

A Foreign Perspective on APEGA's Licensing Process

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Introduction

This report presents the licensing dispute between Ladislav Mihaly and the Association of Professional Engineers and Geoscientists of Alberta, otherwise referred to as APEGA. It evaluates the stakeholders directly involved with the dispute, as well as the timeline of events beginning with Mihaly's first application to APEGA for a license to practise as a professional engineer in Alberta. This report also describes the decisions made by the Alberta Human Rights Tribunal, the Court of Queen's Bench, and the Alberta Court of Appeal. The purpose of this report is to provide the reader with a deeper understanding of the licensing process offered by APEGA. Specifically, Mihaly's experience presents the challenges an engineer with academic qualifications obtained from a country without a Mutual Recognition Agreement must go through to meet the standards set by APEGA. The opinion of the author is presented with respect to both the dispute, and the overall standards set by APEGA for all engineers and geoscientists who practise professionally in Alberta.

Stakeholders

Mr. Ladislav Mihaly

Ladislav Mihaly is a foreign trained engineer who applied to practise as a professional engineer in Alberta. He was educated in the former Czechoslovakia and has a M.Sc Diploma with a specialization in Technology of Fuels and Thermal Energy from the Slovak Technical University in Bratislava.¹ He also obtained a Certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague.² His professional experience as an engineer in Czechoslovakia consisted of more than 10 years, which included experience in both senior and lead positions.³ Mihaly claims to have experienced discrimination based on his Czechoslovakian experience and credentials. He was assigned additional criteria by APEGA to obtain his professional designation which would allow him to practise as a professional engineer in Alberta.

APEGA

The Association of Professional Engineers and Geoscientists of Alberta (APEGA) regulates the practise of engineering and geoscience in Alberta. Up until 2012, it was formally known as the Association of Professional Engineers, Geologists and Geophysicists of Alberta, or APEGGA. For clarity, this report will only refer to this organization as APEGA since the dispute existed before and after the transition occurred. In order for an individual to practise engineering in the province of Alberta, they must obtain accreditation and a licence from APEGA. This ensures the protection of the health and safety of the public since APEGA can set appropriate standards for practising professionals, and indirectly the quality of engineering design. Applicants must prove to APEGA they have sufficient academic qualifications, as well as experience qualifications. For

¹ Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 (CanLII) (Alberta Human Rights Tribunal February 06, 2014) (CanLII, Dist. file).

² Ibid.

³ Ibid.

applicants like Mihaly who apply with credentials obtained outside of Canada, APEGA must ensure the applicant's qualifications are at par with what they expect from applicants who received academic training from accredited Canadian programs.

The Court of Queen's Bench

The Court of Queen's Bench is the Superior Trial Court for the province of Alberta. The Court conducts criminal and civil matters, and it also reviews tribunal action. The dispute between Mihaly and APEGA does reach this Court after being evaluated by the Human Rights Tribunals of Alberta. It is the interest and focus of the Court to ensure all decisions made achieve justice, including the appeals in the context of this report.

The Alberta Human Rights Commission

The Alberta Human Rights Commission is established by the Alberta Human Rights Act to carry out functions of the Act. The Commission educates the public and resolves any complaints of discrimination in the province through human rights tribunals and court hearings. Their goal is to ultimately foster equality and reduce discrimination with their actions and decisions.⁴ If a case presented to the Commission is deemed to have merit, there will be a human rights tribunal to help resolve the dispute. The human rights tribunal are quasi-judicial administrative tribunals, meaning that the decisions made at this level must be made using existing law where common law exists, and do not have the same judicial power.

The Public

The public, in the context of this report, consists of the residents and visitors of Alberta. As the practise of engineering affects the wellbeing of the public in multiple aspects of their life, it is important to the public that only qualified individuals and permitted to practise. The public relies on the standards APEGA sets for its licensed members to ensure engineers are appropriately trained to provide engineering designs.

Self Governing Professions

Self governing professions are professions which are governed by its members. Law, medicine, dentistry, and engineering are a few examples which fall into this category. It is the responsibility of its members that those practising within the profession are appropriately qualified and those who fail to meet standards are disciplined within reason. Standards of practise are typically outlined in a Code of Conduct. The outcome of the dispute between APEGA and Mihaly may impact how other organizations with similar powers as APEGA handles applicants from other countries in the future.

Foreign Trained Engineers/Foreign Professionals

In the context of this report, foreign trained engineers are individuals who received their engineering education outside of Canada and practise, or who would consider practising,

⁴ "About Us," Alberta Human Rights and Citizenship Commission, , accessed February 10, 2018, <https://www.albertahumanrights.ab.ca/about/Pages/about.aspx>.

engineering in Alberta. The outcome of this dispute sets precedence as to how future applicants with similar credentials to Mihaly's would be handled by APEGA.

Background

Ladislav Mihaly first applied for registration with APEGA in May 1999 so he could continue his career as a practising Professional Engineer in Alberta as he had done previously in Czechoslovakia.⁵ In his application, he included his master's degree obtained in Bratislava, and his certificate obtained in Prague. He also included three references of individuals he had worked for in Bratislava.⁶ APEGA also requested his transcripts, his visa, and his Landed Immigrant form.⁷ Mihaly was then informed that he would need to pass the National Professional Practice Exam, otherwise known as the NPPE. The NPPE evaluates the applicant's knowledge and understanding of professionalism, law, and ethics in association with the profession.⁸ It is requirement for anyone wishing to practise as a professional engineer in Alberta, and ten other provinces in Canada.⁹ After evaluating his application in its entirety, it was determined that in addition to the NPPE, Mihaly would need to write three confirmatory exams and obtain credit for engineering economics by taking a course or writing an equivalent exam.¹⁰ As the degree he obtained in Bratislava was on APEGA's Foreign Degree List, APEGA was able to waive two confirmatory exams he would have also needed to pass.¹¹ However, his industry experience proved to be only in a small scope of work and he had minimal exposure to the references provided.¹²

Mihaly had no success with his attempts to fulfill APEGA's requests. Mihaly failed his first attempt, and was absent for his second attempt of writing the NPPE.¹³ However, he did not attempt any of the confirmatory exams or the economics course.¹⁴ As a result, APEGA withdrew his application in June 2001.¹⁵ Mihaly requested to reactivate his application in May 2002, and APEGA obliged.¹⁶ The deadline for completing the confirmatory exams extended to May 2003,

⁵ Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 (CanLII) (Alberta Human Rights Tribunal February 06, 2014) (CanLII, Dist. file).

⁶ Ibid.

⁷ Ibid.

⁸ "National Professional Practice Exam." APEGA, Accessed February 10, 2018, <https://www.apega.ca/apply/exams/national-professional-practice-exam-nppe/>.

⁹ Ibid.

¹⁰ Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 (CanLII) (Alberta Human Rights Tribunal February 06, 2014) (CanLII, Dist. file).

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

and the economics course to November 2003.¹⁷ During this extended period, he failed the NPPE for the third time and fourth time and never attempted the confirmatory exams.¹⁸ APEGA withdrew his application again in August 2003.¹⁹ For the second time, Mihaly requested to reactivate his application in October 2006.²⁰ Since a considerable amount of time had passed, APEGA had him resubmit his resume and provide more current references.²¹ His new references included the name of a Professional Engineer he had worked under in Calgary, the name of a gas company owner, and a co-worker.²² Unfortunately for Mihaly, APEGA deemed the engineering work experience he had gained to not be at a high enough level to be awarded credit.²³ Thus, APEGA still requested Mihaly to complete the three confirmatory exams, engineering economics, and obtain a year of adequate engineering work experience in North America.²⁴ After the second reactivation, he did not attempt any of the necessary exams.²⁵

In August 2008, Mihaly submit a complaint to the Alberta Human Rights Commission claiming APEGA was discriminating against him based on his place of origin. The tribunal for this case occurred in 2014, where Mihaly was successful at establishing a *prima facie* case of discrimination which requires three elements. Mihaly needed to demonstrate he has a characteristic protected by the Alberta Human Rights Act, he was negatively impacted in respect to an available service, and that the characteristic contributed to the negative impact.²⁶ For Mihaly, his place of origin, which was determined to extend to where he received his education, made accessing the licensing process with APEGA more intensive than individuals from Canada, and other select countries.²⁷ While Mihaly was able to establish a *prima facie* case, APEGA was unable to justify its actions under the Alberta Human Rights Act.²⁸ It was determined that APEGA has access to a sufficient level of resources required to assess applicants on a more individual basis when no Mutual Recognition Agreement exists with respect to their educational place of origin.²⁹ Thus, APEGA was found to have discriminated against Mihaly without justifiable reason.

¹⁷ Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 (CanLII) (Alberta Human Rights Tribunal February 06, 2014) (CanLII, Dist. file).

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

As discrimination was proved to have occurred, the tribunal outlined some remedies. Mihaly was awarded \$10,000 for general damages.³⁰ APEGA was also ordered to assist Mihaly in obtaining his designation by providing more individualized attention to his application. APEGA was required to reach out to his educational institute to better understand his education, allow Mihaly to challenge certain areas of the exams, organize a committee to further assess his qualifications, find a mentor for Mihaly, supply him with networking opportunities with other foreign professionals, and help him find resources in the community to improve his English.³¹

Both parties were unsatisfied with the tribunal's verdict. APEGA submitted an appeal to the Court of Queen's Bench claiming their licensing process is not discriminating, but necessary to protect the interests of the public. Mihaly submitted a cross-appeal believing he deserved compensation for the loss of income incurred during his time in Canada. Mihaly requested he be awarded \$1,000,000 and registration with APEGA, or \$2,000,000 without registration.³² It was determined that the tribunal had procedural fairness and not lacked jurisdiction, however a *prima facie* case was not sufficiently established with respect to the NPPE and Canadian work experience requirements.³³ As a result, the decision from the Tribunal was reversed, and Mihaly's cross appeal was dismissed.³⁴

In February 2016, Mihaly did submit an appeal after the decision made by The Court of Queen's Bench.³⁵ However, by June 2016, Mihaly had not filed an appeal record and so his appeal was dismissed.³⁶ In December 2016, he applied to restore the appeal.³⁷ The Alberta Court of Appeal evaluated his application to restore the appeal in January 2017 and decided to dismiss his application.³⁸

The Court of Queen's Bench Decision

After investigating this case, The Court of Queen's Bench made the decision to reverse the decision from the Tribunal in favour of APEGA. APEGA presented four main elements from the Tribunal in their appeal: Procedural fairness, jurisdiction, *prima facie* discrimination, and justification.

³⁰ Mihaly v. The Association of Professional Engineers, Geologists and Geophysicists of Alberta, 2014 AHRC 1 (CanLII) (Alberta Human Rights Tribunal February 06, 2014) (CanLII, Dist. file).

³¹ Ibid.

³² Association of Professional Engineers and Geoscientists of Alberta v Mihaly, 2016 ABQB 61 (CanLII) (Court of Queen's Bench January 26, 2016) (CanLII, Dist. file).

³³ Ibid.

³⁴ Ibid.

³⁵ Mihaly v Association of Professional Engineers and Geoscientists of Alberta, 2017 ABCA 15 (CanLII) (Court of Appeal of Alberta January 12, 2017) (CanLII, Dist. file).

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

APEGA believed the tribunal breached procedural fairness by using issues that were not surfaced by APEGA nor Mihaly to come to its verdict.³⁹ The Tribunal had referenced the Engineering and Geoscience Professions General Regulation, or EGPR, to help evaluate the fairness of APEGA requirements.⁴⁰ In the opinion of APEGA, an excerpt had been misused, and was not brought up during the hearing either.⁴¹ However, tribunals are not required to let parties be heard on every element of a case used in decision making.⁴² Also, the verdict was not heavily reliant on the tribunal's reference to the EGPR.⁴³ Ultimately, APEGA was unsuccessful at establishing a breach of the rules of procedural fairness.

Another issue APEGA surfaced was whether the tribunal had the grounds to evaluate a case with discrimination based on place a person receives education.⁴⁴ The Alberta Human Rights Act extends to discrimination based on place of origin, however the Act does not directly protect where one receives their education. However, for the purpose of the particular dispute, place of origin and place of origin of academic qualifications were determined to be equivalent.⁴⁵ The Court of Queen's Bench found "the protected ground of place of origin, in these particular facts, is broad enough to include any adverse treatment related to his foreign credentials", and the establishment of a *prima facie* case was the proper test for the circumstances.⁴⁶ It was also identified that discrimination can also apply to grounds not directly listed in the Alberta Human Rights Act, so the connection between place of origin and place of educational background need not be established.⁴⁷ It was concluded that the tribunal did have proper jurisdiction over the case.

APEGA also questioned whether the tribunal had selected, applied, and evaluated the correct legal test.⁴⁸ The test applied in the tribunal was the Moore test, and it requires a *prima facie* case to be established.⁴⁹ The Court of Queen's Bench did determine this was the correct test to apply to determine if discrimination had taken place.⁵⁰ It was found the adverse affect of needing to write additional confirmatory exams was related to where he obtained his education. Thus, the Court agreed with the tribunal's assessment in this regard.⁵¹ However, the requirement to have one year of Canadian work experience and pass the NPPE were requirements shared by all applicants regardless of where the applicant received their

³⁹ Association of Professional Engineers and Geoscientists of Alberta v Mihaly, 2016 ABQB 61 (CanLII) (Court of Queen's Bench January 26, 2016) (CanLII, Dist. file).

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

education.⁵² Even Mihaly's struggles obtaining work were not caused by his place of origin, and APEGA does not restrict applicants from finding employment under the supervision of a licensed professional.⁵³ Thus, it was determined the tribunal had not correctly applied the Moore test to these requirements.

Finally, the tribunal had made the decision that APEGA's regulation requirements were unjustified, and that the association should consider assessing applicants further with a more individualized approach.⁵⁴ When discrimination had been determined to have occurred, the onus is on the discriminating party to establish justification.⁵⁵ APEGA was required to prove its standards serve a purpose connected to the main function of the organization, the standard is necessary to serve its purpose, and the standard is reasonably necessary to serve its purpose such that it would be unreasonable to accommodate those with a protected characteristic without incurring undue hardship.⁵⁶ The first two elements of justification were established as APEGA's standards are set in place to protect the safety and wellbeing of the public.⁵⁷ However, the assumption made by the tribunal that APEGA has the resources to accommodate Mihaly and others with similar applications is "rife with logical errors, findings of fact that are not supported by the evidence, and failures to take into account relevant considerations".⁵⁸ Because of this, it was determined that APEGA had satisfactorily proven to have defended its discrimination against Mihaly.

The ultimate decision of the Court of Queen's Bench was that discrimination had taken place against Mihaly. A proper *prima facie* case had been established with the assignment of additional confirmatory examinations. However, it was determined that the *prima facie* case did not extend to the Canadian work experience and NPPE requirements as determined in the Tribunal. The Court of Queen's Bench also found APEGA had successfully justified its reasons for discrimination as their standards are in the best interest of the public. As a result, the decision of the tribunal was reversed. The cross appeal made by Mihaly was dismissed as it no longer applied since APEGA had established justification.⁵⁹

Reflection and Opinion

The dispute between Mihaly and APEGA has stretched over many years and has been through multiple levels of the legal system. In 2014, this case was evaluated by the Human Rights Tribunals of Alberta. As both parties were unsatisfied with the decision made at this level, an appeal and cross appeal were submitted by APEGA and Mihaly, respectively. The Court of

⁵² Association of Professional Engineers and Geoscientists of Alberta v Mihaly, 2016 ABQB 61 (CanLII) (Court of Queen's Bench January 26, 2016) (CanLII, Dist. file).

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

Queen's Bench then evaluated the decision and justification made by the tribunal. Still unsatisfied, Mihaly submitted an appeal to the Court's decision. This dispute was then sent to the Alberta Court of Appeal.

After an investigation of these court cases, I mostly agree with the decisions made by the Court of Queen's Bench and the Alberta Court of Appeal, which were in APEGA's favour. In my opinion, I feel APEGA has the right to maintain high standards for the engineers practising in Alberta as this protects the interests of the public. While it might be discriminatory to assign foreign applicants with additional requirements, it removes any uncertainties about previous academic qualifications, which have not been evaluated as thoroughly as the Canadian academic programs which are investigated by the Canadian Engineering Accreditation Board, or CEAB.

While some of the decisions made from the Human Rights Tribunal were addressed and agreed upon by the Court of Queen's Bench, the ultimate decision made in favour of Mihaly was not reasonable. Before the tribunal, Mihaly did not demonstrate a sufficient level of effort in fulfilling requirements to obtain his professional designation. While he attempted the NPPE, he never attempted to write any of the confirmatory exams or enroll in an economics course. There was also a significant amount of time which Mihaly had allowed to pass between his first application and the Tribunal as well. This demonstrates his lack of desire to obtain a license. The decision from the Tribunal to make APEGA provide him with resources to assist Mihaly in becoming licensed was generous and would have been deserved had Mihaly demonstrated an equivalent persistence. In the fourteen years, Mihaly should have been able to improve his English, obtain more amounts of work experience under a licensed engineer, and put reasonable effort into passing the confirmatory exams.

With that said, I also believe APEGA should accommodate foreign engineers and geoscientists. Alberta, and Canada as a whole, sees many benefits when these industries have a wide breadth of experience and knowledge. Incoming professionals may have worked on larger projects, or projects with different technologies which may be applied in Canadian practise. I also believe it is more important to ensure the quality of licensed individuals put into the work force. A professional license gives an individual the ability to work on a large scope of work, so in the interest of the public it is paramount that applicants can prove their academic qualifications and industry experience are at par with what is expected of Canadian trained engineers.

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