ENGG 513

The Roles and Responsibilities of a Professional Engineer in Society

Mihaly vs APEGA Report

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**INTRODUCTION**

To identify and practice as an engineer in Alberta there are strict guidelines that limit qualified personal to only competent individuals that practice safely and ethically. Upholding such standards is very important in ensuring public safety and maintaining the quality expected from an engineer practicing in Alberta. Whether this includes the accreditation of universities or extensive reviews of potential members, all processes must be done fairly and extensively to ensure equivalent expertise. This report will highlight the alleged discrimination of Ladislav Mihaly, by looking at both the original Human Rights complaint and the appeal. The following discussions will explore the relationship between prima facie discrimination and the bona fide occupational requirement. The case and APEGA’s reaction, analysis, and conclusion will be summarized in this report. Mr. Mihaly applied for membership to APEGA after immigrating from the former Czechoslovakia. From 1999 to 2008, Mr. Mihaly applied for membership 4 times in which each time he was informed he would have to take three confirmatory exams (or only the FE exam, after the law changed) and the NPPE exam. Twice, he failed the NPPE exam, once he failed to attend and he never attempted any of the confirmatory exams. After which Mr. Mihaly filed a complaint with the Alberta Human Rights Commission, “alleging that APEGA discriminated against him based on his place of origin when it denied him registration as a professional engineer” [1]. Although the courts initial decision agreed with Mr. Mihaly’s statement of APEGA’s discrimination, after the appeal, it was determined that APEGA had reasonable justification to assign confirmatory exams as they ensure public safety and fairness across the admittance process. Ultimately, the original Tribunal was reversed and Mr. Mihaly would have to follow the standard admission process, as initially given, if he wished to become a practicing engineer in Alberta.

**STAKEHOLDERS**

Stakeholders are the people and organizations directly involved and affected by the decisions and outcomes of the situation. The key stakeholders and their roles in this case are listed and summarized below:

* APEGA: The board that oversees registration and supervision of Alberta engineers. APEGA was in charge of reviewing Mr. Mihaly’s membership application, deciding on the status of his experience and schooling qualifications, and making the final decision. Due to complaints about the vigorous registration process from Mr. Mihaly, APEGA faced charges for prima facie discrimination. APEGA’s application process includes 48 months of engineering experience, a passing grade on the NPPE exam and academic qualifications [2].
* The Court of Queen’s Bench: The Court of Queen’s Bench oversees cases of higher criminal misconduct and civil rights. They managed the appeal submitted by APEGA and Mr. Mihaly that regarded the human rights tribunal decision convicting APEGA of discrimination. The court concluded that the tribunal was unjustified and APEGA was acting under bona fide occupational requirement [3].
* The Alberta Human Rights Commission: A commission in charge of managing human right complaints. Specifically, the complaint submitted by Mr. Mihaly. They oversaw and directed the human rights tribunal after both parties were unable to resolve the complaint [4].
* Mr. Ladislav Mihaly: An engineer from Czechoslovakia that applied for membership to APEGA and was denied after failing to pass the NPPE exam and take the other competency exams. As a result, he imputed a complaint about discrimination to the Human Rights commission against APEGA. The Human rights tribunal supported his complaint and he was granted $10,000 and reconsideration from APEGA. Mr. Mihaly then appealed the decision along with APEGA. The final verdict saw the decision of the tribunal reversed and Mr. Mihaly’s complaint was dismissed.
* CEAB: The committee in charge of certifying and accrediting various countries and schools that wish to be recognized by APEGA as having equivalent engineering programs as offered in Alberta. This may be reached by regular accreditation or joining an MRA with Canada. The CEAB is important in ensuring the safety and competency of other schools. Regarding Mr. Mihaly’s case, if such claims were seen as discriminatory, and individuals were not required to write additional exams, the work of CEAB would be for naught, as school experience would no longer have the same recognition.
* Dean David Lynch: Has a statutory position of APEGA’s board of examiners. He appeared as an expert witness to give testimony about international agreements and evaluation of credentials of engineers, specifically those educated outside of Canada.
* Dr. Gary Faulkner: The chair of the Board of Examiners for APEGA. He gave evidence regarding the application process of APEGA and the scope of work involved. As well as, the advisory of other committees, including CEAB. Having been one of those involved in reviewing Mr. Mihaly’s case, he verified and explained the decision that required Mr. Mihaly to take additional competency exams.
* Mr. Mark Tokarik: Director of registration for APEGA who testified about the APEGA selection process. Providing information to support its indiscriminately nature, that proves successful for the majority of individuals, no matter their place of origin. Having been involved in Mr. Mihaly’s case, he also discussed the history of the application and the efforts APEGA implemented to make Mr. Mihaly’s application successful.

**BACKGROUND**

Mihaly v. APEGA is an excellent example of how disputes are resolved in the engineering profession. The information and series of events leading to the case, which now lies before the Alberta Court of Appeals, is well established and not in dispute by either party.

Mr. Mihaly was born, raised, and educated in the former Czechoslovakia. In 1975, he earned a M.Sc. diploma, with a specialization in technology of fuels and thermal energy from the Slovak Technical University. He then moved to Canada and applied for APEGA registration and a Professional Engineer certification in May of 1999. APEGA acknowledged his application on May 13th, requested that he send his transcripts, and advised him that he would have to write the National Professional Practice Exam (NPPE). Additionally, he would be required to sit three confirmatory exams and an additional exam in engineering economics. He failed the first writing of the NPPE.

He applied again to write the NPPE in October of 2000 but failed to show up to the exam. Then in June of 2001, APEGA informed Mr. Mihaly that it had withdrawn his application for Professional Engineer as he had failed to write his three confirmatory exams before his May 2001 deadline.

This was a cycle of events between Mr. Mihaly and APEGA that would continue to repeat itself. In May 2002, he requested reactivation of his application, and in July 2002 he failed the NPPE again. In June of that year his application was again reactivated, and he was told to write three confirmatory exams and the additional engineering economics exam, as APEGA had previously instructed him to. Mr. Mihaly sat the NPPE in January of 2003 and for the third time, he failed. In August of that same year, APEGA withdrew his file as he had failed to write the three confirmatory exams by the deadline once again. In the fall of 2006, Mr. Mihaly requests re-activation of his file, APEGA confirmed the reactivation but requested a new resume and references due to the length of time that had passed. Then, in August of 2007, the board told Mr. Mihaly that he would need to write three confirmatory examinations, as well as an exam in engineering economics or the Fundamentals of Engineering exam (as used in the United States). They also informed him that he did not yet have one year of professional engineering experience in Canada, as he had not yet worked at a D level.

Mr. Mihaly did not write the confirmatory examinations, and instead filed a complaint under ss. 4, 7 and 9 of the [Act](https://www.canlii.org/en/ab/laws/stat/rsa-2000-c-a-25.5/latest/rsa-2000-c-a-25.5.html) with the Alberta Human Rights Commission in 2008 [5]. He alleged that APEGA was discriminating against him based on place of origin, which is a protected human right, and that this prima facie discrimination was preventing him from becoming a Professional Engineer.

Five and a half years later, in 2014, the tribunal sided with Mr. Mihaly. They found that APEGA’s examination and experience standards, without a more individualized approach, or the exploration of different options, was discriminatory. The tribunal awarded Mr. Mihaly $10,000 in general damages, as well as the instructions to APEGA to find other solutions for Mr. Mihaly. These included the provision of programs or courses in substitution for exams, application of individual assessment options to correct perceived academic deficiencies of Mr. Mihaly, and matching Mr. Mihaly with a mentor to help him through the process. This decision was appealed by both parties and the decision was overturned by the Court of Queen’s Bench, which will be covered in more detail in the next section. That decision was appealed again, but dismissed by the Alberta Court of Appeals when he failed to follow up the appeal.

**THE COURT OF QUEEN’S BENCH DECISION**

Both APEGA and Mr. Mihaly appealed the decision to the Court of Queen’s Bench of Alberta. APEGA challenged the decision and hoped to have the tribunal’s ruling overturned, whereas Mr. Mihaly was seeking $100,000 in lost wages. In order to prove that Mr. Mihaly faced prima facie discrimination based on origin, the court applied the Moore test as laid out in Moore vs. British Columbia (Education) [1]. There were three criteria that must be proven to conclude that Mr. Mihaly was discriminated against based on place of origin.

The first requirement was to show that the applicant has a characteristic that is protected under the Alberta Human Rights Act (AHRA). APEGA argued that the tribunal had no jurisdiction to rule against discrimination of academic qualifications due to place of origin, under the AHRA, citing case law from Grover v. Alberta [1]. However, the Court of Queen’s Bench disagreed, saying that in Grover, there was no connection between place of birth and place of education. In contrast, Mr. Mihaly’s place of origin and place of education were intrinsically linked, as he was born, raised, and educated in the former Czechoslovakia. Therefore, APEGA did not establish that the tribunal lacked jurisdiction, and the court found that Mr. Mihaly did indeed have a protected characteristic.

The second requirement involves having evidence to show that Mr. Mihaly suffered from adverse impact. APEGA again cited several previous cases, saying that finding of prima facie discrimination requires a complainant to demonstrate that the adverse impact was based on “arbitrary or stereotypical” treatment [1]. However, in the ruling, the court said that there was no requirement that “arbitrary or stereotypical” treatment is required, but it is rather a considered factor. In other words, if “arbitrary or stereotypical” treatment was used, then it would be a good indicator for prima facie discrimination, but it is not the only method to test whether a violation of the AHRA occurred. Once again, Mr. Mihaly was found to have experienced an adverse impact, as he had to write confirmatory exams, which involved an investment of time and money.

Lastly, the Moore test requires that the protected characteristic be a factor in the adverse impact. Thus, Mr. Mihaly’s place of origin had to be the reason he was given the confirmatory exams. In regards to this point, the Judge found that the tribunal did not rule on the evidence it had before it when it found APEGA guilty of discrimination and that the tribunal did not offer any reasoning for its findings. APEGA only asks for confirmatory exams when it has no way of knowing the level of education of applicants wishing to become Professional Engineers. The tribunal asked APEGA to create a committee to assess an applicant and provide individual assistance and guidance. This would create an undue hardship according to the court, as nearly 400 people every year would need this special accommodation. The court also pointed out that an employer does not need to change working conditions, in a fundamental way, to accommodate someone with a protected characteristic. Thus, the Queen’s Bench decided that asking for entry level engineering competence, to ensure public safety, is a reasonable regulation. As a result, Mr. Mihaly’s case failed to prove that his place of origin directly affected his requirement to take confirmatory exams.

In conclusion, there was a clear legal test to pass in order to prove that prima facie discrimination was encountered by Mr. Mihaly. He had to possess a protected characteristic, experience an adverse impact, and the protected characteristic must have been a factor in why he faced the adverse impact. Regarding the first two points, the Court of Queen’s Bench sided with Mr. Mihaly. He does hold a protected characteristic, his place of origin, and he did face an adverse impact by having to write confirmatory exams. However, the court did not find evidence to show that the protected characteristic was a factor in why he faced the adverse impact. APEGA requires confirmatory exams from anyone who comes from an educational background without agreements such an MRA or accreditation from CEAB Substantially Equivalent Program. This was evidenced by the 25% of foreign educated engineers APEGA requires to write confirmatory exams every year. Thus, the decision from the tribunal was overruled, and Mr. Mihaly’s cross-appeal dismissed.

**REFLECTION AND OPINION**

As in all cases across Canada, individuals have the right to appeal court decisions to a higher court if they are unhappy with the decision. In this court case, both Mihaly and APEGA appealed the decision of the Human Rights Tribunal. The Court of Queen’s Bench then concluded APEGA had reasonable justification and revoked the Human Rights Tribunal’s decision. Unhappy with this outcome, Mihaly again appealed the decision to the Alberta Court of Appeal which was eventually dismissed.

The Human Rights Commission and the Court of Queen’s Bench both looked at prima facie discrimination and justification when coming to a decision. While both agreed that Mr. Mihaly’s case did constitute discrimination under place of origin, it is important to consider the validation of such arguments. Mr. Mihaly did experience a disadvantage due to his place of origin, but as supported by the Court of Queen’s Bench, “the Tribunals finding that APEGA’s policies are based on discriminatory assumptions [was] not supported by evidence” [1]. In addition, correct legal tests are very important when deciding on lawful matters, such as discrimination. In Mihaly’s case, the Moore test was used as a main source to confirm prima facie discrimination. The Moore test was correctly used in both courts to confirm discrimination based on place of origin. However, even though Mr. Mihaly had been discriminated against under AHRA section 4, the reasonableness standard then had to be reviewed [5]. As supported in the Tribunal, respondents have the right to “justify the conduct or practice, within the framework of the exemptions available under human rights statutes” [5]. Justification is where the Human Rights Commission and the Court of Queen’s Bench begin to disagree. The Human Rights Commission determined that “without more individualized assessment or exploration of other options, this constitutes discrimination which cannot be justified under the Act” [5]. In contrast, the Court of Queen’s Bench rightly decided that the Tribunal’s decision was based on unreasonable findings such as, saying APEGA failed to explore alternative options than the exams and that APEGA’s “one size fits all approach” exams are not reasonably necessary to ensure engineers practice safely and competently in Canada [5]. There was no dispute that Meiorin, Supra and British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights*)* was the correct legal test of justification [1]. However, there was disparity in whether APEGA adequately proved that the standard of confirmatory tests and the NPPE exam were reasonably necessary to accomplish verifying the standards of potential members. APEGA’s standards are in place to ensure all practicing engineers in Alberta are professional and competent enough to perform the duties required with such status. Thus, the Queen’s Bench’s decision that APEGA was acting within bona fide occupational requirement is more appropriate and justified.

Procedural fairness and jurisdiction were also looked at by the Court of Queen’s Bench. APEGA put forth the Amacon example to illustrate how the Tribunal did not act under procedural fairness. The Queen’s Bench disputed this claim and disclosed that Tribunals “are not required to give parties an opportunity to be heard regarding every point of law” [1]. Thus, the Queen’s Bench accurately determined that the appellant did not breach the rules of procedural fairness. As for jurisdiction, the Queen’s Bench again correctly dismissed the claim by APEGA. APEGA stated that the Tribunal had no jurisdiction over the complaint submitted by Mr. Mihaly, as place of origin was not a protected right under AHRA [1]. Overall, the Court of Queen’s Bench made the right decision. They acknowledged the discrimination faced by Mr. Mihaly, but ultimately decided that APEGA was acting within bona fide occupational requirement and that the Tribunal’s verdict was incorrect based on unreasonable findings. Furthermore, the Alberta Court of Appeal made the right decision to dismiss Mr Mihaly’s re-appeal as it lacked evidence and would therefore have the same verdict as the Queen’s Bench.

Even though the Mihaly case was dismissed by the Court of Queen’s Bench, it is still an important resource when considering the application process and admittance into APEGA. Mr. Mihaly’s case highlighted the struggles faced by immigrant engineers, especially those who are older and/or don’t have English as their first language. While it may have been unreasonable for the Tribunal to demand APEGA be more proactive in creating MRA agreements, provide individual assessment options and resources, and match Mr. Mihaly with a mentor, it does provide a good base as what can be done to improve the success of foreign engineers making the transition into Canadian society. This is important to consider as individuals may fail to meet the criteria to become an APEGA member for other reasons than incompetence and unethical behavior. These reasons can include, but are not limited to, lack of knowledge about Canadian systems, problems with the English language or inadequate information as to what they need to succeed. In these instances, it may be beneficial for APEGA to create an online resource for potential members. This could include information about how to study, what they need to study, ways they can improve their English and other documents that can help ease the transition into the workforce. As a result, Alberta would benefit from more qualified and experienced professionals helping grow the economy, rather than squandered in minimum wage jobs.

**REFERENCES**

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