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*ENGG 513*

*APEGA v. Mihaly Case Study*

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## Acronyms

**AHRA:** The Alberta Human Rights Act.

**AHRC:** The Alberta Human Rights Commission. An organization tasked with upholding the Alberta Human Rights Act.

**APEGA:** The Association of Professional Engineers and Geoscientists of Alberta. Formerly APEGGA, this paper will refer to it as APEGA in all cases.

**COQB:** The Court of Queen’s Bench. The superior trial court of Alberta.

**FD:** Foreign Degree, as in Foreign Degree List. A list curated by APEGA to track which degrees earned in foreign territories are considered equivalent to domestically-earned degrees.

**FE:** Fundamentals of Engineering, as in Fundamentals of Engineering Exam. An exam created by the National Council of Examiners for Engineering and Surveying in the United States of America to judge basic engineering competence.

**NPPE:** National Professional Practice Exam. A nationally-created Canadian exam for confirmation of “knowledge of professionalism, law, and ethics.” [1]

## Introduction

The purpose of this report is to describe and analyze the “Mihaly Case,” a legal and ethical dispute between the Association of Professional Engineers and Geoscientists of Alberta (APEGA) and Mr. Ladislav Mihaly. The dispute began with several years of Mr. Mihaly being denied membership to APEGA and came to a head when Mr. Mihaly accused the organization of discrimination. This accusation led to two legal decisions.

The case itself involved questions on the nature of human rights. The main assertion of Mr. Mihaly was that he was being discriminated against because of his place of origin. On the APEGA side, the assertion was that they were simply not willing to allow membership to someone who they did not know for certain was qualified.

Ultimately the case with the Alberta Human Rights Commission Tribunal led to a decision in favour of Mr. Mihaly, however that decision was appealed by APEGA. The appealed case was brought before the Court of Queen’s Bench, which handles the review of AHRC Tribunal actions in Alberta. The Court of Queen’s Bench reversed the previous decision, claiming APEGA’s expectations of Mr. Mihaly were not unreasonable, and did not constitute discrimination [2].

Mr. Mihaly applied for an appeal himself several months later, however the Alberta Court of Appeal rejected his application [3]. To date that is the last action in the case.

The rest of this report will go into further detail about the parties involved, as well as the events leading up to and during the case. It will detail the decision made by the Court of Queen’s Bench, and includes a reflection on the nature of the case and the correctness of the decision.

## Stakeholders

### APEGA:

APEGA is a self-governed regulating body for the engineering professions in Alberta. Their stated purpose is to “Regulate the practices of engineering and geoscience to serve the public interest in Alberta” [4]. They are allowed under the *Engineering and Geoscience Professions Act of Alberta* [5] to grant professional titles in the province. They became involved in this legal dispute directly after being accused of discrimination by Mr. Mihaly.

### Mr. Ladislav Mihaly:

Mr. Mihaly is an engineer educated in the former Czechoslovakia who immigrated to Canada in 1999. This was when he first applied for membership to APEGA. After several years of being denied entry on the grounds of insufficient qualification, he claimed that APEGA’s refusal to admit him was due to discrimination. This accusation of discrimination led to legal action through the Alberta Human Rights Commission.

### Alberta Human Rights Commission:

The Alberta Human Rights Commission (AHRC) was established by the *Alberta Human Rights Act (AHRA)* to enforce the functions of that Act [6]. They became involved in the case when Mr. Mihaly filed a complaint against APEGA alleging discrimination. They handed down the first decision as to whether APEGA’s actions contravened the AHRA in 2014 [7]. That decision was appealed by APEGA, and the case went to the Court of Queen’s Bench.

### The Court of Queen’s Bench:

The Court of Queen’s Bench (COQB) is the highest Provincial court in Alberta. They are responsible for “the judicial review of government and Tribunal actions in Alberta” [8]. The COQB became involved in this case after APEGA appealed the Alberta Human Rights Commission’s decision that it had discriminated against Mr. Mihaly based on his place of origin [9].

### Honourable Madam Justice J.M. Ross:

Justice Ross was responsible for authoring the decision of the COQB to overturn the AHRC Tribunal decision. She became involved in the case after APEGA filed for an appeal of the Tribunal’s decision. The decision she authored is to date the final word on the Mihaly case in Alberta.

#### Alberta Court of Appeal:

The Alberta Court of Appeal (ACA) is responsible for overseeing appeals to the decisions made by the COQB [10]. The ACA became involved in the case after the COQB decision was appealed by Mr. Mihaly following their overturning of the earlier decision made by the Court of Queen's Bench.

#### Honourable Mr. Justice Frans Slatter:

Justice Slatter was responsible for the authoring of the decision of the ACA to refuse an appeal to Mr. Mihaly after the COQB overturned the original AHRC decision. He became involved several months after the original appeal when Mr. Mihaly attempted to restore his ability to appeal the previous decision against him.

## Background

The “Mihaly Case” can be broken up into three distinct phases: the applications, the human rights Tribunal, and the appeals.

### The Applications [2]:

The case history started in 1999 when Mr. Ladislav Mihaly first applied for membership to APEGA (then APEGGA). He claimed he was qualified because of:

- a) An M.Sc. Diploma in Technology of Fuels and Thermal Energy from the Technical University of Bratislava.
- b) A certificate in Corrosion Engineering from the Institute of Chemical Technology in Prague. [7]

APEGA did not have a mobility agreement – a method for quickly evaluating international degrees – that would apply to Mr. Mihaly’s credentials, so it was decided that he would have to write the National Professional Practice Exam (NPPE), as well as three other confirmatory examinations to prove his qualification. Because his degree was on the Foreign Degree list, he had to write three confirmatory exams instead of nine [7]. Mr. Mihaly failed his first attempt to write the NPPE and failed to show up for his second attempt. At this time his application to join APEGA was withdrawn, as he had failed to pass the required confirmatory examinations by the deadline.

In 2002 Mr. Mihaly applied to reactivate his file. Once again APEGA assigned the same requirements: the NPPE as well as three confirmatory examinations. This time Mr. Mihaly failed the NPPE on two separate occasions. He once again failed to write the three confirmatory examinations by the deadline, and his application was withdrawn.

In 2006-2007, Mr. Mihaly again applied for APEGA membership. He was given similar requirements, however was now also required to write the Fundamentals of Engineering (FE) exam. He was also informed that the work he had done while in Canada was not considered sufficient to qualify as Canadian engineering experience. This time Mr. Mihaly did not attempt to write any examinations. In 2008, Mr. Mihaly filed a complaint with the Alberta Human Rights Commission, which started the legal dispute.

### The Human Rights Tribunal [7]:

A Tribunal was held by the AHRC to evaluate Mr. Mihaly's claim that he was discriminated against when applying for APEGA membership. The main points of their case were:

- The experience standard used by APEGA was discriminatory to foreign-educated candidates, as they did not explore options for assisting them in learning APEGA's system.
- APEGA's system for evaluating foreign educational institutions is insufficient, as they did not directly evaluate the institutions.
- Mr. Mihaly's experience was such that it was difficult for him to get the required one year of Canadian experience, creating a sort of catch-22 where membership was required to gain membership.
- APEGA's examination standard was not applied with the aim of "Correcting a perceived deficiency".

Based on these ideas, the AHRC Tribunal decision stated that APEGA had violated the *Alberta Human Rights Act (AHRA)* when dealing with Mr. Mihaly. They also awarded Mr. Mihaly \$10,000 in damages and required APEGA to reconsider his application.

### The Appeals:

APEGA quickly appealed the ARHC Tribunal decision, and the case went to the Court of Queen's Bench (COQB). The COQB overturned the previous decision, stating that the AHRC Tribunal had not provided sufficient evidence for their claims. There is more information in the COQB decision in the next section.

Mr. Mihaly attempted to appeal the QOCB decision, however the appeal was refused because [3]:

- Too much time had elapsed between the ARHC Tribunal decision and the appeal, with no real progress made by Mr. Mihaly to build a case in the meantime.
- The merit of the appeal was unclear, as few facts of the case were disputed.

## The Court of Queen's Bench Decision

The Court of Queen's Bench decision almost entirely opposed the Alberta Human Rights Commission Tribunal decision. The AHRC Tribunal decision was based upon two major points: the examination standard and the experience standard of APEGA.

The first part of the AHRC case centered on APEGA's examination standard. The COQB disagreed with the AHRC Tribunal on the application of a legal test for potentially discriminatory policies used in Canada [11]. This was applied to the Fundamentals of Engineering (FE) test assigned to, but never written by, Mr. Mihaly. The Tribunal had determined that the use of the FE test was discriminatory and that "the NPPE and the FE are not specific requirements to achieving professional status as an engineer" [7]. There was no disagreement on the appropriateness of the legal test, however the QOCB disagreed on every point that the AHRC Tribunal claimed suggested discrimination. These are [2]:

- No group seems to be disproportionately discriminated against by the FE test.
- Passing the FE test is considered "reasonably necessary to safely practice engineering."
- APEGA would potentially face undue hardship if another untested standard was used.

The COQB also agreed that the FE test was meant to show entry-level competence that is expected in all APEGA-licensed engineers.

The QOCB's other major disagreement was related to the experience standard. The ARHC Tribunal stated that APEGA should be evaluating foreign candidates through an individual assessment. The QOCB said the Tribunal's directions to [7]:

- Allow Mr. Mihaly to network with other engineers in a similar position.
- Assist Mr. Mihaly with fluency and facility of English.
- Match Mr. Mihaly with a mentor with a similar background.

were "beyond the scope of any discriminatory conduct found or even alleged." [2] The COQB added that this would be a significant investment for APEGA, as they would have to accommodate approximately 375 candidates yearly. The COQB agreed that APEGA was only trying to establish engineering competence. APEGA has a responsibility to the people of Alberta to prevent unqualified practitioners [4], as well as a right to enforce professional standards [5]. The QOCB believed that APEGA was exercising that right in a legal way.



Ultimately, the COQB overturned the previous decision made by the AHRC Tribunal, claiming APEGA had established a “reasonable and justifiable” [2] defense of their actions. The examination standard was judged to be valid, as it was the standard system used to evaluate the skill of all APEGA members. The experience standard was also allowed to stand, as working around it would be a significant exertion of resources on the part of APEGA.

## Reflection and Opinion

There are two sides to this case: the legal side and the moral side. The legal side was decided on by the courts, which ended up siding with APEGA. The moral side is not necessarily as clear cut – the question is essentially, did APEGA exercise its legal rights and powers in a responsible way? The topic is a difficult one, because it represents a possible rift between legality and morality. Ultimately, I agree with the decision of the Court of Queen's Bench.

The legal side of the argument against Mr. Mihaly is sound. The Alberta Human Rights Commission Tribunal failed to justify their assertion that Mr. Mihaly's human rights were infringed upon. It applied a test made for assessing rules and regulations that might be discriminatory [7], and it stated that APEGA's examination standard was discriminatory based on this test. This was disputed in APEGA's appeal [2], which suggested that the AHRC Tribunal had not justified its conclusions regarding the test: failure to meet APEGA's requirements could potentially lead to negative effects for the public and the engineering profession. The COQB stated that this meant the standard was reasonably necessary for safe and efficient performance.

The AHRC Tribunal also stated that APEGA should explore alternative methods for testing foreign-trained individuals [7]. It is not the legal responsibility of APEGA to evaluate educational testing methods beyond those already established. While it may be that written tests are insufficient, that is an unrelated issue. Tests are a part of all engineers' training, regardless of place of origin. The COQB decision also pointed out that the required FE exam has an 85% pass rate and did not seem to disproportionately favour Canadian Nationals [2].

The COQB decided that Mr. Mihaly did not have his human rights violated by APEGA. I believe that this is true, as Mr. Mihaly was held to the same standards as all other applicants. He showed several times that he was unable to pass the assigned examinations and was also repeatedly unwilling to sit for exams that he was required to take.

The other distinct side of this argument is the moral and ethical side. First, discrimination is a very real thing, and it can be very subtle and difficult to detect. One point of contention in the ARHC case was whether it was necessary to establish grounds of stereotyping when evaluating possible discrimination [7]. I do not think that Mr. Mihaly was specifically discriminated against because of his place of origin. He was given the same requirements every time he applied for membership. His refusal was based on established rules, i.e. he failed to complete the necessary exams in the given time frame. There also seemed to be good consensus from both appeals that the rules and requirements were created and applied in good faith.

Several of the AHRC Tribunal's directions revolved around being more accommodating to Mr. Mihaly, which could have been extended to other candidates if the decision had held. This is an interesting prospect, as it would theoretically increase the number of competent, practicing professional engineers in Alberta. This accommodation extends to the language barrier involved. The AHRC Tribunal noted that "Mr. Mihaly ... had some difficulty articulating his arguments..." [7]. It raises the question as to what responsibility APEGA has to accommodate people who do not speak English well enough to communicate clearly. The AHRC Tribunal even directed APEGA to assist Mr. Mihaly with English fluency. APEGA does have a requirement that its members are able to conduct their profession competently in English. So, while it may be in the best interest of APEGA to accommodate more individuals that might otherwise be qualified, as noted in the COQB decision this would likely be a significant investment in terms of time, money, and logistics. The moral responsibility of APEGA to protect the public overrides any possible moral responsibility to accommodate non-English speakers.

I also believe that the best way to solve problems is to throw as much manpower at them as possible, so I do think that being more accommodating to foreign-national engineers would be in the best interest of APEGA. However, I do not believe that APEGA has a moral responsibility to accommodate applicants in this position. Mr. Mihaly's main issues were lack of knowledge of APEGA's systems - as evidenced by the fact that he took a job not applicable to APEGA experience standards - and fluency in English. These two places would be a good starting point for APEGA to become more welcoming. At the very least they could set up a system that is more explicit about requirements. They could work up to full integration/assistance programs to educate about being an APEGA member, similar to this course but not tied to a university program. The world is constantly changing. Being more accepting of unique perspectives could give engineers in Alberta a competitive edge.

Ultimately, APEGA acted appropriately both legally and ethically. Their claims held up twice in court, the two appeals, and it does not seem likely there will be a chance of more action in this case. They have no real moral or ethical obligation to assist candidates, who should already be competent engineers, with integrating them into their system. That said, it might be in their best interest going forward to adjust this system, since creating larger and more diverse teams could have definite positive effects going forward.

## References

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