**ENGG 513 – Winter 2018**

**The Roles & Responsibilities of the Professional Engineer in Society**

**Case Study Report: Association of Professional Engineers and Geoscientists of Alberta v. Mihaly (2016 ABQB 61)**

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**Introduction**

This report is an analysis of APEGA Case no. S2008/12/0294 (APEGA v Mihaly, 2016), involving Mr. Ladislav Mihaly and The Association of Professional Engineers and Geoscientists of Alberta. The purpose of this assignment is for the student to gain greater insight into the requirements to become registered as a professional engineer, APEGA’s regulatory process, and the legal and quasi-legal environment in which APEGA operates. In this report we will summarize the case and the decision made by The Court of Queen’s Bench decision. The Respondent. Mr. Mihaly, filed a complaint on August 5, 2008 that APEGA had discriminated against him based on his place of origin, by refusing to recognize his education as the equivalent of an engineering degree from an accredited Canadian University, and by requiring him to write certain examinations to confirm his academic credentials. After applying for registration as a Professional Engineer with APEGA in May 1999, Mr. Mihaly was required to write the National Professional Practice Exam (NPPE) which he failed in numerous attempts along the years.

**Stakeholders**

A stakeholder is a person or organization that is directly influenced or involved with the matters of this case. The stakeholders in this case are listed below:

* **APEGA**: APEGA is an association that has been serving the public interest by regulating the practices of professional engineering and geoscience in Alberta. [Professional Engineers](https://en.wikipedia.org/wiki/Engineer) and [Professional Geoscientists](https://en.wikipedia.org/wiki/Earth_science) contribute significantly to Alberta’s economic success and the enhanced quality of life enjoyed by all Albertans. The complaint was filed by Mr. Mihaly alleging APEGA of discriminating against him on grounds of his place of origin. [1]
* **The Court of Queen’s Bench:** The Court of Queen's Bench is the Superior Trial Court for the Province, hearing trials in civil and criminal matters and the judicial review of government and tribunal action in Alberta. The decision in this case was made by The Court of Queen’s Bench. [2]
* **The Alberta Human Rights Commission:** The Alberta Human Rights Commission is a [quasi-judicial](https://en.wikipedia.org/wiki/Quasi-judicial) [human rights](https://en.wikipedia.org/wiki/Human_rights) body in [Alberta](https://en.wikipedia.org/wiki/Alberta), [Canada](https://en.wikipedia.org/wiki/Canada). It was established under the *Alberta Human Rights Act*. It is responsible for the reduction of discrimination "through the resolution and settlement of complaints of discrimination, and through human rights tribunal and court hearings. Mr. Mihaly took his case to the Alberta Human Rights Commission. [3]
* **Mr.** **Ladislav Mihaly:** Mr. Mihaly is the Applicant in the case. Mr. Mihaly was born in Czechoslovakia and states that he has two Master’s degrees from Czechoslovakia, and yet was not given the right to have professional Engineering status in Canada
* **The Law Society of Alberta:** The Law Society of Alberta regulates the legal profession in the public interest by enforcing a standard of professional and ethical conduct by Alberta lawyers. The Law Society is created and governed by the Legal Profession Act. They are the interveners in this case.
* **Mr. Tokarik (APEGA):** Mr. Mark Tokarik was APEGA’s Director of Registration in 2006 and was personally representing APEGA in case of Mr. Mihaly as he was the one in contact with Mr. Mihaly, trying to explain the procedure and requirements during most of the case. He also testified on several occasions how APEGA was following the rules and requirements and was not discriminating against Mr. Mihaly.
* **Foreign Trained Engineers:** All trained engineers from foreign lands are stakeholders in this case since it affects their status as an Engineer in Canada. It also specifies the rules and requirements of APEGA which are more detailed and clearly explained because of this case.

**Background**

Mr. Ladislav Mihaly was born in Czechoslovakia, and obtained a MSc Diploma (Technology of Fuels and Thermal Energy specialization) in 1975, from the Slovak University of Technology located in Bratislava. He also obtained a Certificate in Corrosion Engineering in 1981 from the Institute of Chemical Technology in Prague.

Soon after immigrating to Canada in 1999, Mr. Mihaly applied to be registered as a Professional Engineer by APEGA. The application was received and APEGA requested Mr. Mihaly to submit his transcripts, as well as advised him that it was a requirement to write the National Professional Practice Exam (NPPE). The Board of Examiners (BOE) reviewed his credentials and concluded that his academic background was not equivalent to an engineering degree conferred by an accredited Canadian university. His credentials however, was listed in the Canadian Council of Professional Engineers Foreign Degree List [4]. From this, it was recommended that Mr. Mihaly write three confirmatory examinations to confirm that the applicant’s education meets APEGA standards. He was also required to take an engineering economics exam in addition to the three confirmatory exams and passing the NPPE.

On January 17, 2000, Mr. Mihaly wrote the NPPE. Almost a month later, APEGA notified Mr. Mihaly that he had failed his first attempt of the NPPE. He later applied to retake the test in August of 2000 but did not attend the exam. APEGA then withdrew Mr. Mihaly’s application for registration and notified him on June 29, 2001. This was due to Mr. Mihaly failing to write the three confirmatory examinations before the deadline set by APEGA.

On May 31, 2002 Mr. Mihaly then wrote back to APEGA to reactivate his application. He also stated in his correspondence his reason for missing his second attempt of the NPPE was due to a serious automotive accident and was in poor health shortly thereafter. APEGA responded by reactivating his application on June 3, 2002 and notifying him that his confirmatory exams have to be written by May 2003 and the Engineering Economics exam by November 2003. Mr. Mihaly then wrote his second attempt of the NPPE which he also failed. He also was not able to complete the confirmatory exams within the deadline set by APEGA, and as a result, APEGA withdrew his application.

Mr. Mihaly’s Application was reactivated in October 18, 2006 following a request for reactivation two weeks prior. APEGA requested an updated resume and reference list since years had passed since his last reactivation. BOE reconsidered Mr. Mihaly’s application in August 10, 2007 and again advised Mr. Mihaly to write three confirmatory exams and the Engineering Economics exam with the NPPE. They also determined that his one-year engineering experience in North America was not sufficient because it was not at the level required by APEGA (D-level North American Engineering Experience). This meant that he had to work for at least a year in the appropriate level and also had to pass the APEGA examinations. Mr. Mihaly ended up not writing his examinations.

On August 5, 2008 Mr. Mihaly filed a human rights complaint against APEGA for discrimination based on place of origin under Sections 4,7 and 9 of the Alberta Human Rights Act (AHRA), which in summary prevents employers, companies and occupational associations from denying, refusing employment, accommodation and facilities, as well as exclusion from membership because of discrimination due to race, place of origin, religion, gender, social and financial status [5].

In 2014, the Alberta Human Rights Tribunal ruled that the system used by APEGA to evaluate Mr. Mihaly’s credentials was discriminatory. As a result, the chair of the Tribunal ordered APEGA to review his transcripts and application, to pay Mr. Mihaly $10,000 as compensation, as well as providing him with a mentor and options to exempt certain portions of the qualification process. APEGA was also ordered to create a committee that includes engineers that have received their qualifications outside of Canada.

APEGA filed an appeal to the Court of Queen’s Bench in 2015 for the AHRT finding of discrimination. Mr. Mihaly filed a cross-appeal which sought to increase compensation to $1,000,000 for lost wages and registration with APEGA or pay $2,000,000 if not registered by APEGA [6].

**The Court of Queen’s Bench Decision**

Mr. Mihaly, a Czech born Engineer, immigrated to Canada and sought certification for being registered as a Professional Engineer in Alberta. According to APEGA, all licensed Engineers are required to pass the National Professional Practice Exam (NPPE), which focuses on professional conduct, ethics and law.

When APEGA received Mr. Mihaly’s application, they reviewed his transcripts and his exam results and then advised Mr. Mihaly that in addition to NPPE he will have to give a set of three technical conformational examinations. He had failed his first attempt at NPPE, but Mr. Mihaly applied to write the NPPE a second time and failed to appear on the day of the test. After two years, Mr. Mihaly wished to reactivate his application with APEGA, only to fail the NPPE for the third and fourth time. He did not even attempt to write the confirmation exams which were a part of the requirements by APEGA. Since, Mr. Mihaly failed to do so by APEGA’s deadlines, they closed his file. Three years later, Mr. Mihaly requested activation, but since it had been seven years from the time of his initial application, he was asked for an updated resume and references. He provided those and on review of them, APEGA once again determined he was required to write the NPPE and technical confirmation exams, and that his work experience in Canada was not recognized by APEGA's requirement of one year of Canadian experience.   
  
Mr. Mihaly then filed a complaint with the Alberta Human Rights Tribunal (AHRT), who took the decision in his favor.  The AHRT concluded that APEGA could not justify its registration requirements. Thus, Mihaly was successful in his claim of discrimination and was awarded $10,000 for impact on dignity. The AHRT declined to award lost wages to Mihaly, as there was no concrete proof of his earning being affected. APEGA appealed this decision to the Alberta Court of Queen's Bench and so did Mr. Mihaly as he thought the Tribunal's award was insufficient and sought it increased to either, $1,000,000 and registration with APEGA or $2,000,000 without registration.

When the cross appeal was taken to court, Madam Justice Ross discussed the appropriate standards of review and then pointed out the issues in the case as follows [6]:

* Procedural fairness: Did the Tribunal breach the rules of procedural fairness when he decided issues that were not raised by or with the parties?
* 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?
* 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?
* Justification: Was the Tribunal’s decision that APEGA’s registration requirements were unjustified unreasonable?

Justice Ross pointed out that the jurisdiction issue in this case was more properly related to the legal test for prima facie discrimination as set out in Moore v British Columbia (Education), 2012 SCC 61 [7], and not to the case of Grover v Alberta Human Rights Commission, 1999 ABCA 240 which APEGA sought to rely on. Much of her decision addressed whether the AHRT had used and applied the correct test for prima facie discrimination, and whether the AHRT was reasonable in holding APEGA responsible for discrimination.

On consideration of similarity with Moore test, the AHRT concluded that Mihaly was discriminated against based on ‘place of origin’ related to the origin of his educational credentials. They also concluded that Mr. Mihaly was adversely affected by APEGA’s requirements that he complete the three confirmatory examinations. Justice Ross emphasized that there is no substantive disadvantage flowing from the requirements to pass the NPPE and possess one year of Canadian experience that would be linked to the prohibited ground of discrimination, place of origin, in this case. Justice Ross then found that it was unreasonable for AHRT to conclude that APEGA should assume that engineers with qualifications from foreign countries with which APEGA has no Mutual Recognition Agreements(MRA), have qualifications which do not match Canadian engineering accreditation standards.  
  
 The evidence in the case was not sufficient enough to demonstrate that Mihaly’s national origin was a factor in relation to any discrimination that he may have experienced as a result of APEGA’s requirements. It was specified that the requirement to pass the NPPE is very generic based on requirements and does not constitute any discrimination. Also, the requirement that registered professional engineers must have four years of experience, one year of which must be in Canada, was not found to have had an adverse impact on Mihaly. Justice Ross concluded that the AHRT’s failure to apply the Moore test in relation to the NPPE and Canadian experience requirements, and the lack of evidence to support a finding that these elements were present, rendered the AHRT’s finding of prima facie discrimination was irrelevant for this case.

Justice Ross noted that since there are a very large number of engineering programs, APEGA does not have the capacity or resources to discuss and negotiate terms with all of them and must take examinations to prove the quality of engineering programs that are undertaken by applicants. She concluded that there were no evidence internationally educated graduates with entry-level competence would have any difficulty passing the confirmatory examinations.

APEGA must assess every applicant to determine if examinations may be waived (e.g., if applicants have completed a graduate degree in a Canadian university or an MRA country, or have ten years of engineering experience), and Mihaly did not meet the requirements for a waiver.

AHRT also guided APEGA to match Mr. Mihaly with a mentor who would provide guidance as to how to address his challenges as an engineer and integrate himself into the profession. Justice Ross found that these went beyond the scope of any discriminatory conduct found and would have fundamentally altered APEGA’s standards. She also held that Mihaly had an obligation to search for possible accommodations, and that the AHRT had failed to consider that Mihaly had never attempted the three confirmatory examinations.

Justice Ross finally concluded that the AHRT had failed to consider relevant factors in the assessment of Mr. Mihaly vs. APEGA. Therefore, the AHRT’s conclusions with respect to APEGA’s alleged failure to accommodate Mihaly to the point of hardship were found to be unreasonable.

Thus, Justice Ross reversed the decision of the AHRT and did not remit the matter back to the tribunal. [8]

**Reflections/Opinions**

The Ruling of the Alberta Human Rights Commission that APEGA’s evaluation process was discriminatory was not justified. The AHRC found that APEGA waiving applicants from countries with Mutual Recognition Agreement (MRA) but not the applicants from non-MRA countries to be discriminatory [9]. However, this ruling was made on incorrect assumptions of discrimination by place of origin. MRA countries were recognized to have “similar licensing standards and practices” compared to Canada[10], therefore it allows easier movement for practicing engineers from MRA countries. The same cannot be said for all countries, and that fact should not be used as basis to label APEGA’s registration process to be discriminatory. Not only that, Sections 4,7 and 9 of the AHRA in which Mr. Mihaly claims to the AHRC that the APEGA violated does not include academic background as grounds for discrimination. We can conclude that the AHRC have liberally interpreted the AHRA.

One of the main sources of misunderstandings for this case was the subject of a “Foreign Degree List”. After a correspondence with Mr. Tokarik regarding his academic background, this foreign degree list was brought up in conversation[4]. Mr. Mihaly misunderstood this as a “profiling” list. This list, however makes it easier for the Canadian Engineering Qualification Board (CEQB) to assess the equivalency of the applicant’s foreign educational background to a degree granted by a Canadian University. This list was made through a review of publicly available information from thousands of academic institutions across the globe.  In fact, Mr. Mihaly was actually saved the trouble of having to write more exams besides the NPPE and the confirmatory exams.

The decision of the Court of Queen’s Bench to clear APEGA of any charges of discrimination was justified. The Court found that there was not sufficient evidence to prove that the foreign degree list used as evaluation criteria for his degree, and the whole examination process was discriminatory. The court found that the tribunal’s decision was “rife with logical errors”, “findings of fact unsupported by the evidence”, “failures to take into account relevant considerations” [6]. Many foreign applicants have gone through the same process as Mr. Mihaly without further incident. The same standards apply to foreign applicants regardless of the place of origin. This “one-size-fits-all” approach, as mentioned by the tribunal, ensures that applicants have the same knowledge that Canadian engineering graduates have acquired over their studies. This approach sets a baseline knowledge that is expected of a practicing engineer.

Mr. Mihaly, by failing to pass the NPPE multiple times and not bothering to show up to write his exams before the set deadlines, shows his blatant disregard for the qualification process and the profession itself. Mr. Mihaly’s actions throughout the case gives us a glimpse on what kind of person we would have allowed to design, handle and maintain critical equipment and structures. His main flaw was avoiding responsibility by shifting the blame on the system for his incompetence and failures. Mr. Mihaly was in no position to negotiate or to appeal to be stated as a member of APEGA due to his actions. Mr. Mihaly then cross-appealed the decision of the Court of Queen’s Bench to the Alberta Court of Appeals, however the Court dismissed Mr. Mihaly’s appeal as he failed to take the required steps to advance the appeal. Mr. Mihaly complained that the Court of Queen’s bench “refused to accept materials” to support his application [11].

The Alberta Court of Appeal was justified in withdrawing Mr. Mihaly’s appeal as Mr. Mihaly yet again fails to complete the requirements necessary in order to properly file an appeal. He clearly expressed intent to go forward with the appeal yet did nothing for months. Although it was determined that the Foreign Degree List showed that his credentials were equivalent to a Canadian Bachelor’s in Engineering degree, the termination of the case was ultimately due to Mihaly’s inaction. The Court finally put an end to this case by letting APEGA have finality and to re-evaluate its procedures for assessing foreign credentials.

APEGA should not accommodate foreign trained engineers and geoscientists. Foreign applicants should be subject to a vetting process. The current process to assess foreign credentials is more streamlined compared to when Mihaly first filed a complaint. Several tools were implemented such as the Degree Equivalency Tool, which allows foreign applicants to check if their credentials are comparable to a Canadian Bachelor’s in Engineering degree.

Practicing the engineering profession is a privilege and not a right. A foreign applicant may have come from a place where the engineering profession have relaxed regulations or is completely unregulated. They have been used to one system and may assume that their home country’s standards also apply to the country they wish to work in. Overall, this is only a part of a bigger issue: Immigrants to a country must abide by the host country’s rules and regulations. As a result of this case, APEGA and the other engineering associations in Canada, as well as external and international bodies have been constantly working to streamline and refine this qualification process. The role of APEGA is to serve the public interest and in Mr. Mihaly’s case, the function of APEGA was fulfilled and was working as intended - to prevent applicants who devalue and disregard the Canadian engineering standard, which jeopardizes the public trust and safety.

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