

Authority for Rescinding Council Resolution approving issuance of a Development Permit/Development Variance Permit

There are no reported court decisions that have directly addressed the authority of a municipal council to rescind a decision based on concerns that council was misled by information provided to it or due to alleged impropriety on the part of an applicant or their agent.

Despite this apparent lack of court decisions involving municipalities rescinding their decisions, guidance can be taken from a decision of the BC Supreme Court involving the review of a decision of the Environmental Appeal Board (EAB); *Residents Assn. v. British Columbia (Director, Environmental Management Act)*, 2017 BCSC 107 (“*Shawnigan*”). The *Shawnigan* case involved an appeal to the EAB of a decision of a Delegate of the Minister of Environment to issue a permit to discharge contaminated soil pursuant to the *Environmental Management Act*. The Supreme Court overturned the decision of the EAB to dismiss an appeal brought by the Shawnigan Residents Association. The Court ruled that there had been a material non-disclosure with respect to the relationship between a qualified professional (“QP”) and the permit applicant, and that this non-disclosure affected the integrity of the EAB process as well as the permit issuance by the Minister’s delegate. The Court noted that the scheme of the *Environmental Management Act* relied on the integrity of the work product from QPs. It would be important therefore in assessing any technical or scientific opinion to know whether the QP who produced the opinion had any reason to be biased:

The existence of a financial benefit to the [QP] from a particular outcome is a clear example of a reasonable apprehension of bias in the person preparing the opinion.

While the Court in *Shawnigan* determined that the subject of the judicial review challenged was the EAB’s decision to deny the residents association appeal, the judge was clear if the decision under review had been the Delegate’s decision to approve the permit, he “would have had no difficulty in setting it aside.”

In setting aside the decision of the EAB and ordering it to reconsider the appeal with evidence before it of the true relationship between the QP and the proponent, the Court ruled that it was not prepared to go so far as to find fraud on the part of either the QP or the proponent. The basis for the Court’s intervention was that the material non-disclosure resulted in the EAB having been misled about the true relationship between the QP and proponent:

I am satisfied that the withholding of this information from the [EAB] brought the integrity of the approval process and appeal into question.

I consider it to be in the interests of justice that the [EAB] must reconsider its Decision with the benefit of this fresh evidence [regarding the true relationship between the QP and proponent].

The Court did not consider it necessary to make a finding as to what the impact would have been on the EAB's decision had the true relationship between QP and proponent been disclosed to it. The judge stated that it was not for the Court to say what influence the information would have had; it was sufficient that the withholding of the information affected the integrity of the processes – both the one before the Director and the appeal before the EAB.

On one important point of evidence, the Court in *Shawnigan* decided that the residents association did not have to satisfy what is known as the four-part “*Palmer*” test for the introduction of “fresh evidence” for the after-hearing discovery of the evidence of the true relationship between the QP and proponent. The Court would have admitted the evidence simply on the basis that the “interests of justice” required it.

The following propositions can be extracted from the *Shawnigan* decision:

- (1) If the receipt of payment may affect the presumed independence or impartiality of a person participating in an administrative proceeding, the fact of and details of such payment should be disclosed to the decision-maker.
- (2) It is not necessary to establish that the party responsible for the non-disclosure has engaged in fraud.
- (3) It is not necessary to establish that the undisclosed information would have been decisive in the decision-maker's decision; it is sufficient if the withholding of the non-disclosed information brings the integrity of the process into question.
- (4) In addition to justifying court intervention on a judicial review application, uncovering evidence of a material non-disclosure affecting the integrity of an administrative decision justifies the decision-maker revisiting its decision and rescission.