

ENGG 513:

The Role and Responsibilities of the Professional Engineer in Society

Mihaly Case Study

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Table of Contents

Introduction	3
Stakeholders	3
APEGA.....	3
Other Professional Regulatory Bodies	3
Engineers Canada	4
Mr. Ladislav Mihaly	4
Canadian Engineering Immigrants	4
The Alberta Human Rights Commission	4
The Court of Queen’s Bench	5
Background	5
The Court of Queen’s Bench Decision	6
Reflection and Opinion (1-2 pages).....	8
References	10

Introduction

The purpose of this report is to try to understand the case as a whole and reflect on the situation as future engineers, as well as gain some perspective from the different stakeholders involved, e.g. Mr. Ladislav, APEGA, The Court of Queen's Bench, etc.

In the case of *Mihaly v APEGA*, the complainant, Mr. Mihaly, has alleged that APEGA has discriminated against him based on his place of origin. Mr. Mihaly is an engineer who came to Canada from Czechoslovakia. He wanted to practice here in Canada, so he began the application process with APEGA. After failing multiple times to complete the process over the span of approximately seven years, Mr. Mihaly felt that he was the victim of discrimination and chose to pursue legal action against APEGA.

Initially, the appeal was not heard by the Human Rights Tribunal, but with persistence, Mr. Mihaly was granted his appeal, that he eventually won. He was awarded reparations and assistance moving forward with the accreditation process. APEGA, however, appealed the decision with The Court of Queen's Bench, who eventually over turned the Human Rights Tribunal's findings and dismissed Mr. Mihaly's appeal.

The decision is now under appeal with the Alberta Court of Appeal.

Stakeholders

APEGA

APEGA, (Association of Professional Engineers and Geoscientists of Alberta) is an organization which regulates the practices of professional engineers and geoscientists in Alberta. They act to serve the public interest by ensuring that engineers and geoscientists conduct their business in a manner that is ethical, environmentally responsible, and safe.

In order to practice professional engineering or geoscience in Alberta, a practitioner must register with APEGA, and fulfill their requirements in order to be granted admission. The admission requirements vary depending on the circumstance, but generally include proof of: sufficient education in the field of their practice, experience in their field, knowledge of local practices, English competency, good character and reputation, and a knowledge of good ethics. Practitioners who are educated in foreign countries often have to pass various exams in order to prove their competence.

APEGA is a stake holder in this case because they were accused of discrimination based on their application process by Mr. Ladislav Mihaly's. This accusation resulted in a Human Rights Tribunal and Alberta Queens Bench ruling on the matter.

Other Professional Regulatory Bodies

Other professions such as law and medicine are regulated in a similar manner to Canadian geoscience and engineering. The implications of cases like the one studied herein have implications for these organizations and their applicants. The Queen's Bench decision referenced several cases from other industries that had previously set precedent, thus showing the cross-

profession impact of the result of similar hearings. The potential for this case to affect future cases for these other organizations makes them stakeholders.

Engineers Canada

Engineers Canada, is a national organization which supports provincial and territorial engineering regulatory bodies, such as APEGA.

Providing outreach, research, and standards, it works to advance the engineering profession and serve public interest. One of the roles of Engineers Canada is to develop professional practice and qualifications guidelines for provincial and territorial regulatory bodies. This function makes it a stakeholder in this case study, as the guidelines created by Engineers Canada and applied by APEGA prompted a human rights investigation.

Mr. Ladislav Mihaly

Mr. Ladislav Mihaly is a man who immigrated to Canada from Czechoslovakia. Prior to his immigration he had earned two engineering degrees at the master's level in Czechoslovakia. He had 12 years of work experience in his field, some of which was at a research institute.

Upon immigrating to Canada, Mr. Mihaly submitted a registration with APEGA in order to start practicing as an engineer. His application process lead him to believe that he had been discriminated against, as is discussed in greater detail later in this report.

Mr. Mihaly is a stakeholder in this case because the APEGA application process and the proceeding legal hearings affected him directly. His ability to continue to practice as an engineer was at stake, he felt as though he had been discriminated against, and his opportunity to be financially compensated for the whole ordeal was up in the air throughout much of the legal process.

Canadian Engineering Immigrants

According to Engineers Canada, around 250,000³ international engineers immigrate to Canada each year. These engineers need to apply through provincial and territorial regulatory bodies before being able to practice in Canada. The results of the hearings discussed in this report have effects on these internationally educated engineers. If discrimination against foreign APEGA applicants were proven, this would affect change in the application process in order to eliminate the discrimination.

The Alberta Human Rights Commission

The Alberta Human Rights Commission is established under the Alberta Human Rights Act (AHRA) in order out carry out functions of the act. The purpose AHRA is to protect Albertans from discrimination for protected traits. The Commission endeavours to reduce discrimination and foster equality.

One function of the Commission is to carry out human rights tribunals. A complainant who believes that they have been discriminated against can file a complaint with the commission. If found to have merit, the complaint can be sent to the Chief of the Commission and Tribunals,

who may appoint a tribunal of one to three commission members. This commission will review the evidence from both parties, and can order a remedy, which is legally binding. Appeals to the Tribunal decision can be made through the Court of Queen's Bench.

The Alberta Human Rights Commission is a stakeholder in this case because Mr. Mihaly filed a complaint against APEGA with the commission, which resulted in a human rights tribunal. The decision of the Tribunal was appealed by APEGA.

The Court of Queen's Bench

The Court of Queens Bench of Alberta is the superior court in the province of Alberta. It hears trials for both civil and criminal matters, and also handles appeals for decisions made in provincial courts. The Court of Queen's Bench of Alberta is Constituted by the Court of Queen's Bench Act.

An appeal to the Tribunal decision against APEGA by Mr. Mihaly was brought to the Queen's Bench by APEGA. During the appeal, it was the duty of The Honourable Madam Justice J.M. Ross of the Queen's Bench to determine if there were legal grounds for the tribunal ruling to be reversed. The Queen's bench is a stakeholder due to their role in hearing the appeal, and also because this case set precedent for future cases.

Background

In 1999, Mr. Ladislav Mihaly was a recent immigrant from Czechoslovakia, where he was a trained engineer who chose to pursue accreditation here in Canada. Upon applying to APEGA to register as a Professional Engineer, the board of engineers (BOE) had four requirements for Mr. Mihaly; write the National Professional Practice Exam (NPPE), write three confirmatory examinations, complete engineering economics or challenge the engineering economics examination and complete one year of Canadian engineering experience. Between 2000 and 2003, Mr. Mihaly attempted the NPPE three times, failing all three times, as well as abstaining from a fourth attempt in October of 2000. During this process, Mr. Mihaly's application was activated and deactivated numerous times, as the requirements set forth by APEGA were not met within the time periods requested.

In October of 2006, he reactivated his application and was informed in August of 2007 by the BOE that the same requirements must be completed, as well as an updated resume and updated list of references would be required. However, he could substitute the confirmatory examination for the Fundamentals of Engineering (FE) examination. The BOE also noted that Mr. Mihaly had not completed the required one year of Canadian engineering experience because the position he held did not meet the "D level" standard. He made no further attempts at examinations.

In August of 2008, Mr. Mihaly filed a complaint with the Alberta Human Rights Commission against APEGA based on alleged discrimination for his place of birth. Over the span of approximately four years, the complaint was investigated and dismissed without a hearing. Upon appealing to the Chief Commissioner, Mr. Mihaly's complaints were heard by the Human Rights Tribunal. After a review released in 2014, they found that the "Examination Standard and the Experience Standard used by [APEGA] to assess his education credentials, without more

individualized assessment or exploration of other options, constitutes discrimination which cannot be justified under the [AHRA]”². The evaluation of Mr. Mihaly’s credentials “constituted systemic discrimination”¹. Mr. Mihaly was awarded \$10,000 in damages and assistance to pursue accreditation in the form of a mentor, networking connections and language resources. APEGA promptly appealed this decision with the Court of Queen’s Bench, to which Mr. Mihaly cross-appealed seeking to increase reparations.

Over the course of two years, the Court of Queen’s Bench requested the Tribunal address three legal issues before the appeal hearing would proceed:

1. “the impact of this Court’s decision in *Grover v Alberta (Human Rights Commission)*”²;
2. “the test for prima facie discrimination”²;
3. “the test for the defence of a bona fide occupational requirement”².

In July of 2015, after the Tribunal had filed submissions on the above legal issues, the appeal hearing proceeded over the span of two days.

After six months of review, in January of 2016, the Court of Queen’s Bench over-turned the decision by the Human Rights Tribunal on the grounds that the decision was “rife with logical errors”¹, “findings of fact unsupported by the evidence”¹ and “unreasonable interpretations”¹. Therefore, Mr. Mihaly’s cross-appeal was also dismissed.

The Court of Queen’s Bench Decision

After losing to Mr. Mihaly at the Alberta Human Rights Tribunal, APEGA filed an appeal with the Court of Queen’s Bench. APEGA raised the following issues with the Tribunal’s decision: procedural fairness, jurisdiction, prima face discrimination, and justification.

APEGA argued that the Tribunal’s decision was based on grounds that neither party had advanced, thus not giving them an opportunity to address the issues. APEGA argued that by doing so the Tribunal breached their duty of procedural fairness.

To support their claim, APEGA referred to a previous legal case in which a landlord had been accused of breaching the terms of its lease. In this case, it was decided that the terms of the lease had not been breached, but instead the landlord was accused by the arbitrator of negligence. Because the issue of negligence was not brought forth by either party, this ruling was overturned. The arbitrator had reached a conclusion on these new grounds without offering each side an opportunity to present their case with respect to negligence.

The Queen’s Bench concluded that this case was dissimilar to *APEGA v Mihaly* in that the grounds for the Tribunal’s decision were addressed during the hearing, and that APEGA had not established a breach of rules of procedural fairness.

APEGA also argued that the Tribunal lacked proper jurisdiction in this case, because they claimed that the AHRA does not protect against the “place of origin of academic qualifications”. According to APEGA, the phrase “place of origin” does not necessarily refer to the place of birth, but in the context of employability it is the place in which a person received their education. They stated that because the Tribunal’s decision did not interpret “place of origin” to

encompass place of education, that it incorrectly applied its jurisdiction to adjudicate the Mr. Mihaly case. The Queen's Bench concluded that APEGA did not provide a sufficiently compelling argument on this matter and the argument of lack of jurisdiction was dropped.

With respect to prima facie discrimination, in order for a complainant to establish this, they must be able to provide evidence that they have a characteristic which is protected from discrimination; that they experienced an adverse effect, and that that adverse effect was due to the protected characteristic. Although the criteria to prove prima facie discrimination is well established, APEGA argued that it is not comprehensive enough. APEGA argued that in order for prima facie discrimination to be proven, evidence must show that the adverse effect was based on stereotypical or arbitrary treatment which is an affront to human dignity. In an effort to support their argument, APEGA referenced previous cases in which arbitrariness and stereotyping were considered in the determination of prima facie discrimination. However, it was ultimately decided that the presence of arbitrary and stereotypical treatment, although relevant, is not required to prove prima facie discrimination.

The Tribunal found that Mr. Mihaly proved prima facie discrimination, based on the three aforementioned criteria. His place of origin, which is a protected characteristic, required him to take additional exams, and therefore, carried with it an adverse effect. Despite the Tribunal's ruling, the Queen's Bench ultimately decided that the evidence was not sufficient. Although these adverse effects were not disputed, there was not sufficient evidence linking them directly to Mr. Mihaly's place of origin. The Queen's Bench sided with APEGA on this matter.

The final issue APEGA addressed was that of justification. Although APEGA was accused of a breaching the Alberta Human Rights act, they were given the opportunity during the Tribunal to provide evidence that the breach was "reasonable and justifiable in the circumstances"². The Tribunal applied a legal test to determine whether justification could be proven. Of the three criteria examined in the test, only one was disputed by APEGA; APEGA's accommodation for Mr. Mihaly, which the Tribunal found was not reasonable.

According to the Tribunal, APEGA's requirement to make Mr. Mihaly write confirmatory exams and the FE exams were prima facie discrimination, which was a breach of the act and therefore, had to be justified by APEGA. The Tribunal found that APEGA's justification was unsatisfactory because Mr. Mihaly was not given an individualized assessment to determine his qualifications; he was instead given standardized examinations.

The Tribunal justified their condemning of APEGA's standardized approach by citing a legal case in which a female firefighter was fired for not passing a standardized fitness test. The firefighter in question performed well in her role but was not able to run 2.5 km in 11 minutes. The Tribunal likened this to APEGA's approach which they argued did not properly take into account the knowledge and experience of their applicants. The Queen's bench found this analogy to be flawed because the aerobic test in this case was disproportionately difficult for women. This requirement was also not reasonable or necessary for the performance of the firefighter, and it was not difficult for the employer to use a different standard. The Queen's Bench concluded that APEGA's standard which required FE exams differed on all three points.

The issue of individualized assessment was then brought forward in which it was found that APEGA does in fact screen applicant on an individual basis, waiving exams on a case by case basis, considering education, experience, and references.

The Queen's Bench further supported justification of APEGA's examination standard citing legal cases involving medical workers. In these cases, the Queen's Bench provided evidence that confirmatory exams are a rational and accepted way to judge competency related to the job.

Ultimately the Queen's Bench concluded that, although Mr. Mihaly had established prima facie discrimination, APEGA provided a reasonable and justifiable defence as outlined in the Alberta Human Rights Act. On these grounds, the decision of the Alberta Human Rights Tribunal was overturned.

Reflection and Opinion

As young engineers in training – who have not yet graduated, let alone become certified by APEGA, it is difficult to criticize Mr. Mihaly for simply wanting an opportunity; or APEGA for wanting to uphold their standards.

Immigrating to another country can be incredibly difficult – “From navigating legal complications to understanding complex transportation systems, securing living arrangements and employment, and battling culture shock, psychological distress, depression and despair.”⁸ Now add a language barrier to all of these complications, and maybe we can begin to understand and appreciate what Mr. Mihaly has had to endure since arriving in Canada.

However, does that mean APEGA's standards should shift to accommodate individuals like Mr. Mihaly? Does his circumstance mean that he should be afforded leniency? Where do we draw the line between what some might consider discrimination and others would consider a necessity for safety?

Over the last two centuries, Canadian engineers have been responsible, in part, for the success of many major infrastructure projects. For example, the Rideau Canal (1932), the Mountain Creek Bridge (1884), the Transcontinental Railway Network (1885), the Saint Lawrence Seaway (1959), the Hydro-Quebec Very-high-voltage Transmission System (1965), as well as many others. The success of these projects, and many times the safety of those involved, hinged on decisions made by the engineers involved.

However, not all engineering endeavours have been successful. Fortunately, some of those failures – like the two Quebec Bridge collapses in 1907 and 1916 for example, helped lead to the regulating of engineers, and eventually geoscientists as a profession in the 1920s. The associations now governing these bodies created prerequisites for enrollment and could ethically maintain standards of practice to which all were required to adhere; what we now know as APEGA.

Over the years, these standards have reduced safety risks, helping prevent countless accidents that could have led to injury or death. So again, we have to ask the question, where do we draw

the line? Should Mr. Mihaly be afforded leniency because of his circumstance? More specifically, should APEGA be forced to alter their standards to create a more accommodating environment for future engineers at the risk of compromising the safety of others. Quite frankly, no.

It is a difficult predicament Mr. Mihaly finds himself in; without a doubt, many would empathize with him. However, the moment the standards are bent for one, we have ultimately created a grey area for all future applicants and those standards have thus been compromised.

As for the specifics of the ruling by the Court of Queen's Bench, it is difficult to question their understanding of the law. Like engineers, these people have spent endless hours studying and practicing their craft. Their interpretation of the letter of the law is ultimately a judgement decision, and by that, it is open to interpretation. Ultimately, we feel that the decision rendered by the Court of Queen's Bench was the correct decision.

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