Federal Court  Cour fédérale

Date: 20211109

Docket: T-34-21

Citation: 2021 FC 1214

Ottawa, Ontario, November 9, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

KNIBB DEVELOPMENTS LTD.

Applicant

and

SIKSIKA NATION

Respondent

JUDGMENT AND REASONS

[1] Knibb Developments Ltd. seeks judicial review of a resolution adopted by the council of Siksika Nation, barring it from obtaining contracts from the Nation or its affiliates. I am dismissing this application for lack of jurisdiction. The impugned decision related to the exercise of a purely private power, namely, the power to choose one's contracting partners. Judicial review does not lie against decisions that are private in nature, even if they are made by a public body.

I. Background

[2] Siksika Nation is a First Nation governed by the *Indian Act*, RSC 1985, c I-5, and the *First Nations Fiscal Management Act*, SC 2005, c 9. Over the years, either directly or through its subsidiaries, it has retained the services of Knibb Developments Ltd., a contractor specializing in water and sewer systems and offering a variety of other services, to perform work in the community.

[3] In 2018, a contractual dispute arose between Knibb Developments and Blackfoot Aggregates General Partnership Ltd., a wholly-owned subsidiary of Siksika Nation. The matter was settled by way of a confidential agreement in November 2020.

[4] On December 3, 2020, the Council of Siksika Nation adopted the following resolution, as appears from the minutes of the meeting:

> Knibb Development Ltd. ("Knibb") – Councillor Tracy McHugh
>
> RE: Legal Issue
>
> ▪ Knibb Soughed [*sic*] the nation, matter was settled in favour of Knibb
>
> ▪ Recommendations made to stop all business on the nation with the Company. No new contract will be allowed, only outstanding contracts will be completed.
>
> A MOTION was MADE and SECONDED to no longer allow Knibb Development and affiliated companies bid or obtain jobs and projects on the Siksika Nation, effective December 31, 2020.
>
> Carried.

[5] Knibb Developments never received any notice that the matter would be discussed at the December 3, 2020 Council meeting.

[6] Knibb Developments applies for judicial review of the December 3, 2020 resolution. It asserts that the process leading to the adoption of the resolution did not comply with the requirements of procedural fairness. Moreover, on the strength of *Roncarelli v Duplessis*, [1959] SCR 121 [*Roncarelli*], it argues that the decision is unreasonable, because it was based on irrelevant or extraneous considerations. It also argues that no reasons were provided and that relevant evidence was ignored.

II. Analysis

[7] I am dismissing Knibb Developments's application. The facts of this case may bear some resemblance with those of *Roncarelli*. There is, however, a crucial distinction. *Roncarelli* was an action in damages based on the manner in which a public power was exercised. This, in contrast, is an application for judicial review of what is in essence a private decision, even though it was made by a public body.

[8] To explain why I reach this conclusion, I must first clarify the nature and scope of the decision embodied in the resolution. I will then show why it was made in the exercise of a private power. Thus, if Knibb Developments has any recourse with respect to the resolution, it is an action in contract or in tort, not an application for judicial review.

A. *Scope of the Resolution*

[9] The resolution is not a by-law made pursuant to section 81 of the *Indian Act*. By definition, a by-law is an act of a governmental body that creates rules binding on all persons or a category of persons under the jurisdiction of that body. Because it is not a by-law, the impugned resolution cannot bind third parties. It does not bind Siksika Nation's members, who remain free to contract with Knibb Developments if they wish to do so. Before me, Siksika Nation recognized as much. This distinguishes the present case from *C & D Septic Ltd v Prince Albert*, 2018 SKQB 185. Moreover, it does not impose any prohibition on Knibb Developments, in particular from being present in the community to perform work.

[10] Rather, the resolution is what is commonly known as a band council resolution or BCR. A BCR is simply the expression of the will of a First Nation's council. Through a BCR, a council may exercise powers expressly granted to it, for example, by sections 12, 14.2(2), 20, 52.1 and 58 of the *Indian Act*. Provided that any other applicable requirements are met, the council may also adopt a BCR to exercise its power to enter into contracts, which has generally been recognized to the councils of First Nations even though it is not mentioned in the *Indian Act*: see, for example, *Gitga'at Development Corp v Hill*, 2007 BCCA 158 at paragraph 27; *Crevette du Nord Atlantique inc v Conseil de la Première Nation malécite de Viger*, 2012 QCCA 7 at paragraphs 57-75, [2012] RJQ 82. In addition, a BCR may be a tool of internal governance. Through a BCR, a council may give instructions to the staff of the First Nation, or to its wholly-owned subsidiaries. In contrast to a by-law, a BCR usually cannot create rights and duties for members of the First Nation or third parties.

[11] The impugned resolution falls into the last two categories. It is a decision of Siksika Nation not to contract with Knibb Developments. It may also be an instruction to its wholly-owned subsidiaries to refrain from doing so. The decision is reversible. Indeed, the evidence reveals that a department of Siksika Nation asked Knibb Developments to perform work after the impugned resolution was passed. Fundamentally, the resolution is a decision about the exercise of Siksika Nation's power to contract.

[12] Knibb Developments argues that the impugned decision should not be characterized based on what it is, but rather on how the Council should have acted to properly implement its desire to ban it from doing work in the community. To accomplish this, the Council should have adopted a by-law. Therefore, the impugned resolution could be the subject of an application for judicial review, as much as a First Nation by-law would be. I am unable to accept this contention. An applicant must take the impugned decision as it is. It cannot reframe it to make it a legitimate target of judicial review.

B. *Jurisdiction of the Federal Court*

[13] According to the Supreme Court of Canada, "Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character": *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall,* 2018 SCC 26 at paragraph 14, [2018] 1 SCR 750 [*Highwood*]. Indeed, both parties agree that the impugned resolution can only be subject to judicial review if it is public in nature: *Air Canada v Toronto Port Authority*, 2011 FCA 347, [2013] 3 FCR 605 [*Air Canada*].

[14] It is notoriously difficult to draw a clear line between private and public decisions. Nevertheless, the characterization of certain kinds of decisions is firmly established. Thus, contracting is a quintessentially private power. In *Air Canada*, at paragraph 52, the Federal Court of Appeal wrote that decisions regarding procurement and contracts are typical examples of private decisions not subject to judicial review, even when made by a public body. See also *Highwood*, at paragraph 14; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 91-116, [2008] 1 SCR 190.

[15] In this case, the impugned resolution pertains to the exercise of the First Nation's power to contract. It is obviously private in nature and not subject to judicial review.

[16] Indeed, this Court has found that purely contractual decisions of First Nation councils are not subject to an application for judicial review*: Peace Hills Trust Co v Moccasin*, 2005 FC 1364; *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band No. 38B*, 2008 FC 812, [2009] 2 FCR 276; *Cyr v Batchewana First Nation of Ojibways*, 2021 FC 512. Where an exception was made to this principle, the matter typically involved not only a contract, but also the exercise of powers conferred by the *Indian Act* or similar legislation, for example the power to grant possession of reserve lands: *Hengerer v Blood Indians First Nation*, 2014 FC 222 at paragraph 43; *Jimmie v Council of the Squiala First Nation*, 2018 FC 190. In the present case, the contracts between Knibb Developments and Siksika Nation pertained to construction work, not to the possession of reserve lands, nor to any power granted by the *Indian Act* or other federal legislation.

[17] In this regard, it does not assist Knibb Developments to argue that the impugned resolution does not pertain to a specific contract. The decision not to enter into a contract is as much private as the opposite decision. Absent legal restrictions, the choice of a contracting partner is within the discretion granted to natural and legal persons by private law.

[18] This finding is buttressed by the consideration of certain of the contextual factors mentioned by the Federal Court of Appeal in *Air Canada*, at paragraph 60.

[19] A public body's freedom to contract may be constrained by statutory requirements regarding calls for tenders. Decisions regarding the tendering process may be subject to judicial review: *Gestion Complexe Cousineau (1989) Inc v Canada (Minister of Public Works and Government Services)*, [1995] 2 FC 694 (CA); *Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116, [2010] 2 FCR 488. Indeed, Siksika Nation adopted a Financial Administration Law, pursuant to the *First Nations Fiscal Management Act*. This Law sets out a comprehensive framework for Siksika Nation's financial administration. It includes a section dealing with calls for tenders. When it intends to award a contract over $50,000, Siksika Nation must issue a call for tenders. For contracts between $100,000 and $500,000, tenders may be by invitation, but above $500,000, the call for tenders must be public. Whether the impugned resolution would allow Siksika Nation to disregard a bid made by Knibb Developments in response to a public call for tenders is an open question: see, by way of analogy, *Cie de construction et de développement Cris ltée v Société de développement de la Baie James*, [2001] RJQ 1726 (CA). As there is no evidence of such a call for tenders, the issue is not

properly before me. With respect to contracts below $50,000, however, the Law does not appear to constrain Siksika Nation's power to contract, which thus remains in the private realm.

[20] According to Knibb Developments, the public nature of the impugned resolution flows from the fact that the work it has performed for Siksika Nation or its affiliates pertains mainly to public infrastructure. I disagree. What is relevant is the nature of the relationship between the public body and the contractor or employee, not the nature of the services that the public body provides to its constituents. The fact that section 81 of the *Indian Act* empowers First Nations councils to enact by-laws regarding various kinds of public infrastructure has no bearing on the matter.

[21] Lastly, it is unclear that invalidating the resolution would bring any tangible benefit to Knibb Developments. Public law remedies would not be adequate. Thus, granting this application for judicial review would not suppress Siksika Nation's freedom to contract, including the freedom to choose its contracting partners. Unless a contract is of such a magnitude that a call for tenders is required, there appears to be no legal basis for this Court to force Siksika Nation to award any particular contract to Knibb Developments. Knibb Developments also submitted that, if the resolution were not quashed, it would need to disclose it to its prospective clients, for example in the context of a call for tenders. However, I note that the resolution does not mention any issue with respect to the quality of Knibb Developments' work, and anyone can form their own opinion with respect to the grounds mentioned in the resolution.

[22] For these reasons, I find that the impugned resolution is the exercise of a private power and, therefore, not subject to judicial review. Given this finding, it is not necessary to determine whether Siksika Nation acted as a federal board, commission or other tribunal, within the meaning of section 2 of the *Federal Courts Act*.

III. Disposition

[23] As this Court does not have jurisdiction to review the impugned resolution, this application will be dismissed. Other recourses may or may not be appropriate, and I express no opinion in this regard.

[24] The usual rule is that the losing party pays the costs of the prevailing party according to the tariff. Given the circumstances of this case, a somewhat reduced award of costs is appropriate. I will thus order Knibb Developments to pay costs in the amount of $500.

JUDGMENT in T-34-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Costs are awarded to the respondent in the amount of $500, inclusive of taxes and disbursements.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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