

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

Mihaly Case Study

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Introduction

The purpose of this report was to examine the case of Mr. Ladislav Mihaly versus APEGA throughout its journey from Alberta Human Rights Commission to The Court of Queen's Bench and finally to the Alberta Court of Appeal. This case explored the requirements to become a registered professional engineer in Alberta by looking into APEGA's regulatory process and the associated legal and quasi-legal environment within which APEGA operates.

Mr. Mihaly was a Czechoslovakia born chemical engineer who came to Canada with the intention of becoming a registered professional engineer in Alberta. After failing to complete the process outlined by APEGA he filed a case with the Alberta Human Rights Commission under the grounds of discrimination. The results from the tribunal were then challenged in the Court of Queen's Bench and later challenged again in the Alberta Court of Appeal. The initial Tribunal found APEGA to be guilty of unjustified discrimination. This decision was reversed by the Court of Queen's Bench who found that the decision by the Human Rights Commission had been made with logical errors and wasn't supported by evidence. Mr. Mihaly challenged the decision again to the Alberta Court of Appeal who found there was no grounds for reopening the case.

It was agreed by the authors of this report that the Court of Queen's Bench was right in its decision to reverse the decision by the Tribunal. The standards set out by APEGA were not proven to be discriminatory against the appellant and the exams requested by the association were part of a process to ensure successful applicants are competent in their fields and deserve the designation of professional engineer. For these reasons APEGA was justified in its requests from Mr. Mihaly who continually showed signs of not putting in effort to comply with the Alberta requirements for professional engineers.

Stakeholders

APEGA

The Association of Professional Engineers and Geoscientists of Alberta (APEGA) was created in 1920 as one of the bodies regulating professional engineers in Canada. Its main function is to regulate the practices of engineering and geoscience in Alberta on behalf of the Government of Alberta through the *Engineering and Geoscience Professions Act*. [1] The association is divided into three main areas of regulating, operations and admissions. They cover a variety of aspects from investigating improper uses of protected titles to developing codes of conduct and ethics to govern members. Their main regulatory function is licensing individuals and companies that want to practice engineering and geoscience in Alberta. The association is also responsible for setting the practice standards that then govern these members. With a goal to encourage a business culture of belonging, inclusion, and diversity for equity within the engineering and geoscience professions they aim to be a leader in diversity within the profession. For this reason they take matters of diversity and qualification for membership very seriously, both of which are important aspects to this case.

The Court of Queen's Bench

The purpose of the Court of Queen's Bench is to hear trials in civil and criminal matters and appeals from decisions of the Provincial Court. Their vision is to be "a leader in innovative, responsible and accessible justice." The Court is responsible for hearing matter related to hundreds of matters each year ranging from criminal and civil proceedings to reviewing

government and tribunal action in Alberta. The Court is made up of a Chief and Associate Chief Justice backed by a number of both full and half time Justices and Masters in Chambers. There are also a number of staff member within the court including legal officers and other assistants.

The Alberta Human Rights Commission

The main goal of the Alberta Human Rights Commission is to ensure all Albertans are treated fairly and without discrimination in all aspects from earning a living to services available and to foster equality. The Commission operates under the Alberta Human Rights Act with the purpose of upholding its mandate. This is accomplished through public education and community initiatives and being involved in the resolution and settlement of complaints of discrimination. The Chief of Commissions and Tribunals are responsible for reviewing appeals and deciding whether to dismiss or continue them.

Mr. Ladislav Mihaly

The main subject of this report is Mr. Ladislav Mihaly. He was born in Czechoslovakia and emigrated to Canada with the intention of becoming a registered professional engineer in Alberta. He came to Canada with the hope of creating a better life for his wife and kids. Having graduated with two masters degrees from Czechoslovakia he didn't anticipate any resistance with being registered in Canada. From 1970 to 1975 he attended the Slovak University of Technology in Bratislava and graduated with a specialization in Technology of Fuels and Thermal Energy. From 1977 to 1979 he attended the Institute of Chemical Technology (ICT) in Prague and received a certificate in Corrosion Engineering in 1981. [2]

Engineering Regulators

Each province is responsible for regulating membership to the engineering profession but all are based on the same standard set of rules and guidelines. Based on the outcome of this case, any drastic adjustments may have ramifications to other organizations. The organizations are grouped under Engineers Canada which is responsible for supporting the provincial and territorial organizations in their attempt to regulate engineering in public interest.

Citizens of Alberta

The citizens of Alberta are trusting organizations such as APEGA to regulate applicants to professional organizations and ensure those working under recognized titles are qualified. There are over 40 000 engineers in Alberta [3] and each of these needs to be screened appropriately to ensure the citizens of Alberta maintain confidence in each and every member.

Internationally graduated applicants

One of the main groups affected by the outcome of this case is future internationally graduated applicants looking to become registered in their profession within Canada. The outcome for this case could result in stricter or more lenient regulations on registration and transfer of qualifications. Over 1500 engineers have applied to become registered with APEGA each year from 2012 through 2016 [3]. That means over one third of applicants in each of those years was internationally graduated. Each of them must go through the APEGA specified process to become a registered professional engineer in Canada.

Background

The topic for this case began in May 1999 with Mr. Mihaly first applied to APEGA desiring to become registered as a Professional Engineer. As part of his application he provided the names of three references he had worked under in Bratislava. By May 13, 1999 APEGA had acknowledged his application and requested all the necessary documentation to receive his designation. This included transcripts, his visa and landed immigration form. Mr. Mihaly was also advised that in addition to the paperwork, he was required to write the National Professional Practice Exam (NPPE).

He first attempted the exam on January 17, 2000 but was unsuccessful. In addition to the exam being failed, the board of examiners decided his experience, although long, was too narrow and his references were from supervisors who had not known him long enough to properly evaluate his work. On February 11, 2000 APEGA advised Mr. Mihaly that he had failed his first attempt at the NPPE and in addition to needing to retake and pass the exam he would need to complete three confirmatory examinations and take a course or pass an equivalent exam in Engineering Economics by May 2001.

On August 1, 2000 Mr. Mihaly applied to re-write the NPPE but on the date of the exam, October 16, 2000, he did not show up for his test. During the eventual trial against APEGA he claimed to have received a letter stating he passed this exam even though he didn't show up to write it. On June 29, 2001 after having failed to pass the NPPE by the specified date (May 2001) he was advised that his application had been withdrawn by APEGA.

Mr. Mihaly asked APEGA to reactivate his application on May 31, 2002 and also applied to write the NPPE for a third time. His justification for not completing the previous application process was a serious car accident and resulting health problems which had made him unable to respond any sooner. On June 3, 2002 APEGA reactivated his file and again advised him that the same conditions as before needed to be met. This time he had until May 2003 to write the three confirmatory examinations and until November 2003 to pass the Engineering Economics exam.

In an attempt to get out of the examination, Mr. Mihaly claimed he did not previously know that his masters degree did not meet the requirements of a Canadian bachelors degree despite having stated in an email to APEGA that he was "ready to pass any exam in case if need to be done"[2]. APEGA's response was to remind him of an email they had sent him on February 11, 2000 stating that his degree was on the Foreign Degree List as set out by the Canadian Council of Professional Engineers meaning he was required to write the requested exams. They explained to him that had his degree not been on the list, he would have been required to write nine exams. In another attempt to avoid the exams, Mr. Mihaly had a phone call with Mr. Tokarik from APEGA on July 8, 2002 asking for the exams to be waived based on 10 years of experience. Mr. Tokarik sent out a Reconsideration and Appeal Sheet to Mr. Mihaly by fax to file an appeal if he wished but he never did.

On July 15, 2002 Mr. Mihaly failed the NPPE again resulting in APEGA withdrawing his file on August 1, 2003 because he did not pass the required exams by the specified date. Four years later, Mr. Mihaly asked APEGA to reactivate his application again and APEGA agreed so long as he provide an updated resume and list of updated references, given the passage of time. On November 16, 2006 Mr. Mihaly provided the requested information which included the name of

a Professional Engineer he had worked under for more than a year in Calgary, a name of a Gas company owner and a name of a co-worker for consideration as references.

The Board of Examiners reconsidered Mr. Mihaly's application on August 10, 2007 and came to the conclusion that Mr. Mihaly still had to complete the three previously requested exams along with a course or exam in Engineering Economics or the Fundamentals of Engineering Examination. Along this these exams he was required to obtain one-year acceptable D level North American engineering experience as he had not acquired this while working in his position in Canada.

Mr. Mihaly didn't write the required examinations. Instead, on August 5, 2008 he filed a complaint with the Alberta Human Rights Commission for having been denied registration as a professional engineer. His complaint was on the basis of whether the requirements imposed on him by APEGA were contrary to the Alberta Human Right Act. His complaint was filed under sub sections 4, 7 and 9 [2]. Section 4 prohibits discrimination in goods, services, accommodation or facilities. The commission found that the matter was related to the relationship between APEGA and Mr. Mihaly which could be seen as registration or the right to practice engineering in Alberta. Section 7 addresses discrimination in employment practices but because he was not employed by APEGA which section was found to be irrelevant. Section 9 address discrimination by an organization. Because Mr. Mihaly was unable to practice as an Engineer without a license and being denied an opportunity to earn a livelihood in his desired profession by APEGA, this section was found to be relevant.

During the trial his engineering credentials were assessed. Mr. Mihaly claimed he received two letters (from Canadian Council of Professional Engineers and Canadian Council of Technicians and Technologists) before emigrating stating his credentials were valid but no longer had the letters. The second letter was produced during cross-examination as he had sent it to APEGA as part of his application. He tried to use the fact that his degree was on the Foreign Degree List as a source of discrimination but the list had in fact reduced the number of exams he'd been required to write, as explained to him at a previous date. When questioned about not even showing up for the requested exams he explained that he did not write the exams requested by APEGA after learning he was being treated differently than applicants from countries such as the UK or France.

On February 6, 2014 the Tribunal made their decision. It was found that Mr. Mihaly had succeeded in establishing that the *Examination Standard* and the *Experience Standard* used by APEGA to assess his educational credentials, without more individualized assessment or exploration of other options, constitutes unjust discrimination under the Act. In compensation Mr. Mihaly was granted \$10,000.00 to cover general damages. It was also required that APEGA evaluate his credentials and allow him to challenge specific parts of the examinations where he is lacking. In three months provide committee to evaluate any perceived academic deficiencies while providing him with resources and a mentor with similar background [2].

Unsatisfied with the results, APEGA appealed to the Court of Queen's Bench about the Tribunal's decision on November 20, 2014. Mihaly cross-appealed for \$1,000,000 and registration with APEGA or \$2,000,000 if not registered [4]. The initial hearing was booked for December 21, 2014 but did not proceed as the Court wished to receive submissions on behalf of the respondent on legal issues raised by the Appellant. The Court requested the Tribunal to address a number of issues which they submitted by March 19, 2015. On April 10, 2015 APEGA filed a reply brief and

Mr. Mihaly filed further submissions. Intervener declined to make further submissions. The appeal hearing was held on July 23 and 24, 2015. It was concluded that the decision of the Tribunal should be reversed and the cross-appeal by Mr. Mihaly was dismissed.

Unhappy with this reversal, Mr. Mihaly filed an appeal to the Court of Appeal in Alberta on February 22, 2016 but on June 23, 2016 the appeal was struck for failure to file the appeal record. On December 15, 2016 the appellant brought the application to restore the appeal and complained that the court hadn't allowed him to submit material but this was not an error as once the court commences, the trial is final. As he was unable to provide a reason for his delay the application was dismissed on January 10, 2017.

The Court of Queen's Bench Decision

Following the decision of the Tribunal, APEGA made an appeal to the Court of Queen's Bench. The topic of this appeal was to determine if APEGA had provided reasonable accommodations for Mr. Mihaly given the circumstances, and whether the Tribunal's decision was appropriate. More specifically, whether the Tribunal were procedurally fair in their decision, had the jurisdiction to classify the type of discrimination occurring, if the discrimination occurring was correctly tested, and if they were justified in saying APEGA's requirements are unreasonable [4 p.9]. The decision made by The Court of Queen's Bench following the appeal was a reversal of the decision made by The Alberta Human Rights Tribunal, and a dismissal of Mr. Mihaly's cross-appeal.

On the topic of procedural fairness, the Tribunal determined that APEGA's examinations were not "for the purpose of correcting a perceived academic deficiency" as "required" [5 p.9] per the EGPR. APEGA argued that this decision breached the duty of fairness as the decision was based on grounds not brought up by either party, nor were they given an opportunity to address it [4 p.9].

APEGA refers to *Amacon Property Management Services Inc. v Dutt* [6], in which an arbitrator found that a landlord did not breach the tenancy agreements but was still liable of negligence to the tenants. As neither party had addressed the issue of negligence at the hearing, duty of fairness requires that both parties can address the new grounds presented. The Court who reviewed this issue determined that the arbitrator was unfair as he reached his own conclusion without giving each side an opportunity to be heard on the issue.

The Court of Queen's Bench determined that Tribunals and courts do not need to provide an opportunity to be heard for every point of law considered [4 p.10]. As the grounds of the case were the same as the grounds of the Tribunal's decision – that APEGA's standards are considered prima facie discrimination – the Court concluded that there was no breach of procedural fairness.

APEGA also submitted that the Tribunal did not have the jurisdiction of Mr. Mihaly's complaint, as the AHRA does not protect against discrimination from place of origin of academic qualifications. To argue this point, APEGA referred to *Grover v Alberta* [7]. As per this case, Veit J determined that "place of origin" enumerates as "place of origin of the person," and could not be stretched to mean "place of origin of a degree." The Tribunal dismissed this argument, referencing *Bitonti v British Columbia* [8] where the Tribunal considered complaints from foreign medical graduates who alleged that British Columbia practitioners discriminated

against them. They concluded that while “place of origin” does not include place of training, the definition is broader than place of birth.

The Court determined that *Grover* was less applicable than *Bitonti*, but that the proper test of prima facie discrimination is *Moore v British Columbia* [9]. To establish a case of prima facie discrimination a complainant must show they have a characteristic protected from discrimination, that there was an adverse impact, and said characteristic was part of said impact. It was determined that discrimination is not restricted to rules directly from the *AHRA*. As long as a rule or practice had adverse impact and the ground of discrimination was factor is said impact, discrimination can occur. By this definition it was determined that the Tribunal had the jurisdiction to apply the correct legal test.

Under the issue of prima facie discrimination using the *Moore* test, a complainant must show they have a characteristic protected from discrimination, that there was an adverse impact, and that said characteristic was a factor in the impact. APEGA argued that this test was not comprehensive, and that a complainant must also show that the adverse impact was based on arbitrary or stereotypical treatment that is an affront to human dignity [4 p.13]. As per *Stewart v Elk Valley Coal Corporation* [10], it was found that the *Moore* test is the correct legal test, and the condition of arbitrary or stereotypical treatment was not necessary but still relevant. Due to this the Court found the *Moore* test to be the correct one.

APEGA then argued that the Tribunal was wrong in stating that APEGA’s policies were discriminatory. APEGA assumes nothing of the qualifications of any graduates, unless the institution satisfies APEGA through the CEAB accreditation process. In *Fazli v National Dental Examining Board of Canada* [11] it was found that differential treatment of medical students was due to actual knowledge of the programs, and therefore not considered discrimination, as graduates of a known program cannot be treated as ones from unknown programs. The Court determined that based on this the Tribunal’s determination was in part unreasonable.

Finally considering the adverse impact affected by Mr. Mihaly, the Court found that as he could not avoid the required exams, this was enough to consider it an adverse impact. Tests like the NPPE however are required by everyone, and therefore do not constitute discrimination. As well, the requirement of 1 year of Canadian experience is important to ensure engineers understand Canadian codes and how engineering is done in Canada. Mr. Mihaly was not able to prove this had an adverse impact, nor that his inability to find a job was due to his place of origin. As the Tribunal did not apply the *Moore* test to the NPPE and Canadian experience requirement and did not consider required elements of the legal test, the Court found prima facie discrimination regarding these unreasonable.

The argument of the Tribunal’s justification comes in the form of the *Meiorin* test from *British Columbia (Public Service Employee Relations Commission) v BCGEU* [12]. Being disputed is the defendant’s proof that the standard APEGA has is necessary to accomplish its purpose or goal, and accommodations cannot be made without incurring undue hardship. When the Tribunal found the requirement to write confirmatory exams or the FE Exam as prima facie discrimination, they ignore the disjunctive or, which includes confirmatory exams. This meant their determination was unreasonable. The FD list was also criticized, which was irrelevant as Mr. Mihaly gained an advantage due to its existence, only having to write three exams instead of five.

The Tribunal finds the FE Exam to be unreasonable as it is standardized, citing *Meiorin*. In *Meiorin* the aerobic standard was found unreasonable as more men were able to meet it than women and was not found to be necessary for proper performance. The employer also would not experience undue hardship from a change. The FE Exam is not the same as it has a pass rate of 85% and may be retaken. There was no evidence provided that foreign graduates had any trouble passing said exam.

The Tribunal found that APEGA's individual assessments to waive examinations were also on very narrow grounds, which was incorrect as 15% of applicants have them waived. The corrections expected by the Tribunal also went beyond the scope of correcting discriminatory conduct and cause undue hardship on APEGA. While Mr. Mihaly had established prima facie discrimination, it was found that these were justified under section 11 of the *AHRA*.

Reflection and Opinion

We disagree with the decisions of the Alberta Human Rights Commission. It is unreasonable for one to determine that a regulated profession such as engineering, which must ensure the safety of the public while performing their job, to accommodate degrees of which little knowledge is known. In cases where an institution or region of origin spend time and effort to ensure standards of education meet that of Canada's expectations, it is understandable to judge them differently than that of Mr. Mihaly's case.

As well, the Tribunal did not consider many factors when considering that APEGA were not justified in making these examinations mandatory. They excluded parts of the *EGPR*, which stated that confirmatory exams are also allowed, and made assumptions about APEGA's exams and admittance process that simply were not true. This is shown with the FE Exam and waiving of examinations. The FE Exam has a pass rate of 85%, and Mr. Mihaly very reasonably could have passed it with this considered. As well, 15% of applicants have their examinations waived, in which the Tribunal had stated was a very narrow case.

We agree with the decisions of the Court of Queen's Bench to reverse the Tribunal's decision and dismiss Mr. Mihaly's cross-appeal. however. APEGA did not find reasonable proof against the Tribunal's procedural fairness or jurisdiction to make its claims. It did however prove that the Tribunal in part did not properly determine prima facie discrimination regarding the NPPE and the required 1 year of Canadian experience. Both are required by all applicants and therefore cannot be discriminatory.

The Tribunal was also unreasonable in finding that APEGA's requirements were unjustified. As the examinations and restrictions are required to ensure public safety and proper understanding of Canadian practices, it is completely understandable that applicants whose qualifications are not known should be required to prove themselves. APEGA should not be required to determine if every institution's programs are comparative to that of its own standards. The immense resources this would take would incur severe hardships on APEGA, and by extension other regulators across the country. In this sense the Court's decision was understandable and reasonable.

Finally, we agree with the decision of the Alberta Court of Appeals to dismiss Mr. Mihaly's appeal in [13]. Mr. Mihaly did not perfect the appeal after filing it, and failed to file the Appeal Record, for which the Court struck the appeal. Later he tried to restore the appeal and did not meet the requirements for restoring the appeal, as no patent error on the decision was

shown, and gave no explanation for the delay in responding for the appeal, nor preparing the Appeal Record. For this reason, the Court dismissed the restoration of the appeal, which is understandable.

We believe that APEGA already accommodates foreign-trained engineers and geoscientists. APEGA has several different methods in which they try to make it easier for foreign graduates to apply, such as the Foreign Degree List which allows many applicants to take three confirmatory examinations instead of the regular five, making it significantly easier and less straining for them to be accepted.

As well, there are several institutions that are considered equivalent to APEGA's standards via CEAB accreditation process, which are then considered the same as Canadian graduates. Any additions to this process could undermine the integrity and safety of the public, as ensuring that engineers understand the local rules and regulations is vital to the safety of the people. The only additional accommodation that could be performed is increasing the sizes of the Foreign Degree List or accredited foreign institutions. This is not a viable solution however, as the required manpower to perform this task is more than APEGA can provide and would therefore force undue hardship upon them. Over time these lists will increase in size, but it is impossible to accommodate everyone without inhibiting APEGA itself.

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