit the case [8].

Reflection and Opinion

Based on the regulations that APEGA follows in the engineering registration process, we do not agree with the AHRC Tribunal's decision in favour of Mihaly's discrimination complaint. Mihaly's complaint alleged discrimination directly applying to his situation, not foreign applicants overall [6]. Mihaly was subjected to the same process APEGA uses to deal with all foreign trained engineers and was not treated differently due to his specific nationality. Mihaly was placed in the examination candidate category found in Section 13 of the EGPR after being examined by the Board of Examiners [6]. His file was then reviewed by a specialized Experience Subcommittee of the Board to clarify and investigate his level of work experience before assigning the required exams [6]. This shows that his file had personal attention and was assessed by experienced APEGA members. Mihaly stated he would write an exam if need be [6], but failed to pass or show up to multiple exams due to choices or circumstances outside of APEGA's control. Based on these facts, we do not agree that Mihaly was discriminated against, and the \$10,000 compensation for injury to dignity was not justified.

The other ruling of the AHRC that we did not agree with was the requirement for APEGA to find a mentor for Mihaly to help him integrate, network, and find language resources. This was beyond of the scope of the services APEGA provides. When Mihaly filed the complaint in 2008, he had already been living in Canada for over nine years and did not express any prior issues with integration, networking or language to APEGA.

We did agree with the rulings to not award Mihaly monetary compensation for lost wages, and for APEGA to reconsider his application. Mihaly never completed the required one year D-level Canadian work experience which he was able to do without registration [8]. APEGA did not hold him back from finding an engineering job that satisfied those requirements. This requirement is also applied to all engineering applicants, including Canadian applicants, which shows that the alleged discrimination did not prevent Mihaly from working. In regards to reconsidering his application, that was a valid expectation of APEGA because there was no reason for APEGA not to and they had never refused to accept one of Mihaly's prior applications. On the other hand the reconsideration outcome would be congruent to all prior outcomes thus far.

Although the Court of Queen's Bench decided Mihaly had a characteristic that is legally protected from discrimination, experienced an adverse impact, and the that the two were linked causing Mihaly a potential disadvantage, the failure to consider the Moore test in relation to the NPPE exam and the required Canadian experience lead to Ross finding the accusation of prima facie discrimination to be unjustified along with the Tribunal's ruling requiring APEGA to act outside of its mandate [8]. The decision to reverse the Tribunal's decision is something we agree with based on these arguments.

The Alberta Court of Appeal dropped the appeal when Mihaly did not follow up and refused to restore it since Mihaly did not meet the criteria. Although the Alberta Court of Appeal did not make any decisions regarding the case, we think it was the right choice not to proceed any further with the case or re-open it when Mihaly requested because of his past inconsistency on following through with his applications.

APEGA's current assessment of foreign graduates is based off the assumption that unless they come from an institution that has an MRA with APEGA, they do not assume anything about the individual's qualifications until properly assessed. World Education Services (WES) conducts the academic assessments for educational credentials and sends them directly to APEGA. The report verifies the authenticity of the academic documents and establishes the Canadian equivalency. APEGA's Board of Examiners also does a full review of the credentials as well, paying attention to the course content and the applicant's performance. They ensure that the applicant's degree satisfies the legal requirements for licensure. The Board may assign applicants the FE exam which is intended to confirm their engineering knowledge. The Board can also assign Technical

exams or equivalent courses; applicants are able to request a reassessment or reconsideration. All applicants are required to complete the NPPE exams and obtain one year of Canadian work experience in their field [2].

When Mihaly applied for his licensure he was assigned the NPPE exam and Canadian work experience like everyone else, as well as three additional confirmatory exams and a course/exam in engineering economics. The process for assigning these exams was done fairly to accommodate his training. His university did not have an MRA so there was no knowledge of their standards for accreditation; however, his university was on the Foreign Degree List. As a result he was only assigned three confirmatory exams and as Mark Tokarik from APEGA had explained to Mihaly, had his program “not been contained on the Foreign Degree List [he] would have been assigned nine examinations.” Tokarik even provided Mihaly with a Reconsideration and Appeal Sheet should he wish to have his work experience reevaluated but he did not use this accommodation opportunity [6].

Clearly, APEGA’s process already accommodates for foreign engineering by following the processes outlined above. They take into consideration what they know about the institution the applicant graduated from and remedy any academic deficiencies with exams or courses, still allowing the applicants to receive licensure rather than rejecting them for insufficient qualifications. Engineering professionals have high standards to maintain because they are responsible for the safety of the public. APEGA is responsible for upholding these standards and by providing foreign graduates with the opportunity to increase their technical knowledge and skills to the Canadian standards, after taking into consideration their education and work experience, is extremely accommodating. Thus, we recommend that in order to maintain high standards, public safety and to license foreign graduates, APEGA should continue to follow their current procedure or else they would risk lowering the safety standards in Canada or risk eliminating the acceptance foreign applications.

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