

Update on legally-binding contracts with First Nations

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Authors: [Maureen Killoran, KC](#), [Sander Duncanson](#), [Sean Sutherland](#), [John McCammon](#)

The Alberta Court of Appeal (the Court) held in its recent decision *Kehewin Cree Nation v Kehewin Construction Ltd* that a specific, written band council resolution approving a contract is not strictly necessary for that contract to be legally enforceable against a First Nation under the *Indian Act* (the *Act*). The Court clarified that a band council resolution approving the terms of the agreement is merely one of several ways by which the council may exercise its authority to bind the band in contract. Nevertheless, band council resolutions remain the most prudent means of establishing the band's legal commitments, and an important tool for entering into agreements with First Nations.

Enforcing a contract under the *Indian Act*

Section 2(3) of the *Act* provides, in part, that "a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened." A band council has several powers conferred on it by the federal government through the *Act*, including the powers to make and enforce bylaws for the band, construct infrastructure, zone and allocate property, impose taxes and license businesses on the reserve, among other things (see sections 81 to 86 of the *Act*). While the power to contract is not explicitly enumerated in the *Act*, the Court affirmed that it is part of the set of implied powers held by a band.

There are decisions from several jurisdictions in Canada holding that a written band council resolution is necessary to validate a legally-binding contract with a First Nation. For example, in *Heron Seismic Services Ltd v Peepeekisis Indian Band*, the Saskatchewan Court of King's Bench held that a verbal agreement to drill water wells on the reserve was unenforceable because it had not been ratified by a band council resolution.

In contrast, other jurisdictions found that ostensible authority may bind a First Nation absent a band council resolution. For example, in *Maloney v Eskanosi First Nation*, the Supreme Court of Nova Scotia held that an employment contract that was signed by the Chief without band council approval was legally binding because the Chief had ostensible authority to act on the council's behalf.

Band council resolution not required

The Court in *Kehewin* pointed out that band council resolutions are not the only means by which a band may demonstrate "consent of a majority of the councillors of the band." Rather, the Court held that section 2(3) of the *Indian Act* captures both express and implied powers: a band may exercise legal authority by a band council resolution at a meeting, but it may also exercise its powers by authorizing a member of the council to negotiate an agreement on its

behalf or delegate that authority to another individual. The Court held that there are no "formalistic requirements" for how a band gives its consent under section 2(3). This reasoning has support in decisions from New Brunswick, Ontario, and Québec, where courts have found that a contract can be enforceable without a band council resolution where it is subsequently relied upon or treated as valid by the band council through its course of conduct.¹¹

However, the Court cautioned that evidence would be necessary to determine whether such an authorization had been made, so relying on a contractual agreement with a delegated authority in a dispute remains subject to the Court's interpretation of that evidence.

Here, the defendant, Kehewin Cree Nation, hired the plaintiff, Kehew Construction Ltd. (Kehew) to build two projects: a housing project in 2002 (with a subsequent debt agreement for the unpaid portion of that project reached in 2009) and an Elders' Lodge in 2007 (also only partially paid for by the band). Neither project had been approved by a specific written band council resolution, but the Court found that they had nonetheless been duly authorized. The Court relied on the following facts to reach this finding:

- The Chief and Council approved Kehew as the contractor for the construction projects, and received regular reports on pricing, project plans and the band's ability to secure funding
- The band used written band council resolutions only for "government and oil and gas company dealings"
- The band's *Financial Administrative Custom Law* specified that the band administrator had authority to negotiate agreements, contracts and loans (under the direct supervision of the Chief and Council) and did not mention a requirement for a written band council resolution
- The Chief had authority to sign and negotiate contracts on behalf of the Nation and could delegate that authority to someone else (here, a Councillor)
- When the budget for the Elders' Lodge Project was increased and the band was behind on payments in 2007, the Chief and a Councillor signed a letter of intent and assured Kehew that payments would be made;
- The Councillor who signed the letter of intent, having been assigned responsibility for Kehewin's social housing portfolio, had signing authority in relation to Kehew's construction activities and the settlement of accounts
- The 2007 letter of intent was presented to the band council at a subsequent meeting and the council reviewed the history of the agreement, and
- None of the Council members took steps to question what was being done or to stop construction from continuing.

Best practices for entering into agreements with First Nations

While perhaps not legally necessary in every circumstance, band council resolutions still provide clarity and surety that a power held by the band council (such as the power to contract) has been duly executed. This surety may be significant if contractual disputes lead to litigation, particularly in the context of the duty to consult. Indeed, even in simple debt collection cases, enforcement will be more difficult and costly if there is no band council resolution approving the contract.

In obtaining a band council resolution, it is important that they address the contract at issue

(i.e., are not in standard form) and make reference to the meeting at which they were signed.

Where negotiating with a representative purporting to hold designated power to enter contracts on behalf of the council, a counterparty should ask for evidence of a meeting where that authority was in fact designated—which is key evidence for enforcing the agreement. As bands move away from the authority of the *Indian Act* to greater self-government through the use of bylaws and modern treaties, the laws of each group also must be considered when identifying the appropriate signing authority for each agreement.

[1] See *Basque v Woodstock Indian Band*, *Sands v Walpole Indian First Nations Band*, and *Conseil de la Première Nation malécite de Viger c. Crevette du Nord Atlantique inc.*