

Mihaly vs APEGA

ENGG 513 Report

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Introduction

This report will examine and analyze the case between Mr. Ladislav Mihaly and The Association of Professional Engineers and Geoscientists of Alberta (APEGA). Mr. Mihaly filed a complaint to the Human Rights Commission of Alberta after APEGA denied his application to be licensed as a professional engineer in Alberta [1]. The Human Rights Commission of Alberta determined that APEGA had discriminated against Mr. Mihaly on the protected ground of “place of origin” and awarded him \$10,000 in damages [1]. Both APEGA and Mr. Mihaly appealed this decision to the Alberta Court of Queen’s Bench, and the court ruled in favour of APEGA, overturning the previous ruling[2]. Mr. Mihaly filed an appeal of the Court of Queens Bench decision, but this appeal was dismissed by the Alberta Court of Appeal, upholding the Court of Queen’s Bench decision.[3]

In this report, each stakeholder will be identified, the background of the case will be reviewed, and the decision made by the Court of Queen’s Bench of Alberta will be analyzed in detail. Following this, a personal reflection and opinion of the case will be given.

Stakeholders

APEGA

The Association of Professional Engineers and Geoscientists of Alberta (APEGA) is the regulatory body licensing engineers for all of Alberta. APEGA regulates the practice of engineering according to the the power granted to it by the Engineering and Geoscience Professions Act (EGPA) and the Engineering and Geosciences Professions General Regulation (EGPR) to ensure the safe and competent practice of its members [4][2]. Anyone wishing to call themselves an engineer in Alberta must be registered and licensed by APEGA [5].

Court of Queen’s Bench

The Court of Queen’s Bench is the second level in a three tier court system in Alberta, ahead of the Provincial Court of Alberta and before the Court of Appeal of Alberta [6]. The Court of Queen’s Bench consists of the Chief Justice, the Associate Chief Justice, as well as other federally appointed justices and provincially appointed Masters in Chambers [7]. This higher court regularly deals with civil and criminal trials throughout Alberta [7].

Alberta Human Rights Commission

The Alberta Human Rights Commission is an organization created by the Government of Alberta to ensure that the rights of Albertans are acknowledged and maintained according to the Alberta Human Rights Act [8]. It seeks to uphold equality and eradicate discrimination through education and public campaigns. It exists to ensure accountability and settle matters of discrimination through tribunal and court hearings [8].

Mr. Ladislav Mihaly

Mr. Ladislav Mihaly was born and educated in former Czechoslovakia where he worked as an engineer for 25 years [1]. After immigrating to Canada with his family, Mr. Mihaly sought to work in his previous field as an engineer in Alberta's oil and gas industry [1]. From 1999 to 2008 Mihaly made multiple attempts to register with APEGA to work as a professional engineer and was told he did not meet APEGA's qualification standards for a professional engineer [1]. He was required to prove his competency through exams and courses which he felt should not be required of him, since they would not have been required of engineers from other foreign countries such as the UK or France [1]. In 2008, Mihaly filed a complaint of discrimination against APEGA citing his foreign education and origin as the reason they would not register him as a professional engineer [1].

The People of Alberta and Canada

The people of Alberta and ultimately the Canadian people rely on organizations like APEGA to set standards for education of its members. Albertans want to know that the men and women engineering their infrastructure are educated and competent so they can feel safe when using infrastructure designed by APEGA certified engineers. Society as a whole depends on engineers capable of designing safe structures or products.

The Court of Appeal of Alberta

The highest appeal court in Alberta, the Court of Appeal of Alberta hears most civil and criminal appeals [9]. The Court of Appeal does not re-try cases, it simply reviews the records of cases from lower courts to determine if there were any errors of law or fact [10].

Future Employers of Professional Engineers

Future employers of Mr. Mihaly and similar foreign educated engineers want to be confident that when they hire a "professional engineer" that they are getting

someone with a certain minimum level of education, knowledge, and capability. APEGA uses their education and experience standards to enforce this minimum, as provisioned by the EGPA and EGPR [1][2].

Background

In May, 1999, Mr. Ladislav Mihaly first applied to APEGA (then known as APEGGA) to be registered as a Professional Engineer [1]. He provided a description of his qualifications, experience and references [1]. Upon request he also provided educational transcripts and immigration papers [1]. APEGA informed Mr. Mihaly that he was required to write the National Professional Practice Exam (NPPE), a non-technical exam covering topics such as engineering ethics, legislation, regulation, and practice in Canada[1]. After reviewing Mr. Mihaly's application, APEGA additionally informed him that he would be required to write three additional tests to confirm his knowledge of engineering in accordance the requirements for an "examination candidate" as outlined in section 8 of the EGPR [1][11]. These requirements were given because Mr. Mihaly's place of education was on the Foreign Degree List, which is comprised of foreign countries and institutions that have been informally assessed using secondary sources to determine the approximate quality and level of education received by students of these institutions [1]. Had Mr. Mihaly's degree not been on the list, APEGA would have required nine exams [1]. Mr. Mihaly wrote the NPPE on January 17th 2000, but was not successful [1]. He applied to write the exam a second time on October 16th of 2000 but did not attend the exam [1]. He also did not complete the other three confirmatory exams APEGA had requested that he complete by May of 2001, resulting in APEGA withdrawing his application in June of 2001 [1].

In May 2002 Mr. Mihaly requested his application be re-opened and to write the NPPE a third time in July 2002 [1]. APEGA re-opened his application with the same terms, that he complete the three confirmatory exams in addition to the NPPE. In addition, an exam or course in engineering economics was required [1]. Mr. Mihaly again failed the NPPE exam, and additionally did not complete the other required exams, resulting in APEGA again withdrawing his application in August 2003 [1].

In October 2006 Mr. Mihaly requested his file be reopened a second time, at which point APEGA requested an updated resume and references, given that many years had passed since his initial application [1]. Mr. Mihaly provided this information and after reviewing his updated application in August 2007, APEGA determined that he was still required to write three confirmatory exams plus the course/exam in engineering economics, or a new option of a single Fundamentals of Engineering (FE) exam which had recently been adopted by APEGA [1]. It was also determined that his recent work experience in Alberta was not at the level that was required for APEGA's requirement of 1 year of north american engineering experience, another

requirement for any foreign engineer seeking registration [1]. Once again Mr. Mihaly did not complete the required examinations, and instead filed a complaint with the Alberta Human Rights Commission (AHRC) in August 2008 [1].

AHRC established that there was indeed enough evidence to suggest discrimination, requiring APEGA to give justification for why it should be exempted from the requirements of the Alberta Human Rights Act (AHRA) according to the allowed exemptions in the act [1]. After hearing APEGA's case, the AHRC made its decision in the case in favour of Mr. Mihaly in February, 2014 [1]. The AHRC determined that APEGA's "one size fits all" Examination Standard discriminated against Mr. Mihaly and that he was not provided adequate assistance and accommodation [1]. The Commission said that APEGA should have provided a more individualized assessment [1]. Rather than relying on the "Foreign Degrees List" which was developed based on second hand information, they should have conducted a more detailed and direct investigation into Mr. Mihaly's credentials, up to and including contacting the university that he attended [1]. The tribunal awarded Mr. Mihaly \$10,000 in general damages and required APEGA to reconsider his application and to institute individualized means of assessment to correct any areas of deficiency both with Mr. Mihaly and future applicants [1].

Both APEGA and Mr. Mihaly Appealed the AHRC's decision to the Alberta Court of Queen's Bench [2]. APEGA was requesting a complete reversal of the ruling, while Mr. Mihaly wanted additional damages for lost wages of \$1 million and registration with APEGA, or \$2 million if not registered [2]. On January 26th 2016 the AHRC's decision was reversed by the Court of Queen's Bench on the grounds that the AHRC's reasoning was "rife with logical errors, findings of fact that are not supported by evidence, and failures to take into account relevant considerations" [2]. The accusation of discrimination was not found to be justified under section 11 of the AHRA [2][12]. Since the AHRC's decision was reversed, Mr. Mihaly's cross appeal was rendered moot, and therefore dismissed.

Following this verdict, Mr. Mihaly made an initial filing with the Alberta Court of Appeal to review the case, however he failed to file the proper follow-up documentation in a timely manner, resulting in his appeal being struck off. After requesting a restoration of his appeal, it was ultimately dismissed on January 17th 2017, thus closing the case with the Court of Queen's Bench decision standing.

Court of Queen's Bench Decision

The Court of Queen's Bench reviewed the decision of the ABHC based on the following issues raised by APEGA, which are quoted from [2]:

1. Procedural fairness: Did the Tribunal [of the AHRC] 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?

In addition, the case was considered based on new case decisions published by the Supreme Court of Canada between the time the appeal was filed, in 2014, and the case was heard, in 2015 [2].

On the first issue, the court found that the AHRC did not breach the rules of procedural fairness when it made its decision based on section 8 of the EGPR without raising this section during the hearing [2]. The court stated that neither the AHRC nor any court is required to give parties an opportunity to respond to every point of law referred to in a decision, even if doing so may have been prudent [2]. Therefore it was concluded that APEGA had not effectively established a breach of the rules of procedural fairness [2].

On the second issue, the court found that the AHRC did in fact have jurisdiction in this case [2]. The ruling was based on a number of cases related to the scope of "place of origin", a protected ground in the AHRA [2]. A previous case in Alberta supported the notion that "place of origin" did not include "place of education", however another case in British Columbia supported the notion that "place of origin" and "place of education" are often linked such that discrimination could be considered to have occurred based on place of education [2]. Despite these arguments, the court ultimately based its decision on neither previous case, instead looking at a third previous case that established a test to determine if adverse effect discrimination had occurred [2]. The case stated that a complainant is required to establish "that they have a characteristic that is protected from discrimination, that they they experienced adverse impact, and that the protected characteristic was a factor in the adverse impact" [2]. In this case, the court agreed with the previous decision by the AHRC that Mr. Mihaly had indeed met these requirements, and thus concluded that APEGA failed to establish that the AHRC lacked jurisdiction in this case [2].

On the third issue, the court found that the AHRC did not correctly apply the legal tests used in determining *prima facie* discrimination, although it noted that the correct tests were indeed used [2]. APEGA submitted that the AHRC's finding that its policies were based on discriminatory assumptions that foreign trained engineers from countries with which APEGA does not have a Mutual Recognition Agreement (MRA) are not on par with Canadian standards is not supported by evidence [2]. APEGA further asserted the contrary, that the supplied evidence in fact shows that APEGA makes no assumptions about a foreign graduates qualifications [2]. The

court agreed with APEGA, stating that the distinction between accredited or equivalent programs and other programs is not based on assumptions, but on knowledge of the programs [2]. The court determined that when APEGA distinguishes between graduates of engineering programs that it has MRAs with and graduates of relatively unknown programs it is not making any assumptions about whether the graduates of unknown programs have inferior or equivalent education, they simply do not know [2]. Therefore based on the above ruling, as well as additional analysis of the AHRC decision, the court concluded that the AHRC did not correctly apply the legal test required to establish that discrimination had occurred [2].

On the final issue, the court found that the AHRC correctly applied the first two of three points in the legal test required to establish “reasonable and justifiable” contravention of the AHRA, but failed in its application of the third point [2]. On the third point the AHRC determined that APEGA did not reasonably accommodate Mr. Mihaly, and that doing so would not have seen APEGA incur “undue hardship” (the core of the third point) [2]. It stated that APEGA should proactively seek out MRAs with institutions and countries around the world because the way that the FD list is compiled (based on secondary sources) is not effective [2]. The court disagreed, finding that there was no evidence that the resources and ability required to undertake such a proactive approach are available to APEGA, nor should they be expected to be available [2]. In fact, the court found that the evidence suggested the opposite, as the process of negotiating an MRA or establishing substantial equivalence is a significantly lengthy and costly process, which is why APEGA relies on the work of the Canadian Engineering Accreditation Board (CEAB) in this area [2]. The AHRC also decided that the confirmatory examinations were unreasonable because they are standardized tests, however the case cited in support of this argument was determined by the court to not apply, as the core of that case was whether passing the standardized test was actually required for the safe and efficient performance in the job the test was for [2]. In this case the court found that these tests do indeed determine whether an individual has the knowledge and competence required to safely and efficiently practice as an engineer [2]. Finally, the AHRC also directed APEGA to provide a number of supports to Mr. Mihaly, including matching him with a mentor and providing him with resources to help him network with other foreign engineers, to assist him in gaining increased fluency in English, and to establish a special committee with the express purpose of assessing Mr. Mihaly’s credentials and possibly finding alternate ways to provide him with a truly individual assessment, including developing individualized tests [2]. The AHRC found that providing these supports should not have much of an undue effect on APEGA since they have so many dues paying members [2]. On this point the court again disagreed with the AHRC, especially in their assessment that providing these many supports to Mr. Mihaly and indeed other applicants like himself would not cause “undue hardship” for APEGA [2]. The court found that these requirements “would

appear to entail a significant dedication of resources” [2]. The court went on to say that making such accommodations would fundamentally alter the regulatory role of APEGA [2]. Based on these findings, the court ultimately ruled that the AHRC’s decision that APEGA had not sufficiently justified their requirements under section 11 of the AHRA was unreasonable [2].

Based on the court’s ruling on the above points, it concluded that the AHRC’s decision should be reversed, and since a reversal of that decision rendered Mr. Mihaly’s cross-appeal moot, that appeal was dismissed [2].

Reflection and Opinion

I find this case to be an example of how Canada’s excellent human rights legislation can be abused, and I ultimately applaud the court’s decision in the matter. From my perspective, it seems that the AHRC looked at the case from a position that was completely detached from the fundamental purpose of standardized testing and assessment. If we cannot hold all our regulated professionals to the same standard, then how can we effectively regulate them at all? APEGA cannot possibly know about and adequately vet every single engineering degree program in the world for equivalency with Canadian standards. However, since their primary purpose is to ensure that anyone in Alberta that uses the title “Professional Engineer” meets the same minimum standard, they have to assess that each applicant meets that standard. In some cases they have sufficient information about the applicant’s education to immediately know that they have the required knowledge. Other times, they do not, and so the easiest way to assess the presence of such knowledge is a test.

On the topic of Mr. Mihaly’s conduct throughout the years. It doesn’t appear that he made much of an effort to prove to APEGA that he had the requisite knowledge. If he had been a practicing engineer in Europe for 25 years then it should have been relatively trivial for him to complete the examinations, though I acknowledge that his proficiency in English may have been a barrier to writing the tests. The fact that he did not even attempt the tests makes me wonder if this was from a place of pride and arrogance, that “an engineer with 25 years of experience should not have to prove his competence”. However there is little information available to truly assess Mr. Mihaly’s attitude toward APEGA’s requirements. He did write the NPPE exam three times, failing each time, but there is no evidence about whether he did or did not make any attempt to learn and study the material on the exam between writings. As a student myself, I imagine that after writing the test twice he would have a pretty good idea of the types of questions, and the topics covered by the test. Again, if English proficiency was the issue, it would seem that sufficient time had passed between the writing of each NPPE for anyone who was serious about passing to gain the required skills in English. I am not aware of the availability

of ESL classes in the early 2000s but if it's anything like 2018, this should have been a minimal barrier.

I wholeheartedly do not believe that APEGA has any role whatsoever in accommodating foreign trained engineers. APEGA exists to set and ensure compliance with the standards of practice of professional engineers. It is up to the individual applicants to ensure that they meet these standards. If an engineer that is trained in a country that does not have an MRA with APEGA wishes to be licensed, they must prove to APEGA that they have the qualifications, up to and including writing tests that evaluate their engineering knowledge. If their knowledge is lacking, it should be up to the applicant to seek out appropriate "upgraded" education, as this is different for each applicant.

References

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[11] Engineering and Geoscience Professions General Regulation. Edmonton, Alberta, 1999.

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[13] Engineering and Geoscience Professions Act. Edmonton, Alberta, 2015.