

**IN THE MATTER OF THE ENGINEERS AND GEOSCIENTISTS ACT
R.S.B.C. 1996, CHAPTER 116 as amended**

and

IN THE MATTER OF ANTHONY A. SALWAY, P.Geo.

TO: Anthony A. Salway, P.Geo.
2954 Six Mile Road,
Nelson, B.C. V1L 6W3

TAKE NOTICE that a Panel of the Discipline Committee of the Association of Professional Engineers and Geoscientists of British Columbia (the "Association"), will meet at Suite 200, 4010 Regent Street, in the City of Burnaby, in the Province of British Columbia on **Wednesday the 26th day of September, 2007**, at the hour of 9:30 in the forenoon for the purpose of taking evidence or otherwise causing an inquiry to be made with respect to the allegation herein pursuant to the *Engineers and Geoscientists Act*, R.S.B.C. 1996, Chapter 116, as amended (the "**Act**").

AND TAKE NOTICE that the allegation against you is that, contrary to the *Act*, you have demonstrated unprofessional conduct by your neglect or refusal to provide a timely response to communications from your clients, [REDACTED], regarding your report to them dated February 3, 2006.


AND FURTHER TAKE NOTICE that you, Anthony A. Salway, P.Geo., have the right, at your own expense, to be represented by counsel at the inquiry by the Panel of the Discipline Committee and you or your counsel shall have the full right to cross-examine all witnesses called and to call evidence in defence and reply in answer to the allegation.

AND FURTHER TAKE NOTICE that in the event of your non-attendance at the inquiry, the Panel of the Discipline Committee may, upon proof of service of this Notice of Hearing upon you, proceed with the taking of evidence or otherwise ascertaining the facts concerning the allegation, despite your absence, and may make its findings on the

facts and its decision without further notice to you.

DATED at the City of Burnaby, Province of British Columbia, this 18th day of July, 2007.

The Discipline Committee of the Association of Professional Engineers and Geoscientists of the Province of British Columbia.



Per: Roy Wares, P.Eng.,
Discipline Committee Chair

**IN THE MATTER OF
THE ENGINEERS AND GEOSCIENTISTS ACT
R.S.B.C. 1996, CHAPTER 116 AS AMENDED**

- and -

IN THE MATTER OF DR. ANTHONY A. SALWAY, P. Geo.

DISCIPLINE COMMITTEE PANEL:

Robert T. Martin, P. Eng., Chair
Neil A. Cumming, P. Eng.,
David R. Ricketts, P. Eng.

COUNSEL FOR THE ASSOCIATION

Robert W. Hunter and Sonia Sahota
Bull Housser & Tupper

COUNSEL FOR THE MEMBER

Timothy W. Pearkes
Timothy W. Pearkes Law Corporation

DETERMINATION

BACKGROUND:

1. On January 24, 2008, this Discipline Committee Panel (the Panel) of the Association of Professional Engineers and Geoscientists of British Columbia (the Association) under authority of the *Engineers and Geoscientists Act*, R.S.B.C 1996, C. 116, (the "Act"), held an Inquiry to examine the alleged contraventions of the *Act* by Dr. Anthony A. Salway, P. Geo.
2. Dr. Salway was a member of the Association under the Professional Geoscientist designation at all times relevant to the matters herein in question.

3. The allegation of unprofessional conduct against Dr. Salway as set forth in the Notice of Inquiry dated July 18, 2007 is as follows:

"AND TAKE NOTICE that the allegation against you is that, contrary to the Act, you have demonstrated unprofessional conduct by your neglect or refusal to provide a timely response to communications from your clients, [names deleted], regarding your report to them dated February 3, 2006."

BURDEN AND STANDARD OF PROOF

4. Mr. Hunter opened the hearing by informing the Panel of the rules of evidence, the burden of proof upon the Association and the standard of proof that the Panel must apply in reaching its decision. Mr. Hunter made clear that the burden of proof always rests upon the Association, and that the onus falls upon the Association to demonstrate that the charges had been proven to the appropriate standard of proof.
5. The Panel accepted that the standard of proof required is that stated by Madame Justice McLachlan in *Dr. William Jory v. The College of Physicians and Surgeons of British Columbia* (unreported December 13, 1985) which reads in part:

"The standard of proof in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt. But it is something more than a bare balance of probabilities. The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence ... The evidence must be sufficiently cogent to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community."
6. An Agreed Statement of Facts was put before the Panel as evidence in the hearing. The Panel also heard testimony from Dr. Salway and his partner, [REDACTED]
7. At the conclusion of submissions by counsel, the Panel advised the parties that the allegation of unprofessional conduct by the Association against Dr. Salway had been proven to the requisite burden of proof. At the request of the parties, we adjourned to deliver our written Determination and reasons pending receipt of submissions from counsel as to the appropriate penalty to follow our Determination.

DETERMINATION

8. We wish to emphasize that in coming to this Determination, only the evidence put before the Panel during the hearing was considered.
9. Dr. Salway was engaged by his clients to provide a report to his clients [*names withheld for privacy*], in respect of their property. Dr. Salway issued his report to the clients dated February 3, 2006.
10. At the time of providing the report to the clients, Dr. Salway was required to have a peer review of his professional services by another geoscientist pursuant to a Stipulated Order accepted by Dr. Salway in the face of earlier discipline proceedings before the Association.
11. Dr. Salway admitted that at the time the Feb. 3, 2006 report was issued, it had not been reviewed by another Professional Geoscientist, but that it was his intention to have the review done at a later date by a member whom he had previously engaged for the purpose of providing peer reviews.
12. In an e-mail dated April 10, 2006, Dr. Salway was notified by his clients that a peer review of the February 3, 2006 report was required in order to satisfy the requirements of the Regional District.
13. Dr. Salway admitted to not responding to his clients' requests for further information upon their learning of a requirement by the Regional District for a peer review of his report to them on their property, dated February 3, 2006.
14. Dr. Salway testified that he spoke to one of his clients by telephone on the morning of April 11, 2006 at which time he advised his client that he would consult with a colleague regarding peer review. The Panel took this as an acknowledgment by Dr. Salway that he was aware on or before April 10, 2006 that a peer review of the February 3, 2006 was required.
15. Dr. Salway testified that he did not respond further to the April 10 e-mail from his clients.

16. In a letter sent by the clients on June 3, 2006, Dr. Salway was notified that his report was of no value to them without the required peer review. This letter was also not replied to by Dr. Salway.
17. In spite of being shocked by the tone of the letter, which demanded that the payment he received for the report should be refunded to the Clients, Dr. Salway testified that he passed on the letter to his partner ██████████ to deal with. Dr. Salway testified that it was his intention to respond, but this did not occur, for various reasons. As expressed by Dr. Salway, "it fell through the cracks". In addition, after delegating the letter to his partner, he did not follow up to verify that a response had been sent.
18. On July 5, 2006 the clients sent an email to Dr. Salway asking if he had received the June 3 letter. Dr. Salway admitted that he did not respond to the July 5 email.
19. Dr. Salway testified that throughout the period of February 3 to early September, 2006 he was attempting to make arrangements with a member acceptable to the Association to conduct the necessary peer review.
20. It was only when the Association informed Dr. Salway of the complaint against him by the clients, some five months after the April 10, 2006 notification, that he provided any information in response to his clients' concerns.
21. Principle 4 of the *Code of Ethics* requires members to "*act as faithful agents of their clients...*". Principle 7 requires members to "*conduct themselves with fairness, courtesy and good faith towards clients...*".
22. The Panel wishes to emphasize that in reaching a finding of unprofessional conduct against Dr. Salway, it did not consider the lack of peer review as the act of unprofessional conduct. It considered only the specific allegation in the Notice of Inquiry, namely that Dr. Salway neglected or refused to provide a timely response to communications with his clients.

23. While in many cases a failure to provide timely communication may not constitute unprofessional conduct, in this case the finding of liability turns on the gravity, consequences and importance to Dr. Salway's clients of the failure to respond to their requests for further information.
24. Dr. Salway should have been aware that the value of the report to his clients that lacked the required peer review would be diminished. When this fact was brought to his attention by the client and Dr. Salway subsequently failed to respond to the client's e-mail of April 10, 2006, letter of June 3, 2006 and e-mail of July 5, 2006, Dr. Salway did not respond as we would expect of a fellow member in the gravity of the circumstances.
25. Dr. Salway's obligations of fairness, courtesy and good faith and the requirement that he act as his clients' faithful agent required him to respond to his clients' communications within a reasonable time. Accordingly, the Panel has concluded that in failing to do so, Dr. Salway has demonstrated unprofessional conduct as alleged in the Notice of Inquiry.

CONCLUSION

26. The finding of unprofessional conduct against Dr. Salway as alleged in the Notice of Inquiry dated July 18, 2007 is confirmed.
27. The Panel requests that on or before February 15, 2008, the Association first deliver to the Panel in writing, in care of Ms. Beverley Mitovic of the Association, its submissions on the appropriate penalty and costs to be imposed upon Dr. Salway. Mr. Pearkes is requested to provide his submissions in a similar fashion no later than February 25, 2008.
28. The Panel will leave it to the decision of counsel whether either believe further oral submissions are necessary to supplement the written submissions on penalty costs requested above. If either party desires to make oral submissions, then the parties can arrange for a convenient date to resume the hearing for that purpose. If it will save expense, the Panel is quite content to receive any oral submissions by teleconference on a date established by counsel through Ms. Mitovic.

Signed on behalf of the Discipline Committee Panel this 31 day of January, 2008.

A handwritten signature in cursive script, appearing to read "R. T. Martin".

Robert T. Martin, P. Eng. Chair

**IN THE MATTER OF *THE ENGINEERS AND GEOSCIENTISTS ACT*
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and

IN THE MATTER OF DR. ANTHONY A. SALWAY, P.Geo.

DISCIPLINE COMMITTEE ORDER ON PENALTY AND COSTS

DISCIPLINE COMMITTEE PANEL:

Robert T. Martin, P.Eng., Chair
Neil A. Cumming, P.Eng.,
David R. Ricketts, P.Eng.

COUNSEL FOR THE ASSOCIATION:

Robert W. Hunter and Sonia Sahota
Bull Housser & Tupper

COUNSEL FOR THE MEMBER:

Timothy W. Pearkes
Timothy W. Pearkes Law Corporation

INTRODUCTION

A Discipline Committee Panel (the "Panel") of the Association of Professional Engineers and Geoscientists of British Columbia, (the "Association"), under the authority of the *Engineers and Geoscientists Act*, RSBC 1996 c. 116 as amended (the "*Act*") determined on January 24, 2008 (executed on January 31, 2008) that the allegations against Dr. Salway in the Notice of Inquiry had been proven to the requisite standard.

Both parties have provided their submissions on penalty and costs in writing, pursuant to the schedule set out by the Panel in its Determination of January 31, 2008.

The charge proven against Dr. Salway was as follows:

"Contrary to the Act, you have demonstrated unprofessional conduct by your neglect or refusal to provide a timely response to communications from your clients, [names deleted], regarding your report to them dated February 3, 2006."

PENALTY

The Discipline Panel has carefully considered the written submissions on penalty and costs received from both parties. In reaching its decision on penalty the Panel was guided by the belief that any penalty imposed on the member should reflect the following principles:

- the need for the protection of the public;
- the need to deter Dr. Salway from repeating the offence;
- the need to deter other members of the Association from similar actions; and
- the need for rehabilitation of Dr. Salway.

Both parties have recommended that the most appropriate penalty is a reprimand. The Panel concurs with the recommendation of the parties and pursuant to section 33 (2) of the *Act*, the Panel orders that:

Dr. Salway is reprimanded.

COSTS

In accordance with section 35 of the *Act*, the Association is awarded costs in the amount of \$16,373.00, representing 70% of the Association's reasonable legal fees and disbursements totalling \$23,390.00. The costs are to be paid in six equal monthly instalments of \$2,728.83 each, and due on the first day of the month, commencing May 1, 2008. Failure to pay any instalment on the due date will result in the membership of Dr. Salway being suspended until the full costs of \$16,373.00 are paid.

Dated this 13th day of MARCH, 2008.

Signed on behalf of the Discipline Committee Panel:



Robert T. Martin, P.Eng.
Chair