

# ENGG 513 - The Role and Responsibilities of the Professional Engineer in Society

Case Study: Mihaly v. APEGA

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## **Introduction**

This report is an examination of the human rights case between Ladislav Mihaly and the Association of Professional Engineers and Geoscientists of Alberta (APEGA). Its purpose is to explore the registration process use by APEGA to register Professional Engineers in Alberta, as well as look at APEGA's responsibilities to it's members, applicants, and the public. It will also explore the outcome of the case as it progressed though the Human Rights Tribunal, The Court of Queen's Bench, and The Court of Appeals. It will examine how the decisions of these bodies affect prospective and current engineers in Canada and the way APEGA regulates these groups.

## **Stakeholders**

### Association of Professional Engineers and Geoscientists of Alberta

APEGA is the regulatory organization responsible for ensuring competency in the Engineering Profession in Alberta. They also oversee the registration of anyone looking to work in the engineering field in Alberta. They are the defendants in this human rights case, accused of discrimination, and the outcome of the case affects the evaluation process APEGA uses to accredit foreign trained engineers. [1]

### The Court of Queen's Bench

The Court of Queen's Bench is the court responsible for evaluating the appeal of a Human Rights Tribunal decision. They have the responsibility of reviewing the Tribunals decision to ensure that no error in judgment occurred. The decisions made by this court could affect the outcomes of other similar cases, so their deliberation must be thorough. They have the power to reverse any decision made by the Human Rights Tribunal or to send a decision back for further deliberation. [2]

### The Alberta Human Rights Commission

The Alberta Human Rights Commission is responsible for enforcing the Alberta Human Rights Act and provide recourse for anyone who thinks they have been denied a right outlined within that act. It is an independent commission created by the Government of Alberta. It has two main mandates: to foster equality and to reduce discrimination. [3]

### Mr. Ladislav Mihaly

Mr. Mihaly is an emigrant from former Czechoslovakia who applied for accreditation with APEGA. He is the complainant in the human rights case and accused APEGA of discrimination regarding his application. He cannot work as an engineer in Alberta until he is accredited and has blamed APEGA for having to take a low paying unskilled job due to their refusal to accredit him based on his experience. The outcome of this case affected his ability to register in his preferred profession.

### Foreign Schooled Immigrants with degrees in the Engineering field

The outcome of this case also impacts other foreign trained engineers who wish to work in Canada but have degrees from universities whose program quality is not known to Canada. This case could set a precedent for how foreign trained engineers are evaluated and their ability to work in Canada.

### Other Professional Engineering and Geoscience Associations in Canada

The outcome of this case also affects the regulation bodies of other provinces in Canada as all provinces have similar regulation and admittance processes for Engineering and Geoscientist professionals. A mandatory change to how APEGA evaluates foreign credentials could affect the processes used in other provinces. The decision of the Tribunal has already been used in a case study for a course on human rights in the work place at University of Ottawa. [4]

### The General Public of Alberta

The general public has a stake in this decision. Engineers and Geoscientists are strictly regulated because of the impact their work can have on the public. APEGA is tasked with ensuring competency of their members and any change to the standards by which members are held to could affect the safety of the public.

## **Background**

Mr. Ladislav Mihaly was born in Czechoslovakia and obtained two master's degrees in that country. He received a M.Sc. Diploma from Slovak Technical University from (1970-1975) and a Certificate in Corrosion Engineering from the Institute of Chemical Technology Prague (1977-1979). He emigrated to Canada then applied for registration as P. Eng. in May 1999. He received a letter on May 13, 1999 and was advised that completion of the National Professional Practice Exam (NPPE) was required for his registration. On Jan. 28, 2000, his transcripts were considered by an evaluation board at APEGA. His experience was considered long but narrow. On Feb 11, 2000 APEGA advised Mr. Mihaly that he must pass 3 additional exams besides the NPPE, as well as a course or exam in engineering economics. They also advised him that he failed his first attempt at the NPPE written on Jan 17, 2000. On Aug 1, 2000 Mr. Mihaly applied to rewrite NPPE on Oct 16, 2000. He did not attend the exam. On June 29, 2001 APEGA withdrew his application due to failure to complete the required exams in given timeline. On May 31, 2002 Mr. Mihaly asked to have his Application reopened and to write the NPPE On July 15, 2002. On June 3, 2002 his file was reopened and APEGA told him the confirmatory exams were required to be complete by May 2003. Mr. Mihaly failed the NPPE exam for 2<sup>nd</sup> time. On Aug 1, 2003 his file was closed again due to missing the exam deadline. On Oct 3, 2006 Mr. Mihaly asked for his file to be reopened again. He was assessed the same 3 confirmatory exams and the economics exam. He was also required to obtain 1 year of suitable D-level North

American engineering experience. His previous experience was deemed insufficient because it was not at a D-level. Mr. Mihaly did not write the exams and filed a complaint with the Alberta Human Rights Commission in August of 2008.

The complaint was based on alleged discrimination based on place of birth when being considered for a professional license under the AHRA (Alberta Human Rights Act). Specifically, sections 4, 7, and 9 of the AHRA. On Feb. 6, 2014 the Tribunal found that discrimination had occurred based on the evidence that Mr. Mihaly was assigned confirmatory exams, the FE exam, and the NPPE without special considerations being offered. The Tribunal believed APEGA should have made more of an effort to accommodate Mr. Mihaly individually. They believed that the examination standard was one size fits all and was an undue hardship to a foreign applicant. The Tribunal awarded 10,000 in general damages to Mr. Mihaly. The Tribunal also ordered APEGA to review Mihaly's transcripts in direct consultation with his previous learning institutions and any other references still available and to grant Mr. Mihaly the option to challenge specific exams in areas where he is not granted an exception. They ordered APEGA to form a committee, within three months of the decision, that would be made up of professional engineers that were of similar background to Mr. Mihaly and had successfully integrated themselves into Canadian society and the engineering practice. This committee would "assess Mr. Mihaly with a view to correct any perceived academic deficiencies." This committee would also provide Mr. Mihaly assistance and guidance to gradually progress in the engineering profession. APEGA was also ordered to assign Mr. Mihaly a mentor with a similar background to provide him with the necessary guidance to approach his challenges as an engineer and help him integrate into the profession. They were to provide him with resources to network with other foreign engineers facing similar challenges and to direct him to community resources which could help him improve his fluency and facility in the use of the English language. [5]

On November 20, 2014 APEGA filed an appeal brief seeking a reversal of the Tribunal's decision. Mr. Mihaly also filed a cross-appeal seeking that he receives compensation for lost wages in the amount of one million dollars and admittance into APEGA as a professional engineer or two million dollars if not admitted into APEGA. The Queen's Bench conducted the hearing on July 23 and 24, 2015 and read their decision on the 26<sup>th</sup> of January, 2016. The Queen's Bench decided to reverse the Tribunal's verdict due to logical flaws in the Tribunal's reasoning and unrealistic expectations of the role of APEGA in assisting Mr. Mihaly. Mr. Mihaly's cross-appeal was based on remedy only, and dependent on a finding so it was dismissed. [2]

Mr. Mihaly filed for appeal with the Court of Appeals on February 22, 2016 but did not complete the appeal. It was struck on June 23, 2016 for failure to file an appeal record. On December 15, 2016 Mr. Mihaly applied to have the appeal reinstated. An appeal can be restored based on several factors at the discretion of the judge. Factors such as, arguable merit to the appeal, an explanation for the defect or delay of the appeal, promptness to have the appeal restored or corrected, intention in time to proceed with the appeal, and lack of

prejudice to the respondents including time delay. The Court of Appeal found no merit to the appeal as the applicant did not point out any error with the findings of The Queen's Bench. Mr. Mihaly provided no explanation for the delay in submitting the required information for the original appeal. He did not attempt to perfect the appeal and submitted no further documents. The Court of Appeal also found that the complaint had been outstanding for eight years, since 2008, and that the defendants were entitled to closure on the matter. They ruled that the appeal had not met the requirements to be restored and the application was dismissed. [6]

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

The decision of the tribunal was appealed by both APEGA for a perceived misjudgment of certain facts in the case, and by Mr. Mihaly for the refusal of the tribunal to award him compensation for lost wages. APEGA sought the reversal of the tribunals orders and Mr. Mihaly sought one million dollars and accreditation as a professional engineer or two million dollars if he was not accredited. After all parties, including APEGA, the Tribunal, and Mr. Mihaly, filed briefs with the Court of Queen's Bench the hearing commenced on July 23 and 24, 2015. The Appellant (APEGA) raised four issues regarding the Appeal.

1. Procedural fairness: Did the Tribunal breach the rules of procedural fairness when he decided issues that were not raised by or with the parties?
2. Jurisdiction: Did the Tribunal err when he held that he had jurisdiction to determine whether discrimination based on the place a person receives their education constitutes discrimination based on place of origin?
3. *Prima facie* discrimination: Did the Tribunal rely on the correct legal test, and reasonably apply that test, to determine whether Mr. Mihaly had demonstrated *prima facie* discrimination?
4. Justification: Was the Tribunal's decision that APEGA's registration requirements were unjustified unreasonable?

On the first point of procedural fairness, APEGA argued that the Tribunal did not give sufficient allowance for them to file submissions in response to new sections considered by the Tribunal that neither party had raised, specifically section 8 of the Engineering and Geoscience Professions General Regulation (EGPR) [1]. The precedence for this complaint came from a case *Amacon Property Management Services Inc. v Dutt* [7] in which the defendant was originally found by the case arbitrator to be in compliance with the tenant agreement but to be guilty of negligence toward the tenants. The Supreme Court of BC ruled that this was unfair because the defendant had been given no chance to submit a defense for the accusation of negligence as it was outside the scope of the original case regarding the tenant agreement. APEGA believed that consulting section 8 of the EPRG constituted new ground that neither party had specified. The Queen's Bench decided that the decision based on section 8 of the EPRG was still within the grounds of the original hearing and not a violation of procedural fairness.

The second point of lack of jurisdiction was based on a case, *Grover v Alberta (Human Rights Human Rights Commission)* [8], in which Dr. Grover accused the University of Alberta of discrimination against Canadian-trained Ph. D's, in comparison with United States-trained Ph. D's. Dr. Grover argued that "place of origin of the person" meant where they came from as opposed to place of birth and must be considered based on what is key to the case. In this case, it was the origin of the degree. The Tribunal overseeing the case did not agree with the reasoning and concluded that place of origin cannot be extended to where a person received their Ph. D degree. The decision of the Tribunal was upheld by the Court of Appeals but the specific argument for jurisdiction was not commented on. APEGA submitted that the Tribunal had no jurisdiction to evaluate a human rights violation as discrimination based on origin of one's degree is not protected under the AHRA. The Queen's Bench ruled that unlike Dr. Grover's case, where there was no connection between place of origin and place the place of one's education, Mr. Mihaly had sufficient grounds to link these two aspects as a source of discrimination. The Tribunal was found to have jurisdiction in the matter.

The third complaint was based on concern over incorrect establishment of a *Prima Facie* case. A *Prima Facie* discrimination case is defined as "one which covers allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favor in the absence of an answer from the respondent." [9] This case is determined based on a *Moore* test in which a complainant must prove that discrimination against a protected characteristic caused an adverse impact. APEGA argued that the *Moore* test used by the Tribunal did not consider that there must be evidence that the adverse impact was based on arbitrary or stereotypical treatment that is an affront to human dignity. The Queen's Bench, citing the direction in Supreme Court of Canada decisions, found that arbitrary or stereotypical treatment was not a required factor in establishing *Prima Facie*. They also found the Tribunal had selected the proper test to decide if discrimination had occurred. The Queen's Bench found that while the Tribunal did apply the correct test to determine discrimination, the logic used while applying it was flawed. Mr. Mihaly did experience adversity and a disadvantage because of the requirements established by APEGA but place of origin was not a factor in all these requirements. Mr. Mihaly was required to write confirmatory exams or the FE exam, write the NPPE, and gain 4 years applicable experience, one in Canada. Only the FE exam or confirmatory exam requirement is based on the origin of the education of the applicant. All others are a requirement of any candidate looking for accreditation with APEGA and are therefore not applicable to the *Prima Facie* case.

The last complaint was that the Tribunal's opinion that APEGA's registration requirements were unjustified was unfounded. The only relevant requirements as established previously were the confirmatory exams and FE exam as they are the only ones based on an applicant's origin. The Tribunal decided the FE exam requirement was discriminatory and not justifiable under section 11 of the HRAA because the exam did not focus on "correcting perceived academic deficiencies" as is the stated purpose in section 8 of the EGPR [1]. They found that he should be individually assessed, and more accommodations should be made in

cases like this. The Queen's Bench disagreed with this assessment because the Tribunal incorrectly interpreted section 8 of the EGPR which states, "But 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" [1]. The wording of this section is such that correcting a perceived academic deficiency is not required of an exam given by the Board of Examiners nor is it a legal mandate of APEGA as suggested by the Tribunal. The Queen's Bench also found a lack of evidence to suggest that foreign students were at a disadvantage when writing the FE exam which tests the basics expected of a member of the engineering profession. It found APEGA acted correctly in assigning exams to ensure competency in the engineering profession where information about a candidate's experience is lacking. It also ruled that the accommodations ordered of APEGA by the Tribunal constituted undue hardship and were unrealistic given the size and nature of the requests. The Queen's Bench found that while the Tribunal had correctly established *Prima Facie* regarding the FE Exam, it failed to recognize the necessity of such measures and ordered amendments outside the scope of APEGA's capabilities. The Queen's Bench reversed the decision of the Tribunal and dismissed the cross-appeal of Mr. Mihaly due to it being dependent on a finding.

## **Reflection and Opinion**

In the case between Mr. Mihaly and the Association of Professional Engineers and Geoscientists of Alberta I agree with the decisions of the Court of Queen's Bench and The Court of Appeals. APEGA's primary purpose is to regulate the professions of engineering and geoscience to ensure competency of registered professionals to ensure public safety. [1] Mr. Mihaly claimed discrimination under the Alberta Human Rights Act, specifically sections 4, 7, and 9. Section 9 states that no trade union or employers' organization can discriminate against any person or member because of place of origin. [10] Mr. Mihaly believed that his place of origin was linked to where he received his credentials and he was being unfairly treated because of the origin of his credentials. Both the Tribunal and the Queen's Bench agreed that he experienced adversity in his registration process because of the origin of his credentials. This would constitute discrimination under the AHRA if it were not also subject to consideration under section 11 of the AHRA which states, "A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances." [10] Given that APEGA's primary directive is ensuring competency and public safety, it is justifiable that Mr. Mihaly would be subject to greater scrutiny as his credentials and education were not deemed sufficient based on the information APEGA was given.

The Tribunal found that APEGA should have done more to accommodate Mr. Mihaly and taken a more individualistic approach with regards to his certification. According to APEGA's 2016 annual report, about 5600 applications were received for evaluation. 1,637 of those applications were from international applicants and 2016 saw the lowest number of applicants in the last five years. [11] Creating a committee to individually assess Mr. Mihaly and other candidates like him as suggested by

the Tribunal would require a significant investment from APEGA. Compared to the standardized FE exam for determining qualifications, the Tribunal's suggestion constitutes unreasonable accommodation.

The Tribunal's claim that the FE exam was an undue hardship Mr. Mihaly had to face was not based on solid reasoning. During the Tribunal Hearing Dr. Lynch, the Dean of the Faculty of Engineering at the University of Alberta, testified that the FE exam is mandatory for Canadian graduates wanting to work in the United States and that the pass rate of students from the U of A is 98%. [5] Mr. Mihaly never wrote the FE exam, so it is impossible to say whether he would have passed, but the exam is considered to test the basic knowledge that is required of a Professional Engineer. APEGA is required to ensure foreign candidates' education is on par with the knowledge expected of Canadian graduates. If a foreign applicant cannot pass the FE exam and show parity with Canadian education requirements, then they cannot be considered suitable for registration as a Professional Engineer or Geoscientist. Concessions cannot be made without risking the safety of the Canadian public. The Rules of Conduct for professional engineers described in the Engineering and Geoscience Professions Act states, "Professional engineers and geoscientists shall, in their areas of practice, hold paramount the health, safety and welfare of the public and have regard for the environment. Professional engineers and geoscientists shall undertake only work that they are competent to perform by virtue of their training and experience." [1] Mr. Mihaly has not proven that he can meet the competency standards required of a professional engineer in Alberta and it would not be holding paramount the safety and welfare of the public to allow him to practice engineering freely without supervision.

I think APEGA should take reasonable steps to accommodate foreign trained engineers as long as the safety of the Canadian public is held paramount. Foreign trained engineers are an asset to the overall practice in Canada. My personal experience at the University of Calgary has allowed me to interact with many Professors and Post-docs who were foreign trained and are now registered with APEGA. The research and teaching capabilities of these foreign trained engineers is invaluable to Canada and to the University of Calgary Schulich School of Engineering. APEGA should continue to test foreign trained applicants to ensure the high quality of the Canadian Engineering practice but should be proactive in ensuring that all capable applicants are admitted and allowed to contribute to and advance the profession. APEGA already takes steps to ensure foreign applicants can apply with minimal difficulty while still ensuring credentials and competency. In APEGA's 2016 general report they described the new steps they are taking to streamline the application process. These measures include the use of World Education Service (WES) which is an international academic accrediting agency specializing in translating and standardizing foreign credentials for APEGA's assessment. APEGA is also using online testing to speed up result feedback and convenience for applicants. [11] APEGA should continue to explore new options for assessing and admitting foreign trained applicants that are cost effective while still holding Public safety as paramount.



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