



UNDRIP in 2020 – Where to now?

Implications of BC's DRIPA
and UNDRIP implementation plans
across Canada

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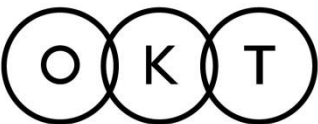
OKT Law

**11 March 2020
NALMA Training,
Whitehorse**



UNDRIP 2020 – What’s Happening?

- BC’s Bill 41 - DRIPA
 - Status and Implications
- NWT Process towards UNDRIP
- Federal Legislation
 - Bill C-262 is dead, will Canada bring it back?



UNDRIP: Background



United Nations Declaration on the Rights of Indigenous Peoples

- Declaration the result of long advocacy by Indigenous peoples and *compromise* at international level
 - UNDRIP Resolution passed in 2007 by UN
 - 2010 – Canada endorses as “aspirational”
 - 2016 – Canada states support “without reservation”
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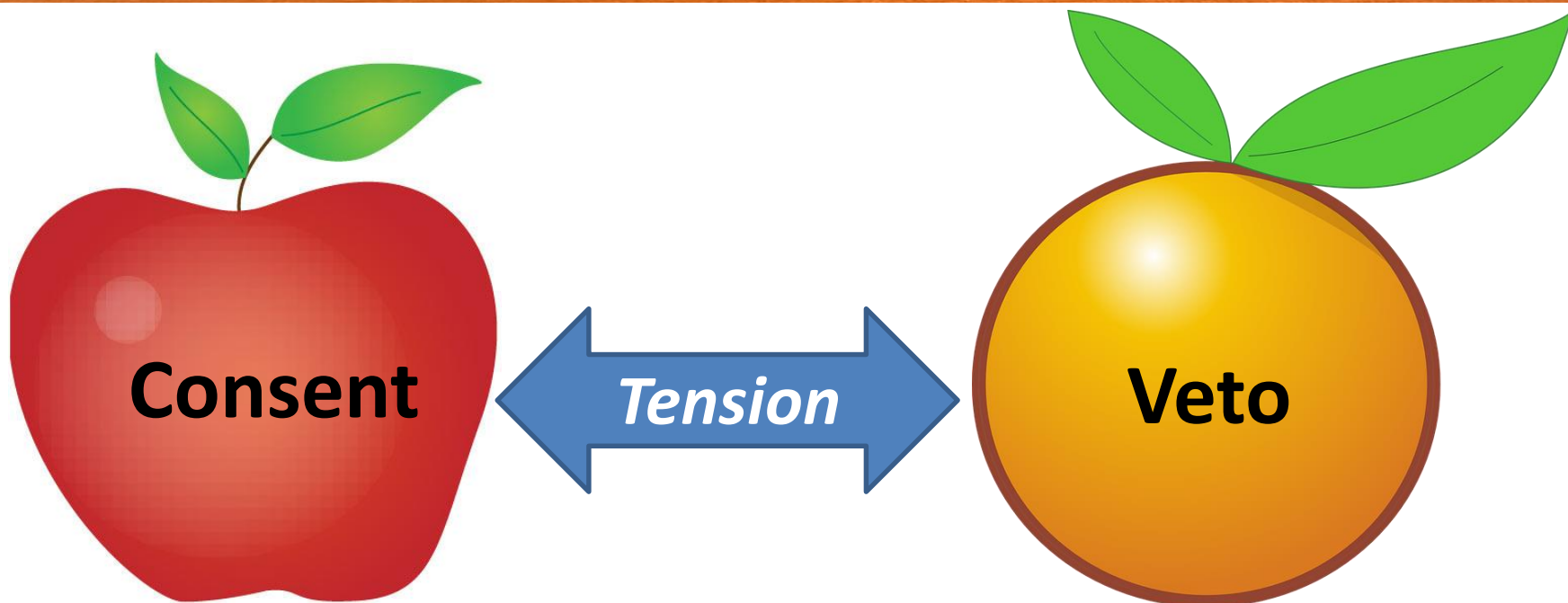
United Nations Declaration on the Rights of Indigenous Peoples

- UNDRIP has broad scope – 46 different articles covering broad range of topics, including:
 - culture
 - identity
 - language
 - governance
 - education
 - redress for takings
-



Free, Prior, and Informed Consent

- FPIC is arguably most talked about concept in UNDRIP
- states must have the objective of obtaining consent before:
 - **Art. 19** - The adoption of legislation or administrative policies that affect indigenous peoples
 - **Art. 32** - The undertaking of projects that affect indigenous peoples' rights to land, territory and resources, including mining and other utilization or exploitation of resources

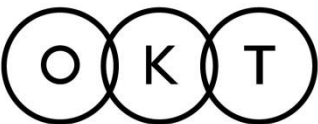


Definition:

- *Permission for something to happen*
- *To allow something to happen or to be done*

Definition:

To unilaterally stop an official action, esp. legislation. From the latin "I forbid"



Bill 41: DRIPA



BC's DRIPA - Background

- Bill 41 – Passed in November 2019
 - Result of co-drafting with BCACFN, FNS, UBCIC and province
 - Based on model of federal Bill C-262 – action plan to implement with some additions
-



BC's DRIPA – What does it do?

- Action plan to implement objectives of UNDRIP “without delay”
 - BC to “take all measures necessary” to ensure BC laws consistent with UNDRIP
 - Minister required to prepare a report on progress towards action plan
-



BC's DRIPA – What does it do?

- Allows for decision-making agreements between Crown and First Nations
 - Extension of policy of shared-decision making agreements under New Relationship
 - Allows for sectoral co-decision making within a Minister's statutory power
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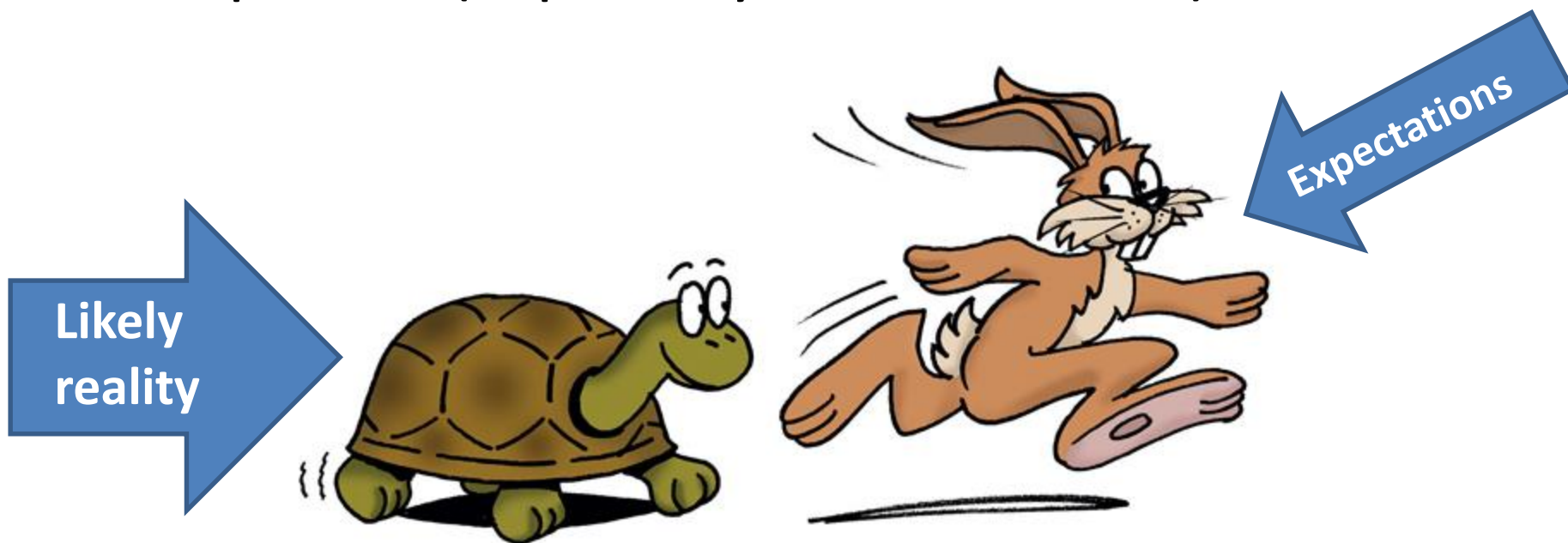


BC's DRIPA – Key takeaways

- Gradual and incremental implementation
 - No set timelines
 - Capacity available will be a big factor
 - Areas of priority may shift
 - Many remaining issues remain to be worked out
 - Meaning of FPIC in practice
 - Jurisdictional tensions with Canada (and other provinces)
-

BC's DRIPA – Key takeaways

- Actual implementation may be slower than expected (especially in some areas)



BC's DRIPA – Key takeaways

- BC said in passing the Bill:
 - No immediate changes as a result of the Act
 - Will not change how BC consults with FNs
 - Full alignment of laws “generational work”
 - “Doesn’t create new rights”



BC's DRIPA – Key takeaways

- First action plan expected in “months”
 - First priorities EAs and child welfare
- BC *Environmental Assessment Act* drafted with intent of compliance with Bill 41 and UNDRIP
- Much of what seems to be envisioned is building on pre-existing initiatives



New Environmental Assessment Act

- Purpose includes supporting UNDRIP implementation
- Possibility of collaborative assessments (s. 41)
- Explicitly requires goals of achieving consensus with participating First Nations (s. 28)
- Dispute resolution process where no consensus (s. 5)





New Environmental Assessment Act

- Devil may be in the details
- Key regulations still being finalized:
 - Alternative Dispute Resolution Regulations
 - Indigenous Capacity Funding





Outstanding issues: Defining Consent

- BC Govt clear that UNDRIP implementation doesn't mean a "veto" for FNs
 - Question of what meets the threshold of consent TBD – *i.e.* do FNs ever have the right to say "no" and if so in what context?
 - Operationalizing consent will still be tricky
 - e.g. Overlap in jurisdictions of FNs, etc.
-



Outstanding Issues: Priorities

- Unclear what will be prioritized and when
 - Once action plans in place there will be some timeline requirements and there is yearly reporting
 - No requirements to make action plans on a specific timeline
 - Court challenges to longer delays?
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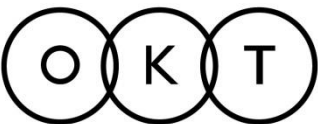
Outstanding Issues: Jurisdiction

- May be issues with other provinces and feds in relation to jurisdiction overlap
 - How will overlap with federal jurisdiction get navigated?
 - Will there be federal UNDRIP legislation and if so how will it overlap?
-



Impact of recent events?





UNDRIP Implementation in the NWT



UNDRIP's Evolution in the NWT

- Our Starting Position
- The Current State of Play
- The Promise of UNDRIP: Cooperation & Collaborative Consent

UNDRIP implementation means renewing Treaty-based federalism in the NWT and Canada

Consultation in the NWT

- We have regulatory processes embedded in legislation built in the 1990s to implement co-management under modern land claim agreements
- These processes largely address **procedural aspects** of consultation

- **3** Wherever in this Act reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised
- **(a)** by providing, to the party to be consulted,
 - **(i)** notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter,
 - **(ii)** a reasonable period for the party to prepare those views, and
 - **(iii)** an opportunity to present those views to the party having the power or duty to consult; and
- **(b)** by considering, fully and impartially, any views so presented.

*Mackenzie Valley Resource Management Act,
S.C. 1998 c. 25*

The Consultation Spectrum

*Low
impact on
rights*

Low

Notice, disclose
information,
discuss issues

*Honour of the Crown applies
throughout to diligently uphold
the process, ensure Indigenous
interests are being considered.*

*High
impact on
rights*

High

Shared
decision-
making or
consent.

“No sharp dealing”

Procedural Fairness

*Low
impact on
rights*

Low

Notice, disclose
information,
consider facts.

*Parties before an administrative
board/tribunal have a right to be heard,
to receive fair and unbiased
consideration, and have meaningful
opportunities to address issues and
concerns raised through the process.*

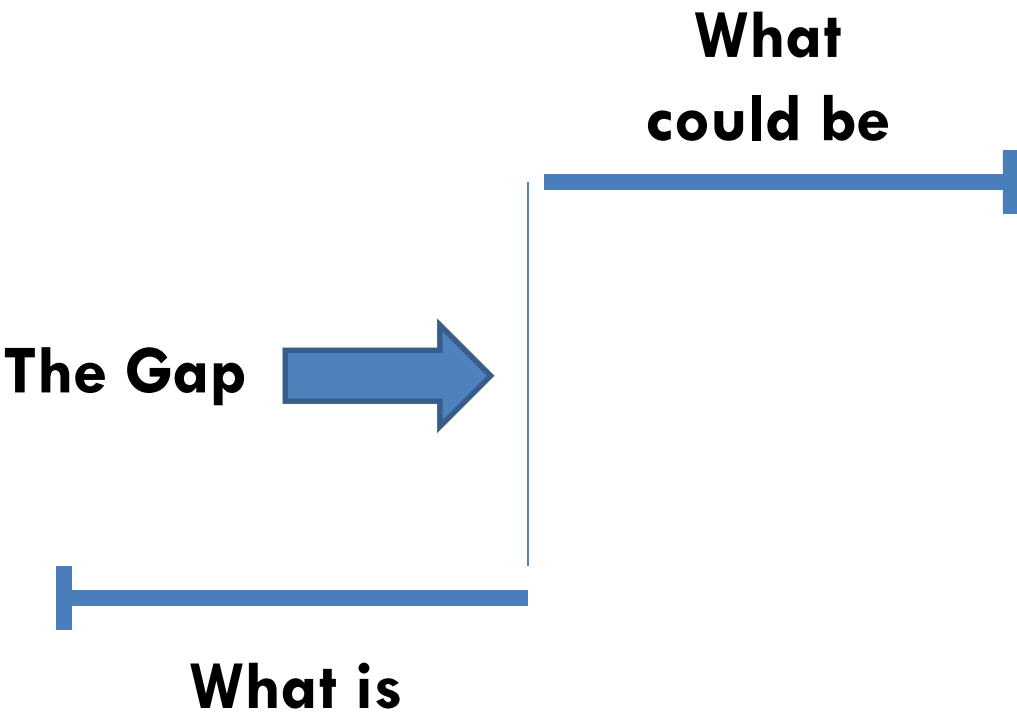
*High
impact on
rights*

High

Decisions
must be fully
informed,
reasons must
be provided

“Fair and Reasonable”

What About Consent?



2008: Legislative Assembly of the NWT “recognizes and supports” the Declaration, “strongly urges the Government of Canada to respect and honor the decision of the international community in adopting the Declaration.”

2018: Bill C-262 introduced to recognize and give effect to the Declaration in Canadian law.

Crickets from the GNWT.

Motion

United Nations Declaration on the Rights of Indigenous People

WHEREAS the *United Nations Declaration on the Rights of Indigenous People* establishes a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous people;

AND WHEREAS the *United Nations Declaration on the Rights of Indigenous People*

- addresses individual and collective rights;
- identifies rights to education, health, employment and language;
- outlaws discrimination against indigenous people;
- ensures their right to remain distinct and to pursue their own priorities in economic, social and cultural development; and
- encourages harmonious and cooperative relations between States and indigenous peoples;

AND WHEREAS Canada as a member of the United Nations Human Rights Council took a leadership role within the Commission on Human Rights that drafted the Declaration over the past 20 years;

AND WHEREAS on September 13, 2007 the United Nations adopted the *Declaration on the Rights of Indigenous People* by a vast majority vote of 143;

AND WHEREAS Canada was one of only four countries that voted against the *United Nations Declaration on the Rights of Indigenous People*;

AND WHEREAS the Declaration is now an aspirational document; ~~78627~~

NOW THEREFORE I move, seconded by the honourable Member for Mackenzie Delta, that this Legislative Assembly recognizes and supports the *United Nations Declaration on the Rights of Indigenous People* as an international legal instrument;

AND FURTHER that this Legislative Assembly strongly urges the Government of Canada to respect and honor the decision of the international community in adopting the Declaration.



Date of Notice:

February 15, 2008

Moved by:

Mr. Menicoche

Date of Introduction:

February 19, 2008

Seconded by:

Mr. Krutko

Disposition:

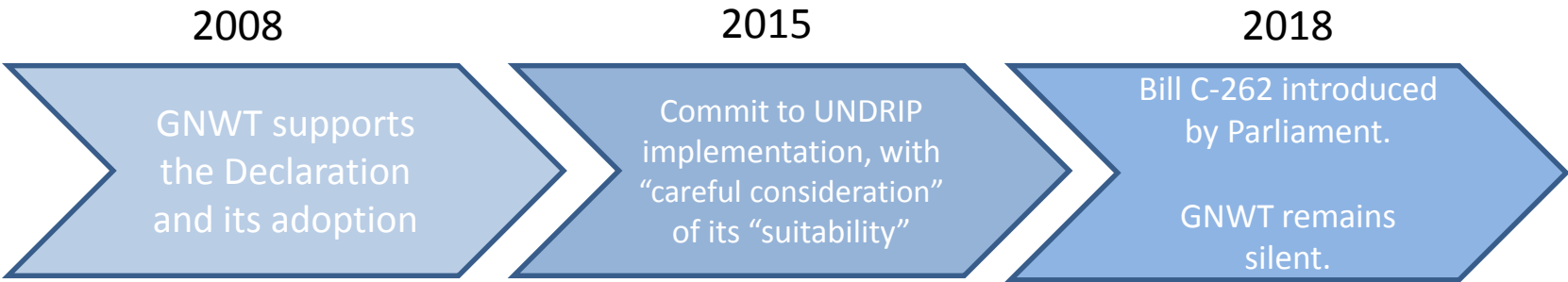
Carried as Amended R.V.

Ruled Out of Order;

Carried:

February 19, 2008

GNWT's Position on UNDRIP



Canada's Position on UNDRIP





So why the holdup?

Hint...consent!

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Article 32



Achieving UNDRIP in the NWT: GNWT Mandate (2019-2020):

The Commitment

- New “progressive” government
- Pledge to make UNDRIP a priority
- 19th Assembly mandate includes implementing UNDRIP:

GNWT commits to “implementing UNDRIP within the constitutional framework of Canada” as part of its advancement of reconciliation



Achieving UNDRIP in the NWT: Next Steps

How and Who is Involved?

- Work to be done by Department of Executive and Indigenous Affairs in partnership with Indigenous governments
- Will collaborate with federal government “to support Canada’s efforts to implement UNDRIP”

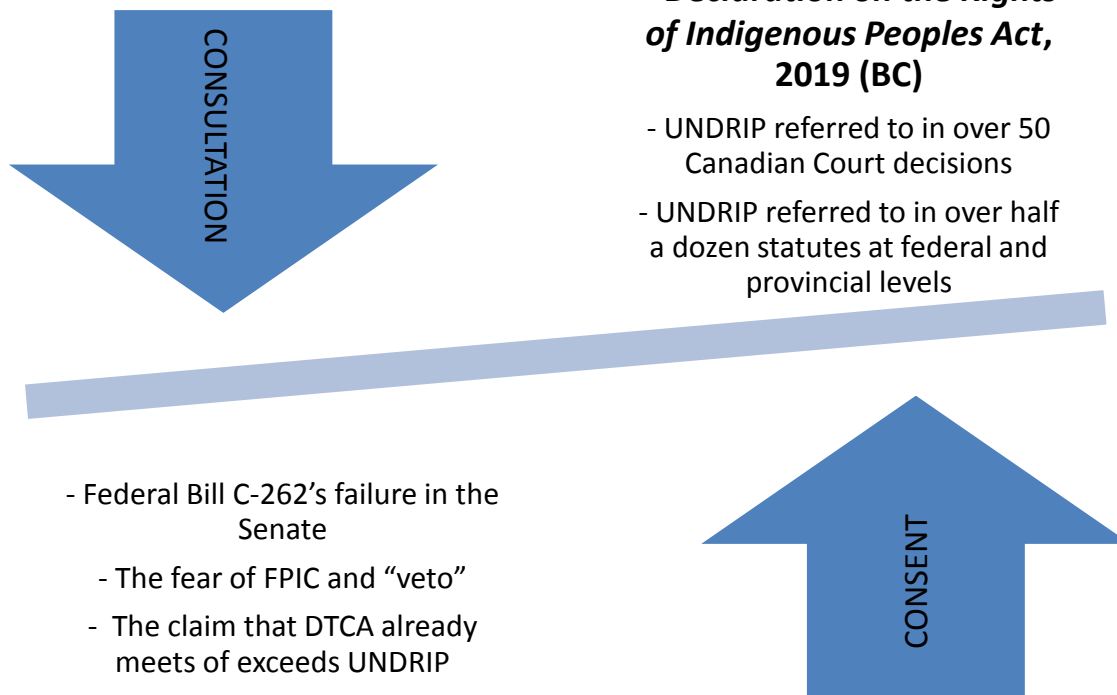


Achieving UNDRIP in the NWT: Next Steps

When will it Happen?

- Terms of Reference and Working Groups with Indigenous Governments – Summer 2020
- Implementation plan – Summer 2022
- Reporting on program and services changes – Ongoing

What Changed?



The Speed of the Leader is the Speed of the Gang



What to Expect in the NWT and How BC Is Different

Northwest Territories	British Columbia
Modern and Historic Treaties	Small number of treaties
Greater clarity on group representation; fewer disputes over traditional territories	Many First Nations – lack of certainty where legal rights rest
Co-Management System embedded in modern land claim agreements and legislation – boards that examine projects from start to finish with Indigenous voices	Impact assessment process that incorporates duty to consult and, in some instances, co-developed management plans
Agreement to partnership legislative drafting and policy development in key areas (lands and resources)	Consultation-based involvement of First Nations in legislative drafting and policy development



Northern Context: Unique Opportunities

What are the Expectations?

- Approach to creating legislation that builds trust, collaboration and basis for shared success
- Detailed legislation likely to draw on framework from elsewhere – e.g., DRIPA, Bill C-263
- Become new standard-bearer; NWT processes closer to normative framework of UNDRIP than in southern parts of Canada



Northern Context: Unique Challenges

- **Bureaucracy's role in wearing down creativity & ambition**

"Leadership that moves the bureaucracy outside of its comfort zone is sorely needed in the NWT"

- [Kieron Testart, Former NWT MLA](#)

- **Expectations are high**
 - Immediate results unlikely to be match excitement

How does this affect you?

The Promise of UNDRIP

Going beyond
consultation in the NWT:

**A process of
deliberative dialogue
aimed at achieving each
party's consent to a
proposal**

Process: ongoing, iterative

Deliberative: planned, focused, deep,
meaningful, substantive

Dialogue: mutual, transparent, responsive,
knowledge-based, interests-based

Aimed at: genuine intent, no sharp-
dealing, no veto

Consent: substantive agreement on the
outcomes.

Proposal: becomes a shared goal.

Free, Prior and Informed Consent

Free

- Freedom from force, intimidation or coercion

Prior

- Mutual agreement on a process for consultation
- Robust and satisfactory engagement prior to approval of a project

Informed

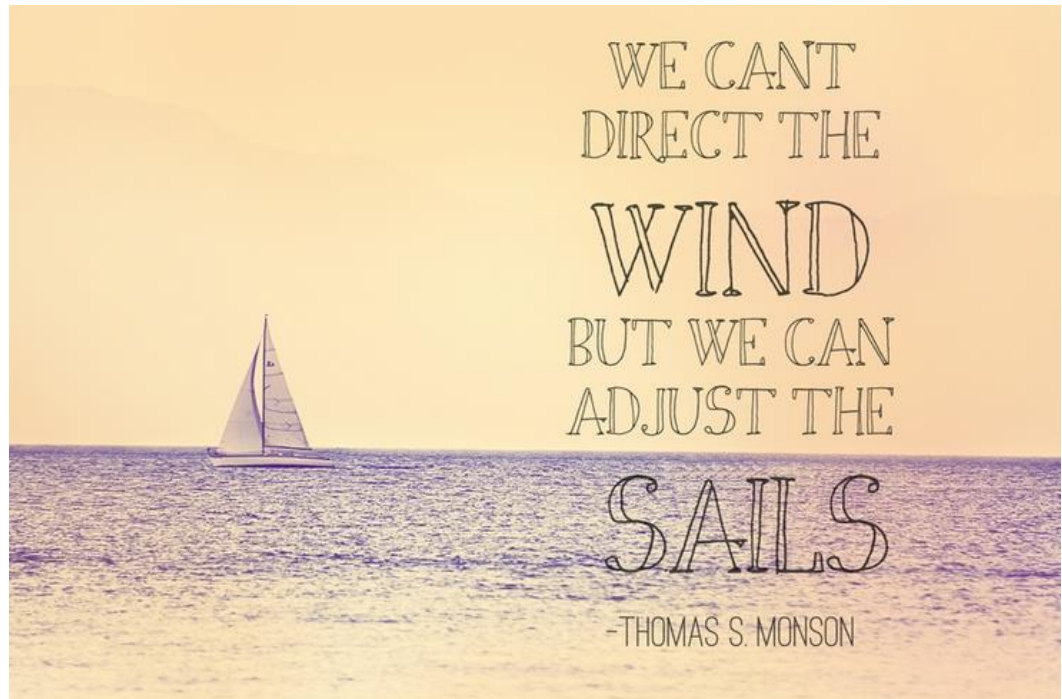
- Sufficient and timely information exchange
- Proper resourcing, both technical and financial, to allow the Indigenous group to meaningfully participate

Consent

- Shared objective of obtaining the reasonable consent of the Indigenous group

The Path Forward

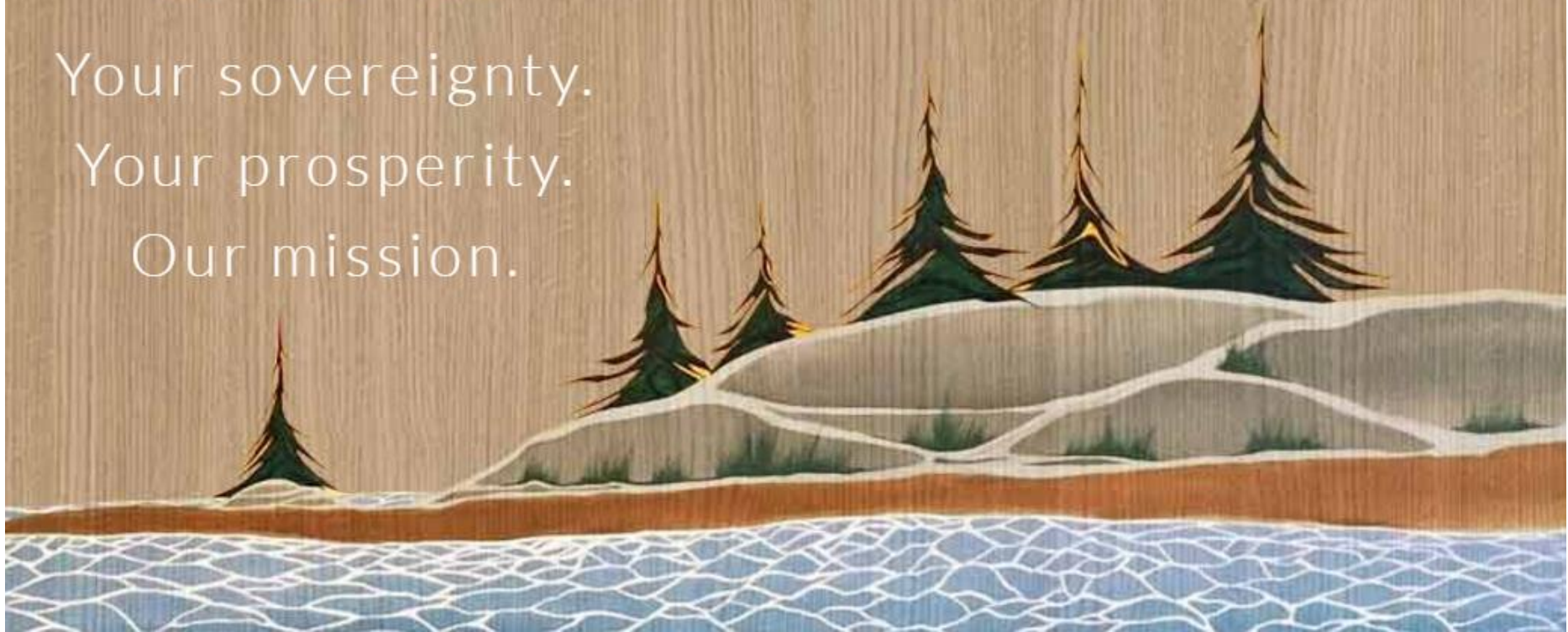
Move From	→	To
Apathy		Interest
Close-minded		Open-minded
Control		Empower
Delay		Do
Hesitant		Willing
Naysayer		Advocate
Undermine		Support
Sabotage		Promote





QUESTIONS?

Your sovereignty.
Your prosperity.
Our mission.



THANK YOU!



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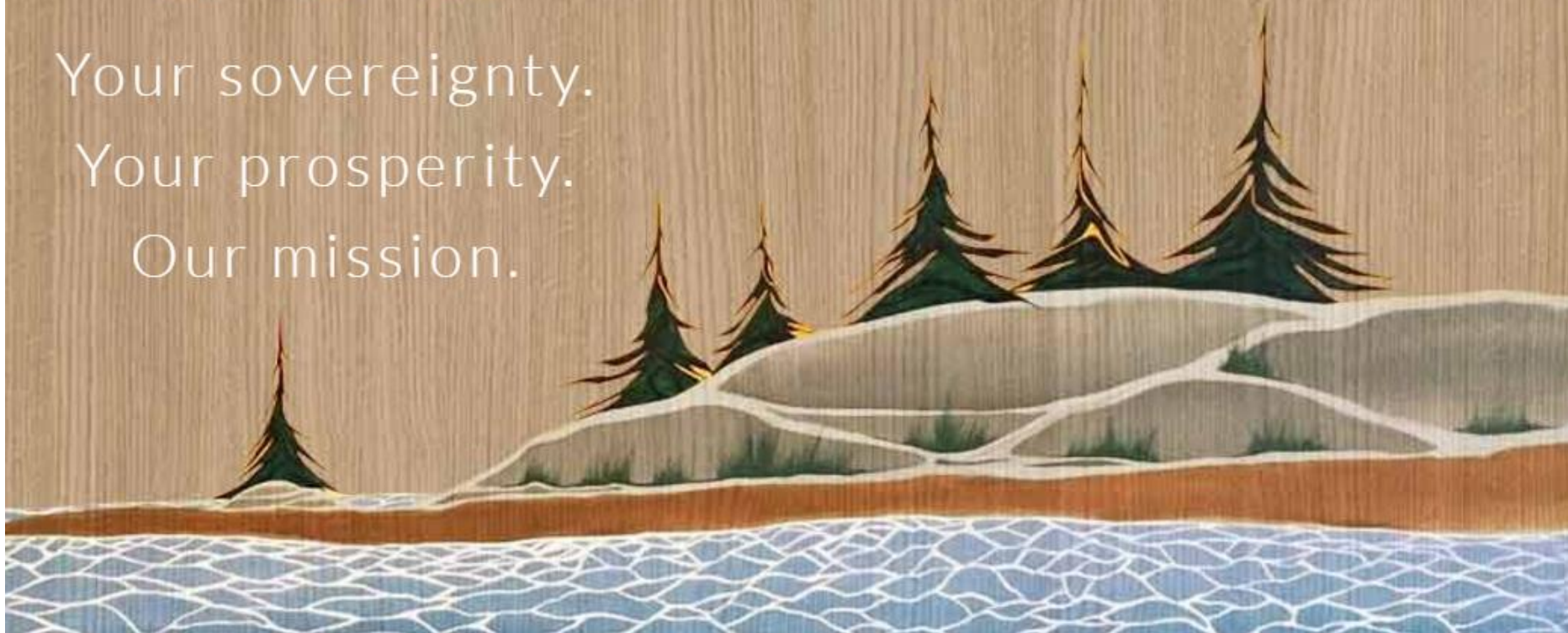
867-675-5806

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Your sovereignty.

Your prosperity.

Our mission.





Legislative References & Resources

Legislation

- [Bill 41 – 2019 “Declaration on the Rights of Indigenous Peoples Act” \(British Columbia\)](#)
- [Bill C-262 “An Act to ensure that the laws of Canada are in harmony with UNDRIP” \(Federal\)](#)

NWT Policy Guides

- [Meeting the Challenge of Reconciliation: The GNWT response to the TRC Calls to Action](#)