Should We Take the Government To Court?[1]

Considering whether to take a government to court on decisions potentially affecting aboriginal and treaty rights

A. Advantages, Disadvantages & Strategies of Using Litigation

B. **Strategies for Using Court-Ordered Consultation Processes[2]**

Condensed Speaking Notes

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A. Advantages, Disadvantages & Strategies of Using Litigation

Advantages of Litigation

- You may get the solution that you want to the immediate issue at hand
- Litigation pushes the envelope and the government may take you more seriously about the level of significance of the issues or potential impacts of the decision on your rights
- The level of information litigation engenders is usually much more than not
    - For example: You will realize during litigation that you only had a fraction of the information that the decision maker had before him/her
- It is an effective method to deal with non performance by the government if the Court orders further consultation
    - You can ask that the judge can remain seized of the matter and the Parties go back to court if necessary
- Regardless of the decision, it may lead to incremental changes in the government's approach to your First Nation, or it may lead to broader governmental policy changes advantageous to your First Nation
- It provides an opportunity to bring the First Nation together on an important issue, to work together toward a shared goal of recognition
- Those involved will gain confidence and knowledge in how the governmental decision process works and how litigation works
- There may be the opportunity for information sharing and community

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cohesiveness when as a whole the community decides to defend rights and resources.

  - This is especially so when Elders, Traditional Knowledge Keepers and all levels of the First Nation are involved as experts and helpers in an open setting. This entails ensuring that affidavits are not separately compiled by lawyers with Elders and leadership

- It will assist the First Nation to articulate your rights, the scope of your rights, and entails a translation of your perspective on your aboriginal and treaty rights so that the government may understand them, the Court may interpret them

  - All of which may lead to policy development for more than just the one issue brought before the Court

- It will assist the First Nation articulate its relationship and expectations with respect to the traditional territory and your approach to the management of it

- The evidence you put forward and the information that is gathered for litigation all goes toward further knowledge for your First Nation including information about the resources, the lands, etc.

  - This information may not have been gathered together in one place, which can now be used and added to by community for other processes such as land use planning or traditional use studies

- It will inevitably show the government how serious the First Nation is about the land and resources and may strengthen the justification behind implementing concepts and processes such as co-management and shared jurisdiction for the traditional territory as being a better solution rather than continuing to go to court or using the legal system which is an adversarial approach

  - For example: It will show all the Parties the limits and problems with using the court system

- Relationship building can result with other governments or levels of governments increasingly taking your First Nation seriously on your position to an issue

  - This may include municipalities, societies, tourism industries, neighbouring nations, all of whom can support and assist the case for the First Nation in different ways which may result in bridge building where previously the First nation may have felt isolated

- Litigation mobilizes the government to expend the resources, gather the information and do the job they are supposed to do with respect to its duty to consult on all aspects of a decision

  - This process may in and of itself lead to policy change and different options than the specific Ministry originally foresaw

- It may assist other First Nations in their own struggles by providing a positive precedent and example, depending on the breadth of the issues of the case

Disadvantages of Litigation

- It will be difficult to walk the line between 'no veto' on land use decisions and holding a strong governmental policy position on present practices of government regulators affecting your First Nation's lands and resources

- It is difficult to be diligent about not asking the Court to become the "consulting body", but it must be avoided as the First Nation cannot expect the Judge to understand all of the information, nor the nuances in the compressed time period of a court proceeding

    - Yet it is extremely difficult not to steer in this direction as the Judge will have in front of him/her much more comprehensive information than the decision maker may have originally had

- The format is too compressed to fully articulate the issues, nuances, perspective and position of the First Nation, as the Judge will probably lack in expertise or time to decipher the aboriginal world view, will wish to narrow the issues, and may simply not understand your First Nation's perspective or concerns

- The format is too compressed to fully articulate the technical, scientific and theoretical issues involved as the Judge will probably lack expertise or time to decipher the information to the extent required, so may make findings or not make findings which may be integral to the outcome

- The adversarial nature of litigation does not add to the resolution-based concept inherent in consultation and reconciliation

    - In fact, litigation may further harm the relationship between the Parties, especially where there is a need to have an ongoing relationship, whatever the outcome

- Bad feelings and heartbreak may result for community members when sitting in court and listening to the Crown parties deny the Nation exists, or has its own law, policy and governance independent of that which the Crown 'gives' to the First Nation

    - The Crown will invariably attempt to diminish the significance of the First Nation, its aboriginal and treaty rights and the potential infringements to the rights at issue

- It may prove difficult to find legal counsel who the First Nation can be confident will understand the issues and the Nation to then successfully translate that information so that the Court can digest it

- The time, commitment and human resources it takes to properly prepare may overwhelm the available resources of the First Nation such that other pressing areas of concern are neglected

- Taking issues on which could result in a loss or a bad precedent is a real concern simply through misinterpretation or unfortunate findings by the Judge

- The effects of such a decision the First Nation will have to live with, potentially. For example: what happens if a Court finds that your First Nation does not have a particular right? The judgment may also prove to have negative consequences to other First Nations, despite differences in facts

- The government will instruct Crown counsel to defend it's actions or lack of action throughout the proceedings, regardless of the First Nations perspective on what actually occurred

    - This is yet another reason why it will be difficult to switch to consultation mode if the Court orders that the Crown breached its duty and needs to consult further with the First Nation. This will result in a longer time period needed to transition into productive consultations, especially if the Crown counsel is the same in court as in the consultation process

- Even where a case has facts whereby the Crown should conceivably admit certain facts about the First Nation, it may choose not to due to a higher level policy or position the Province or Federal government is taking on aboriginal issues, due to the changing political environment

- Financial expenses are enormous for litigation, especially when added to the 'paper trail' the First Nation may have initiated regarding the particular issue

    - Often a First Nation decides to use lawyers for initial correspondence on issues of great significance. These costs must be eventually included in the overall budget including preparation of expert testimony, commissioning of studies or reports, preparation of court documents, correspondence regarding the litigation, and the actual court proceedings. If the Nation is successful and receives 'costs ', these will not cover even half of what was expended by the First Nation. In addition, the First Nation should strategically decide on a budget for the further expenses if the Nation decides to appeal the decision, or the Crown decides to appeal the decision. Finally, the Nation must also factor in the potentially significant costs associated with any consultation or remedy the court may order, if successful, as even if successful receiving capacity funding from the government ministry, this is rarely sufficient

- Psychologically, taking your First Nation and your aboriginal and treaty rights into the non-aboriginal adversarial common law court system, may be very difficult for the First Nation or particular community members

    - There may be a feeling of helplessness in the alien environment of the court room and having to rely on such a system to resolve the issues

- Some community members may be alienated from the process if they are not asked to participate or asked their advice or don't agree with what they hear in court or read in a judgment

- Litigation may alienate neighbouring First Nations, governments or third parties with whom the First Nation may have previously had a good relationship

- The Court may not give strong enough directions to the Parties in any remedy, or may find a breach occurred, but still not overturn the decision

    - This leaves the First Nation with the task of trusting that the Crown will consult and make a different decision as a result of such court ordered consultation

Litigation Strategies , including preparation in advance of filing

- Be consistent and be coordinated

- Be strategic and plan options and an approach to referrals and your First Nation's government consultation policy in advance

- When you know there is a government referral which is going to be problematic, For example: making a decision will impact and infringe upon the First Nation's rights, then implement a paper trail right from the beginning, using legal counsel to assist, as required

- Come from a place of knowledge which is coordinated and prioritize two or three positions and issues. Keep your positions strong and simple. Be focused and don't waiver from continuing to communicate the importance of the issue or the concern your First Nation wishes to express

- Decide on a multi-pronged approach to your First Nation's governance activities and to the traditional territory

    - This will assist in deciding when and which issues are such that as a Nation you would take the government or a third party to court to defend the right or resource in question

- Keep the paper trail into the court process and engage in the documents assembled by your legal counsel and opposite counsel as this information will be useful post court, for many other uses by the First Nation generally

- Coordinate in advance a team of community members, experts and others who will agree to work with legal counsel right from the beginning, through the court action and after if a consultation process is ordered

    - Keeping people in the loop, while ensuring a sense of confidentiality is a difficult balancing act and must be considered before hand

- Generally keep the community in the loop by having community meetings prior to deciding on litigation, then throughout the process and after

- Be prepared to do studies or commission reports to find information that is important to understand the potential impacts a decision may have, ensuring that the information is in a format conducive to a court proceeding

- Do your homework, know your territory and assert your management direction, policy and activities, both historical and present day, including soon to be implemented planning processes or future plans

  - The stronger you present your First Nation's governmental processes, both historic and current, the more likely the government will be inclined to take you seriously

- Back up your positions with articulating your rationale through studies, traditional law and policy, historic and contemporary

- Craft any responses in the initial paper trail very strategically, requesting information, asserting the nature and scope of your rights, outlining only initial potential impacts, asking questions and requesting face to face meetings, outlining capacity issues needing to be addressed, all without ever stating that you have nothing further to say about an issue

  - Often times the First Nation will be asked to respond to an application without adequate information, whether physical, technical or scientific.

- Take control of the process prior to going to court, even if you think you may have to go to court on an issue

  - For example: if you are pretty certain a government official will not make a decision you want

- Request face to face meetings and bring plans, proposed agreements or protocols, impacts or rationales for your concerns or potential impacts, which may be used later in court proceedings

- Ensure that your expectations to the initial consultations are articulated in written format so that they can be used later for court, if necessary, attached to an affidavit.

  - This honing is helpful both at the front end, and then in court, and even somewhat after court to use as a guide stick to gauge progress in further consultation, if so ordered

- Strategize early on with your legal counsel and coordinate action items, roles and positions of the First Nation for the court proceeding

- Make use of scientists, technical folk, environmentalists or academics who know about the resource or activity the government decision will potentially impact

  - Often they are more than willing to assist, even without payment, merely because it meets their interests

- Use other processes you are engaged in to ensure that all Parties have notice of your concerns, and are provided with your rationale and your position on the issues

- Use other processes to get your concerns out in, such as other Ministry or government consultation processes your First Nation may have previously been involved in, or political alliances, treaty tables, land use boards, etc.

- Use any forum where you have officially provided information about your First

Nation as a place to direct the government Ministry initially. For example: provincial or municipal land use planning boards, advisory boards, tribal councils, etc. may have information about your First Nation that you have already taken the time to compile

  - This will ensure that the First Nation is not reinventing the wheel by providing basic information to different Ministries in the same government. If you do this you are asking for a 'one window' approach to your government by third parties or other governments. This will save time and resources for the limited amount of staff the First Nation probably has to respond to referrals coming into the community office

- Consider the use of information technology which can be updated and it's information provision can be restricted, as necessary

  - For example, web sites or databases for traditional use or traditional law and policy that defines the First Nation can be provided with limited access, depending on the confidentiality of the data

- Take excellent notes if you do have meetings or consultations on a resource application you have already tagged with the potential of needing to be litigated

  - Provide the notes you take to the other party, asking them to confirm receipt

- Work with your neighbours, both aboriginal and non-aboriginal to push the envelope on issues you know they have common interests in protecting

  - This may include municipalities, regional districts, environmental groups, and especially, neighbouring or even farther afield First Nations who share your concern and may also be impacted by far field or cumulative impacts the activity may create

- If you go to court, propose to the Court explicitly what direction you wish it to give to the Parties in its judgment

  - This could include a framework for any consultation process the court may order, or at the very least, it should include the broad or narrow focus you wish the process to address. It may be that you included only a couple issues in the initial pleading, but throughout the court proceedings the issues may have broadened due to the nature of the decision the government official made

  - For example, the Blaney decision was technically about the government decision to allow the addition of Atlantic salmon to the fish farm, however, during argument, the Xwemalhkwu First Nation successfully broadened the issues to include the actual location of the farm in the traditional territory and the regulations by which the Province manages the industry, resulting in a court ordered consultation process which was much broader than merely the addition of Atlantic salmon would have warranted

- If compiling a traditional use study, Elder's affidavits, technical or resource based studies, or otherwise, have meetings inviting community members to participate, even as observers

    - The more members who participate the stronger the effect the decision to go to court will have on the community, and the greater benefits will accrue in the form of knowledge transfer and empowerment

B. Strategies for Using Court-Ordered Consultation Processes

- Prepare a Terms of Reference on how to approach the process

    - Ensure that as a First Nation you take the time to prepare it in advance, with rationale for every section so that it can be justified and explained to the government ministry

- Ensure that the Terms of Reference is agreed to between the Parties, including a commitment to resource the process, prior to substantively commencing consultations

    - Such Terms may include the parties, the approach, the issues, the procedures, the logistics, the resources necessary, the time line and a dispute resolution process (if it is decided that going back to Court for guidance should not be the default)

- It is especially important to articulate the expectations of the Parties and to ensure a commitment to the process, including the provision of information, the scope of any eventual decision and the type of ongoing relationship the Parties desire post consultation process

- Know the worst case scenario and best case scenario for the decision the First Nation hopes the process will result in

    - So you can strategize as the process evolves or if it looks like the information or impacts are not strong enough to get the best result the First Nation desires

- The with prejudice aspect to this type of consultation process may make the process rigid and limit the ability of the Parties to explore creative solutions and accommodations early on, a solution is to get a transcriber or a court reporter to ensure that the process is transparent

    - During a meeting if one party specifically requests to go off the record for exploratory talks, it can be agreed to on an ad hoc basis

- If there is no adjudicator present, consider whether neutral third parties should sit in as witnesses or observers

    - Examples include other government representatives or political representatives, representatives of neighbouring First Nations, AFN representatives, MLA's, MP's

- Attempt to ensure that the actual decision maker is committed to attending the consultations, and give this person all the time and support they need from the First Nation to process the cultural, scientific, technical and legal nuances of the issues, rights and potential impacts

- Ensure that the appropriate people from both the First Nation and the government are there to address issues, respond to questions, explain potential impacts

    - If you have a scientist attend to explain your position with respect to impacts of a particular activity, ensure that the government or third party has their own scientist or technical people there on the same day, to avoid duplication or misinterpretation when depending solely on written data.

- Either keep an open door policy for your community members to sit in when they desire, or strategically ask community members to come in to present, to hear responses or to back up presenters explaining the First Nation's approach to the issues, your laws or culture. Be sure to ensure that those doing the speaking can be heard by one another

    - Keep in mind that large numbers of community members may intimidate the government representatives. However depending on the importance of the issue to the community, it is your First Nations choice to insist that they be included if they so desire. Depending on the issue on the table for the consultation that day, or the scientific or technical nature of the issues, more or less members will remain interested. Keeping members informed of the process is probably of political importance

- Coordinate the consultation process in a fluid yet proactive manner so that the Terms of Reference can be used to guide the Parties back to the process if it appears to be going off the rails

- Be diligent with explaining the First Nation's perspective on the issues from an aboriginal and treaty rights perspective, notwithstanding that other stakeholders may have similar concerns

    - It may be necessary to remind the Crown of the obligations it has to meaningfully integrate your concerns as when technical staff begin to attempt to address issues, they may tend toward technical or scientific justifications rather than approaching your concerns through the lens of the Crown duty to meaningfully integrate your concerns and the potential impact on your rights, not merely to justify through a consultation process why your concerns are unfounded

- Review the transcribed minutes of each consultation and highlight outstanding issues, questions and commitments by each Party prior to the next consultation

    - Present the document to the government (and third parties) prior to the next meeting, request they respond in writing to the outstanding issues, questions or information requests, or get it on the record when they have responded to your satisfaction

- A consultation process may provide the first opportunity for face to face meetings. Use these occasions wisely to bring forward your First Nation's unique perspective in an oral as well as written format

    - Notwithstanding the outcome of the particular decision at issue, engaging in this process may result in relationship building and some areas of agreement or areas to work together on outstanding issues in the future

- Having the decision maker at the table may result in placing the focus on information provision coming directly from the First Nation to the decision maker

    - For example, often the decision maker relies upon over worked bureaucrats or technicians to give information from First Nations

- Don't be shy to go back to court if necessary for guidance to the Parties or the process, just attempt to use this option strategically to push your prioritized issues to the forefront

- If the First Nation decides to go back to the Judge with an issue, use it to your advantage and articulate exactly what has gone wrong, offering the Judge the transcribed notes and other documents to explain the First Nations approach to the issue and to show how or where the Crown did not address it meaningfully