

REDACTED

**IN THE MATTER OF
THE ENGINEERS AND GEOSCIENTISTS ACT,
R.S.B.C. 1996, chapter 116, as amended (the “Act”)**

and

a hearing concerning

**[APPLICANT A]
(the “Applicant”)**

DECISION OF THE REGISTRAR

Hearing Date: December 8, 2016
Counsel for the Association: Henry Wood, Q.C. and Neal Nicholson
Counsel for the Applicant: Self-represented

1. The Applicant is an engineer in training (EIT). While an EIT, a complaint was made to the Association about his conduct by his former employer.
2. It was determined by the Association that the complaint file would be closed and the matter be referred to the Registration Committee.
3. The Registration Committee determined that a hearing should be conducted pursuant to s 7(c) (5) of the APEGBC Bylaws for a decision on the Applicant’s suitability for registration.
4. The Council has delegated its power to conduct a hearing to the Registrar pursuant to s. 13(8) of the Act.
5. A Notice of Hearing was issued dated November 22, 2016 and delivered to the Applicant setting out the date for the hearing. The Applicant attended the hearing.
6. At the outset of the hearing, the Applicant confirmed that he knew he was entitled to have counsel, but elected to proceed without legal counsel.

Onus and Burden of Proof

7. Section 13 of the Act provides that “an applicant...must submit evidence satisfactory to the council...that the applicant is of good character and repute.”
8. Counsel for APEGBC submitted that in light of the wording of that section, the onus is upon the Applicant to satisfy this panel of his suitability.

9. Further, counsel referred the panel to the Supreme Court of Canada's decision in *F.H. v. McDougall*, [2008] 3 S.C.R. 41, which says that the standard to be met in a civil case is the "balance of probabilities", meaning "more likely than not".
10. The Applicant did not dispute this position.
11. I am satisfied that in a registration hearing, the onus is on the applicant to satisfy the Association on the balance of probabilities of his suitability for registration.

Facts

12. Although the onus is upon the applicant, it was agreed that the Association would proceed first in order to give maximum opportunity to the Applicant to address the issues.
13. The Association called as its only witness [Witness], the complainant and a principal of the Applicant's former employer, [Firm 1]. [Witness] referred to documents gathered in [Firm 1]'s internal investigation, and to her correspondence regarding her complaint.
14. [Witness] testified that the Applicant worked for [Firm 1] for three years.
15. In June 2015, [Firm 1]'s IT provider told [Witness] that it appeared that the Applicant was using the company equipment and resources to pursue a project for the ultimate benefit of a competitor [Firm 2].
16. Over the next week or so, [Firm 1] gathered documents that showed that the Applicant, while still an employee of [Firm 1] :
 - a) used a company computer and other company resources in order to complete a tender and make related communications on behalf of a competitor, [Firm 2], with which he expected soon to commence employment,
 - b) approached a fellow employee to discuss the employment opportunity that employee might have at [Firm 2],
 - c) attempted to download extensive electronic file information belonging to [Firm 1] for his future use,
 - d) arranged to meet with a potential customer of [Firm 1] for purposes of encouraging them to deal with [Firm 2] on the same project, and
 - e) submitted a claim and received reimbursement for the cost of a professional practice exam that was scheduled for several months in the future at a time when he had already decided to leave [Firm 1].
17. [Witness] testified that once the information was gathered, on June 11, 2015, the Applicant was confronted. He admitted that he had accepted a position with another firm. He resigned that day, but remained with [Firm 1] for a short time to wrap up files.
18. The complaint was then made to the Association by [Witness]. The Applicant provided a response, and [Witness] provided comments on that response.
19. The Applicant did not challenge the evidence of [Witness].
20. I accept that the facts set out above are true. In summary, the Applicant:
 - a) used [Firm 1] resources to complete a tender on behalf of a competitor,

- b) did so for the purposes of steering business to that competitor,
 - c) disclosed confidential [Firm 1] information to the competitor,
 - d) attempted to download electronic file information from [Firm 1] for his own use,
 - e) submitted an expense claim of \$241 for payment of the exam fee when he had already accepted an employment offer from [Firm 2].
21. The Applicant testified. He said, repeatedly, that he recognized that what he did was wrong. He has apologized to the Witness and Firm 1 and to the Association.
22. The Applicant admitted that he knew that what he was doing was wrong at the time that he did it.
23. Pressed for an explanation, he said he was unhappy in his position and wanted to impress a prospective employer. He was looking for work and met [Mr. X], who was at the time working for [Firm 3]. By the time of the second interview, [Mr. X] was looking to set up a new company and invited the Applicant to join the new venture, [Firm 2]. [Mr. X] said that [Firm 2] wanted to get a contract in place before starting up. It was this that motivated the Applicant to prepare the tender and engage in the other conduct described above.
24. As to subsequent events, the Applicant testified that he continues to be employed by [Firm 2]. He continues to work closely with [Mr. X] (who had communicated the expectation to the Applicant that the Applicant would need to do his portion of a tender for a competitor while still employed at [Firm 1]).
25. The Applicant says he also works with two EITs.
26. When asked how he would learn and grow in this environment, the Applicant advised that what helps him is to explain to the EIT's what can go wrong when you make poor decisions.
27. The Applicant appears to have no present contact with a professional engineer. A professional engineer is employed at [Firm 4] which is associated with [Firm 2]. The Applicant said that his communications with that engineer have only been for clarification of construction related matters but that going forward he could see himself speaking with this engineer on matters of a contractual nature that make him uncomfortable.

The Meaning of Good Character and Repute

28. Counsel referred me to an article prepared by Mary Southin *The Advocate*, (1987) v. 35, at 129, Mary Southin, QC (as she then was) quoted in a decision of the Law Society, *Applicant 3 (Re)*, 2010 LSBC 23 (CanLII). Ms. Southin wrote that character comprises:
- 1. An appreciation of the difference between right and wrong;
 - 2. The moral fibre to do that which is right, no matter how uncomfortable the doing may be and not to do that which is wrong no matter what the consequences may be to oneself;
 - 3. A belief that the law at least so far as it forbids things which are *malum in se* must be upheld and the courage to see that it is upheld.”

29. Counsel noted that the last of these three items might be applicable more to lawyers than other professions. I am satisfied that this article captures a description of the quality of integrity that is essential for a member of this profession. A practical test of good character would be that if the general public, your colleagues and your competitors knew your actions, full disclosure, they would not hesitate to consider you to represent them, or partner with you.
30. Good repute was defined in the article as follows:
“... would a right-thinking member of the community consider the applicant to be of good repute? ...
If that right-thinking citizen would say, knowing as much about an applicant as the Benchers do, “I don’t think much of a fellow like that. I don’t think I would want him for my lawyer”, then I think the Benchers ought not to call him or her.”
31. I am of the view that the applicant’s repute is gauged by assessing what a member of the public or a member of the engineering profession would say about him or her, knowing the relevant facts.
32. Counsel also noted other principles that have been applied in credentials hearings conducted by other regulatory bodies, in particular, the Law Society of British Columbia and the Law Society of Upper Canada. All of these principles were referred to in *Re Applicant 3*. I have borne these in mind in considering this application:
- a) The issue is the applicant’s character at the time of the application;
 - b) The standard to be met is not one of perfection;
 - c) A single incident is not determinative of character;
 - d) A serious event that calls into question the applicant’s character is not addressed merely by an assertion of remorse: a more thorough examination is required.

Discipline Cases

33. Counsel referred to authorities which show that the Association disciplines members for using a professional position to secure a personal benefit, in conflict with the interests of the employer: APEGBC re Yussuff Ackbar, APEGBC re Gifford F. La Rose, and APEGBC re John Blair Evans, each of which were published in *The Professional Engineer*, in July 1985, July 1986 and October 16, 2006. The penalties ranged from a reprimand to a fifteen month suspension.
34. In the La Rose case, the Council wrote:
An engineer must recognize his special position when acting as an employee or associate in an engineering company. The clients are the clients of the company and attempts to gain personal benefits through company clients must be avoided.
Section 11 of the Code stresses the need to abstain from unfair competition. It is particularly important that an engineer be open and careful in all steps he takes when he contemplates resignation or start-up of his own company.

Drawings, files and other documents which are the property of an engineering company cannot be vested in an individual. Retention or possession of these documents by an individual without specific agreement with the company is unethical.

35. These principles are set out as #4 in our Code of Ethics and discussed in the Guidelines to the Code of Ethics.

Analysis

36. The Applicant stated repeatedly that he recognizes that his conduct was contrary to the expectations of the profession and indeed that he knew it was wrong at the time he did it.
37. His motivation was personal gain.
38. When asked what he would do differently, the Applicant focused on disclosing his dissatisfaction with his employment to his employer. This misses the point. The concern is not that he looked for a new position; it is that he used the resources of his employer in a manner that was not authorized, to his personal advantage, and to the employer's detriment. This left me with some concern as to the Applicant's insight into his conduct and his ability to avoid similar situations in future.
39. The Applicant testified that he'd never been in trouble before (p.80) and would never act in an unethical manner again (p. 79). However, there was no evidence that would satisfy the Association otherwise as to his character. He produced no character references, nor any witnesses who could testify to his performance in other settings.
40. In the result, we are left with recent evidence that the Applicant has engaged in behaviour which is highly detrimental to the ability to engage in this profession.
41. In preparing for this hearing, the Applicant could have sought the advice of the engineer that works for [Firm 4] but did not do so. He also did not bring any character references or bring legal counsel. This causes me to be concerned that he may not have fully appreciated the seriousness of the situation.
42. I also note that the Applicant remains in continuing close association with persons who apparently led him into or at least participated and sought to benefit from his wrongful conduct. The Applicant continues to choose to surround himself with individuals who may have demonstrated questionable character themselves. Again, I am concerned that he may not fully appreciate the nucleus of the behavior that calls into question his good character.
43. For these reasons, I am of the view that the Applicant is unable to discharge the burden of satisfying the Association that he is of good character and repute at this time.

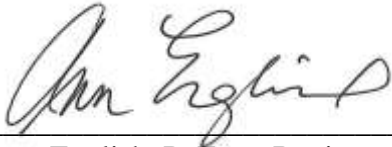
Decision

44. I have therefore concluded that the Applicant's application will be denied. I have further concluded that he will be eligible to reapply in 12 months from the date of this decision.
45. I have decided to put a time limit on eligibility for reapplication on the strength of the authority in *Pugliese v. Clark*, 2008 BCCA 130 (CanLII).
46. In my view, a period of time before reapplication will afford the Applicant an opportunity to gain experience so that he can in future demonstrate good character and repute. The

Association will of course consider the merits of his application when it is made. I encourage the Applicant to take education on ethics and business practice, to build a network of business colleagues that can attest to his good character and to pursue mentoring relationships with professional engineers with whom he can discuss and seek more than just technical guidance but also ethical guidance.

47. The Applicant can remain an EIT at the firm where he is currently employed should it be his wish and circumstance. However, as an EIT, the Applicant does not have the right to engage in the practice of professional engineering unless he is under the direct supervision of a professional engineer.

DATED this ____18th____ day of __January__, 2017.

A handwritten signature in cursive script, appearing to read "Ann English". The signature is written in black ink and is positioned above a horizontal line.

Ann English, P. Eng., Registrar