



## ADMINISTRATIVE LAW

*See also: Aboriginal Peoples*

Judicial review of resolution adopted by respondent's council barring applicant from obtaining contracts from Nation or its affiliates — Respondent, First Nation governed by *Indian Act*, R.S.C., 1985, c. I-5, *First Nations Fiscal Management Act*, S.C. 2005, c. 9 — Over years, either directly or through its subsidiaries, retaining services of applicant, contractor specializing in water, sewer systems, offering variety of other services, to perform work in community — Contractual dispute arising between applicant, wholly-owned subsidiary of respondent's but matter settled through confidential agreement — Later, respondent adopting resolution at issue; applicant never informed that such matter to be discussed — Applicant asserting, in particular, that process leading to adoption of resolution not complying with requirements of procedural fairness; that decision unreasonable because based on irrelevant or extraneous considerations — Present application for judicial review concerning private decision even though decision made by public body — If applicant having any recourse respecting resolution, such recourse action in contract or in tort, not judicial review — Resolution not by-law made pursuant to *Indian Act*, s. 81 — Is act of governmental body that creates rules binding on all persons or category of persons under jurisdiction of that body — Because not by-law, impugned resolution cannot bind third parties — Not binding respondent's members, who remain free to contract with applicant if they wish to do so — Resolution known as band council resolution (BCR), which is expression of will of First Nation's council — BCR usually cannot create rights, duties for members of First Nation or third parties — Through BCR, council may exercise powers expressly granted to it — Impugned resolution decision of respondent not to contract with applicant; may also be instruction to its wholly-owned subsidiaries to refrain from doing so — Decision reversible — Applicant arguing that impugned decision should not be characterized based on what it is but on how council should have acted to implement its desire to ban it from doing work in community; that council should have adopted by-law to accomplish this — Impugned resolution can only be subject to judicial review if public in nature — While very difficult to draw clear line between private, public decisions, characterization of certain kinds of decisions firmly established — Thus, contracting quintessentially private power — Impugned resolution pertaining to exercise of First Nation's power to contract — Private in nature, not subject to judicial review — Court previously finding that purely contractual decision of First Nation councils not subject to application for judicial review but certain exceptions made involving exercise of powers conferred by *Indian Act* or similar legislation — In present case, contracts between applicant, respondent pertaining to construction work, not to possession of reserve lands nor to any power granted by *Indian Act* or other federal legislation — Not assisting applicant to argue that impugned resolution not pertaining to specific contract — Decision not to enter into contract is as much private as opposite decision — Absent legal restrictions, choice of contracting partner within discretion granted to natural, legal persons by private law — Despite that work performed for respondent or affiliates in present case pertaining mainly to public infrastructure, what is relevant is nature of relationship between public body, contractor or employee, not nature of services that public body providing to constituents — Fact that *Indian Act*, s. 81 empowering First Nations councils to enact by-laws regarding various kinds of public infrastructure having no bearing on matter — Lastly, unclear that invalidating impugned resolution would bring any tangible benefit to applicant — Public law remedies would not be adequate — Thus, granting present application for judicial review would not suppress respondent's freedom to contract, including freedom to choose its contracting partners — In

conclusion, impugned resolution was within exercise of private power; therefore, not subject to judicial review — Given such finding, not necessary to determine whether respondent acted as federal board, commission or other tribunal, within meaning of *Federal Courts Act*, R.S.C., 1985, c. F-7, s. 2 — Court not having jurisdiction to review impugned resolution — Application dismissed.

KNIBB DEVELOPMENTS LTD. V. SIKSIKA NATION (T-34-21, 2021 FC 1214, Grammond J., reasons for judgment dated November 9, 2021, 10 pp.)