



# **WINDIGO FIRST NATIONS COUNCIL**

**Presentation to the Standing Committee  
on General Government  
Bills 173 and 191**

**Mr. Frank McKay  
COUNCIL CHAIR**

**Thursday, August 6, 2009  
Queen's Park, Toronto, ON**



# WINDIGO FIRST NATIONS COUNCIL

## SERVING THE COMMUNITIES OF:

Bearskin Lake First Nation  
Cat Lake First Nation  
Koocheching First Nation  
North Caribou Lake First Nation  
Sachigo Lake First Nation  
Slate Falls First Nation  
Whitewater Lake First Nation

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### Introduction

Windigo First Nations Council provides program, technical and advocacy services to seven (7) First Nations situated in northwestern Ontario. These include: Bearskin Lake First Nation; Cat Lake First Nation; Koocheching First Nation; North Caribou Lake First Nation; Sachigo Lake First Nation; Slate Falls Nation; and Whitewater Lake First Nation.

Of these communities, Sachigo Lake, Bearskin Lake, Cat Lake, Koocheching, North Caribou Lake, and Slate Falls First Nations and part or all of their traditional lands are situated in the Far North plan area.

Windigo First Nations Council has had a long history of involvement in various planning efforts on land and resource planning with the province. These include:

- Report of the Royal Commission on the Northern Environment, 1986;
- Cedar Channels, 1986/7;
- The Dona Lake, Golden Patricia and Musselwhite Agreements, 1986 to the present;
- Traditional Uses Study, 1992;
- Windigo Shibogama Ontario Planning Agreement, 1993 through 1998;
- Timber Management Class Environmental Assessment Hearing, 1987 through 1995;
- Tay Bwaay Win: Truth, Justice and First Nations, 1990; and
- Lands for Life, 1996 through 1998.

Windigo First Nations Council has been consistent in our position that First Nations should be involved in decision-making and planning of lands and resources. The attached appendix provides a brief history of these efforts.

Recently Windigo First Nations Council is developing two important initiatives with the Province:

- The Windigo First Nations Council/ Ontario Ministry of Natural Resources District Engagement Protocol to develop and implement a consultation process where

any resource development or any activity is proposed on its member First Nation's traditional lands: and

- The Four First Nations Initiative Agreement intended to provide for cooperative planning for infrastructure such as all-weather roads, grid lines, hydro electrification and winter roads for Bearskin Lake, North Caribou Lake and Sachigo Lake First Nations and Muskrat Dam First Nation. All of these communities are within the Far North planning area.

Cat Lake First Nation and Slate Falls Nation are also conducting land use planning within their traditional territory. Bearskin Lake First Nation has completed their land use planning process with their community.

Cat Lake and North Caribou Lake First Nations have been and continue to be parties to the various Musselwhite Agreements that address environmental, social and economic matters arising from the Goldcorp's Musselwhite Mine. These communities and Windigo First Nations Council entered into an agreement with Ontario in 1994 to create the Windigo Interim Planning Board which produced "**Pemachihon, Sustained by the Land**" a land use plan for the traditional lands of North Caribou Lake and Cat Lake First Nations.

The Planning Board was comprised of a number of representatives of various stakeholders and the First Nations. That Board worked diligently and produced a draft plan. That draft plan was submitted to the Province in 1998. In our opinion, that plan is representative of the kinds of plans this legislation will produce, if enacted.

#### **The Windigo Chief's Position:**

First Nations are signatories to the Treaty. The First Nations of Windigo First Nations Council are members of Nishnawbe Aski Nation. The Windigo Council Chiefs position has been consistently clear on land and resource issues and that position is based on our treaty being a resource sharing pact and not a land surrender.

Windigo First Nations Council will continue with their land use planning as the tool to rebuild our First Nation economies to sustain our First Nations as vibrant healthy independent communities. Windigo Council Chiefs will not accept the status quo of absolute Provincial discretion in land and resource decision-making. Confrontation over land use conflicts must be replaced with co-operative joint decision-making process that observes the autonomy of the First Nation to make their own decisions.

The Windigo Council Chiefs support the condemnation of the arbitrary imposition of a 225,000 square km protected area. However, the Windigo Council Chiefs will continue to work with the Province in the recognition of land use planning through this legislation or improved legislative process that is based upon the duty to consult and the recognition of treaty and aboriginal rights.

The Windigo Council Chief's position is that further discussions or negotiations on the Far North legislation be conducted directly with First Nations and tribal councils as it relates to their traditional lands and treaty territories on a government-to-government basis.

Windigo Council Chiefs considers the proposed legislation an acceptable and necessary way to secure the plans that Windigo First Nations Council has commenced in order to build the necessary foundation for economic, social, cultural and environmental development. The legislation binds the province and First Nations to the approved community plans.

Windigo Council Chief's oppose the recommendation to have appointed stakeholder boards that would prepare community plans. Windigo First Nations Council opposes that recommendation because our communities live in the Far North and are not stakeholders. Windigo First Nations Council only accepts First Nation to Ontario Government negotiations. First Nation involvement and consent is crucial to the successful administration of planning in the Far North that secures our economic, social, cultural and environmental concerns.

**Specific Highlights:**

Here are a number of highlights of this legislation and amendments that Windigo First Nations Council would like to stress:

1. Windigo First Nations Council has been involved in sustainable economic development, for example, the Musselwhite Mine. The legislative process provides communities with the opportunity to define the categories of use and planning policies consistent with First Nation economic, social, cultural and environmental concerns within community plans.
2. First Nations can chose not be involved in preparing community plans.
3. The legislation provides for some certainty because the First Nation and the Minister sign off on the preparation of and final approved community plans. As a result, the development can proceed in an orderly fashion. That stability is essential to secure private sector funding for and involvement in the infrastructure projects Windigo First Nations Council is planning for its communities.
4. In our opinion, where there are no community plans, there will be no economic development.

**Specific Recommendations, Bill 191:**

1. With respect to First Nations consultation, the provisions of Section 3 addressing the Constitution Act, 1982 and specific provisions applying to the Far North land use strategy (7.1) and Far North policy statements (7.6) apply. First Nations must be involved in the development of regional land use strategies and policy statements.

2. Windigo First Nations Council recommends that provisions be made for the adequate funding of community land use planning.

**Recommendations on Bill 173, Amendments to the Mining Act:**

1. With respect to Bill 173, Amendments to the Mining Act, Windigo First Nations Council has one recommendation. Provision needs to be made to ensure that commitments made to First Nations during exploration be binding on subsequent owners of the claim. Our experience has been that commitments made during exploration may not be honoured when the claims are sold to other companies.

## **Appendix A:**

### **A Brief History of Windigo First Nations Council Involvement in Land and Resource Planning**

#### **1.0 Introduction:**

This appendix includes a brief summary of Windigo First Nation Councils involvement in land and resource planning on behalf of its member First Nations and our understanding of Bill 191's planning provisions.

#### **1.1 Royal Commission on the Northern Environment:**

Windigo First Nations Council helped Nishnawbe Aski Nation prepare a response to the recommendations of the Fahlgren Report in 1986 that addressed the possible roles First Nations might have in resource management and development. Windigo supported a fundamental proposition made by the Commissioner that *“Economic growth should and must take place but can only do so if it benefits the people of the north and does not have adverse social or environmental consequences”* (pg 1-14).

Several recommendations were made on the Fahlgren Report and these were not implemented.

#### **1.2 Cedars Channels:**

In the mid-80's, Ontario Hydro redeveloped the Cedars Channels and Rat Rapids dams on the Albany River and Lake St. Joseph. No environmental assessments were required as the work was undertaken under exemption orders. These orders provided for the preparation of environmental study reports. Windigo First Nations Council and Mishkeegogamang First Nation reviewed these reports and took exception to the discussion of environmental impacts.

The First Nation with the assistance of Windigo First Nations Council launched an appeal of Ontario Hydro's environmental study report and through a series of difficult and confrontational negotiations managed to obtain a number of environmental mitigation provisions in a Ministry of Natural Resources license used by Ontario Hydro to occupy the site (dated April 1987) addressing fisheries, water quality and quantity downstream of the Cedar Channels facility. This also involved monitoring of the construction work particularly as this work affected the fishery at the Cedar Channels Dam.

This amendment resulted in a comprehensive monitoring program that, while carried out, did not involve Mishkeegogamang in the review and evaluation of the results. This experience wasn't fully satisfactory.

### **1.3 The Dona Lake, Golden Patricia and Musselwhite Mines:**

Windigo First Nations Council and its member First Nations were signatories to a series of three agreements addressing the Dona Lake (1987), Golden Patricia (1988) and Musselwhite Mines (1990). These included general agreements (addressing matters such as employment and contracting, traditional uses, environmental management, and employment and contracting arrangements) and compensation agreements (for harvesters whose use of the land was disturbed by mining operations) for the three mines.

Harvester compensation agreements were developed largely on the basis of the value of fur and country food that would have otherwise been harvested on the lands occupied by the three mines. The Musselwhite Mine also made provisions for a significant spiritual site close to the Mine.

These efforts arose from letters written by the First Nations and Windigo First Nations Council requesting the mines to be designated as undertakings under the Environmental Assessment Act. The Provincial administration of the day responded by helping establish a negotiating procedure chaired by Alan Grant and involving the Federal and Provincial Governments as well as the mining interests and First Nations.

Meinhard Doelle evaluated the Dona Lake Agreement. He observes, *“the mediation process and the resulting agreement were seen as an alternative to the Ontario environmental assessment process. The inflexibility of that process, its confrontational nature, and the fear of setting a precedent in Ontario with regard to assessment of private projects under provincial legislation encouraged the parties to take an active part in the process. The author concludes that the mediation, or private contract approach, was successful in the Dona Lake example, but warns against too much optimism regarding its general applicability.”*<sup>1</sup>

When the Musselwhite Agreement was re-negotiated, Ontario and Canada withdrew from the agreement and this weakened the ability of the implementation by withdrawing critical Provincial involvement, where co-ordination was required.

### **1.4 The Traditional Uses Study:**

The Traditional Uses Study<sup>2</sup> was prepared in accordance with the provisions of the Golden Patricia Agreement signed by Mishkeegogamang, Cat Lake and Slate Falls First Nations, Windigo First Nations Council, Ontario and Canada. The parties to the Dona Lake and Golden Patricia Agreements agreed to negotiate and include a sub-agreement to carry out an independent study of past and present harvesting levels and to identify constraints and opportunities. The effort was intended to enable the development of a

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<sup>1</sup> Doelle, Meinhard., *Regulating the Environment by Mediation and Contract Negotiation: A Case Study of the Dona Lake Agreement* in the *Journal of Environmental Law and Practice*, Volume 2, 1992.

<sup>2</sup> Ecologistics Limited, *Traditional Uses Study, Cat Lake, Slate falls and Osnaburgh First Nations*, July 23, 1992.

planning capability responsive to First Nation needs and priorities as well as those of third parties and the Province of Ontario.

The recommendations include the following:

1. *“Resource development and third party development proposals should be evaluated on the basis of their effect on traditional hunting, trapping, fishing and gathering uses among other things. At a minimum, the test a development proposal should meet is whether continued practice of traditional uses is possible. Where this test is not met, approval from the affected community and Band members should be required.*
2. *Where environmental approvals are required of any third party or Ministry of Natural Resources development proposal, each affected community and harvesters should have the opportunity to have input into the approval sought, supporting reports and documentation and conditions of approval including mitigation and compensation.*
3. *Dispute resolution procedures are required to address disputes arising from resource and land development issues.*
4. *Effective means of consulting with Cat Lake, Slate Falls and Mishkeegogamang First Nations are required. These means should respect normal community decision making procedures used in each community.*
5. *The processes used to resolve difficult resource management issues should be arrived at in consultation with the parties affected and in particular the affected First Nation.*
6. *Provision should be made for co-ordination of the preparation of Ministry of Natural Resource plans and the processing of approvals with the First Nations. First Nations should help decide which are most important and be involved in making arrangements to enable their input.*
7. *The traditional uses sub-agreement should recognize and support the role community trappers play in managing the natural resources within their traplines.*
8. *Recognitions should be provided to the sites used by traditional harvesters. Their continued usage for harvesting and community purposes should be guaranteed.”<sup>3</sup>*

The sub-agreement wasn't finalized and the recommendations were not acted upon. But the report sets out procedures which if used could address many concerns raised in this consultation.

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<sup>3</sup> Ibid, Ecologistics, 1992, pages 47 to 50.

### **1.5 The Windigo Shibogama Ontario Planning Agreement:**

Throughout the procedure whereby the Dona, Golden Patricia and Musselwhite Agreements were negotiated, Windigo First Nations Council sought to expand First Nations involvement in land and resource planning. Each of the agreements involved greater First Nations involvement in environmental management and resource planning. The Traditional Uses Study mentioned above is one example of that effort and it was intended to set the stage for the preparation of community plans which would involve First Nations in land and resource decision making.

Within the Musselwhite negotiations, a separate agreement on planning was negotiated which resulted in the preparation of two land and resource plans. Windigo and two of its members First Nations: North Caribou Lake First Nation and Cat Lake First Nation, formed, with other stakeholders appointed by the Province, the Windigo Interim Planning Board which prepared a Land Use Plan entitled "*Pemachihon: Sustained by the Land*" in 1998.

The rich tradition established in the late 80's and early 90's culminating in the Musselwhite Agreements has lapsed in part because the Province and First Nations have not been able to develop legislated and policy mechanisms that used the good will formed by these earlier agreements and institutionalized the mechanisms that were created in these efforts into Provincial decision making.

That Plan was submitted to the Province with the expectation that the Province would respond and from this effort, a legislated planning mechanism would be created by the Province and First Nations that would address First Nation involvement in land and resource development and decision making. No response has been received and Windigo considers this to be unfinished business.

### **1.6 The Timber Management Class Environmental Assessment Hearing:**

In the early 1990's, Windigo First Nations Council participated in the Ministry of Natural Resources Timber management Class Environmental Assessment Hearing through the preparation of witness statements and appearing before the Board in 1993 to give evidence. Nishnawbe-Aski Nation and Windigo First Nations Council reached in a settlement agreement with the Ontario Forest Industries Association and the Ministry of Natural Resources, on principles for the drafting of acceptable terms and conditions. This agreement was presented to the Board in a hearing in Sioux Lookout and the Board adopted the settlement agreement in its decision.

The Minister of Natural Resources also made a commitment separately to commit forest resources to First Nations, following an examination of each forest management unit, to assist in the economic development of member First Nations. The Board expanded upon this commitment with Term and Condition 77 that expanded the requirements to provide access, employment and contracting opportunities.

There was also an understanding in the Province's position during the hearing that land and resource decision making north of the active forest management units would have to differ from that which is used by the Province in existing legislation, policy and administrative procedures in the south. Windigo agrees with this position and takes the view that this new vision for the north must be more than simply an extension of the Ministry of Natural Resources legislation, policies (i.e., the northern boreal initiative) and administrative framework northwards.

Most of the requirements arising from the Board's decision have not been met or they have been delegated to forest management companies to implement through forest management planning. These measures have not been effective.

### **1.7 Tay Bwaay Win: Truth, Justice and First Nations:**

The arrest of Stanley Shingebas, a Mishkeegogamang Band member, who became a quadriplegic between his arrest in Pickle Lake and subsequent release led to the establishment of the Osnaburgh (now Mishkeegogamang) Windigo Tribal Council Justice Review Committee and Report dated 1990 and entitled "*Tay Bwaay Win: Truth, Justice and First Nations*".<sup>4</sup> The enquiry conducted by Alan Grant, Michael Bader and Dennis Cromarty concluded the report with recommendations addressing the underlying conditions Mishkeegogamang faces, including land, economics and social matters.

With respect to land and economic development, these recommendations include:

- *"All bands require access to larger tracts of land in the areas surrounding their present locations to ensure economic viability and to act as a buffer against all activities which would have negative impacts on First Nations traditional activities such as hunting, trapping, fishing and gathering.*
- *All four communities should have representation... in the decision-making processes on natural resource use and economic development in the areas surrounding their locations. They must be involved in co-management and planning board activities. Access to royalties, jobs, training, apprenticeships, scholarships and contracts for goods and services to be supplied to development projects, must be assured to First Nations in the area. In addition proper compensation must be paid in any case of loss of hunting, trapping, fishing or gathering that has been or would be caused by development."*<sup>5</sup>

There has been nothing of substance achieved as a result of these recommendations.

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<sup>4</sup> Justice Review Committee, *Tay Bwaay Win: Truth, Justice and First Nations*, July 31 1990.

<sup>5</sup> *Ibid*, Justice Review Committee, 1990, pages 72 and 73.

## 1.8 Lands for Life:

The Lands for Life Program was approved following the preparation and review of the reports of three Lands for Life Round Tables, each of which had First Nation membership for all or part of their work. In 1998, the recommendations of these Round Tables were consolidated in a report entitled “Consolidated Recommendations of the Boreal West, Boreal East and Great Lakes-St. Lawrence Round Tables.”<sup>6</sup> The following recommendations were meant to apply in active forest management units but the general intent applies throughout Ontario.

*“Recommendation 1. MNR should begin dialogue with Aboriginal organizations to seek to resolve Aboriginal concerns about Lands for Life and MNR planning, Crown land and resource use.*

*Recommendation 2. In partnership with Aboriginal organizations, MNR should develop a strategy to ensure Aboriginal participation in land use planning and the decision affecting Aboriginal communities.*

*Recommendation 3. MNR should ensure that its land use planning incorporates and respects these principles: the Aboriginal view of stewardship planning for seven generations; the oral tradition of information and knowledge transmission from Aboriginal elders and communities.*

*Recommendation 4. MNR should ensure that its land use planning respects: Aboriginal and treaty rights that are, or may be recognized under the Constitution Act; active land claim negotiation processes.*

*Recommendation 5. MNR should ensure that its land use planning actively seeks to: provide economic opportunities for Aboriginal people from Crown land and resources; provide opportunities for Crown land and resource management co-management partnerships with Aboriginal communities.*

*Recommendation 6. Before placing in regulation any new provincial parks, conservation reserves, or other land use designations, MNR should: ensure there is meaningful and direct dialogue with affected Aboriginal communities; in areas subject to land claims, delay regulation until the claim is settled or the affected Aboriginal communities agree to regulation.*

*Recommendation 7. MNR should begin dialogue with Aboriginal organizations and communities to seek to ensure long term protection of sacred Aboriginal sites on Crown lands. Opportunities for Aboriginal tenure of these sites should be considered.*

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<sup>6</sup> Lands for Life, Consolidated Recommendations of the Boreal West, Boreal East and Great Lakes St. Lawrence Round Tables, Ministry of Natural Resources, October 1998.

*Recommendation 8. MNR should ensure that Aboriginal people's exercise of their Aboriginal and treaty rights to harvest and gather resources for food, social, and ceremonial purposes is not impeded by other Crown land uses.*

*Recommendation 9. The Ontario Government should work with Aboriginal people to pass on to all Ontarians, knowledge of Aboriginal history, treaties, and culture.”<sup>7</sup>*

### **1.9 Windigo First Nations Council-Sioux Lookout OMNR Engagement Protocol:**

For over three years Windigo First Nations Council has been pressing for an engagement protocol to address First Nations concerns. Windigo First Nations Council has negotiated the Windigo First Nations Council-Sioux Lookout OMNR Engagement Protocol Implement Process intended to develop and implement a consultation process where resource development is proposed on its member First Nation's traditional lands. Preliminary consultations are underway.

### **2.0 Bill 191 Land Use Planning and Protection in the Far North:**

Here is an overview of the relevant sections that apply to First Nations.

**Section 1** states *“the purpose of this Act is to provide for community based land use planning in the Far North that directly involves First Nations in the planning and that supports the environmental, social and economic objectives for land use planning for the peoples of Ontario that are set out in section 6.” A community based land use plan means a land use plan that has been prepared under section 8 and approved as required by that section.”*

**Section 3** states *“this Act shall be interpreted in a manner that is consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the Constitution Act, 1982, including the duty to consult.”*

The objectives for land use planning are set out in **Section 6**. *“The following are objectives for land use planning in the Far North:*

- 1. A significant role for First Nations in the planning.*
- 2. The protection of areas of cultural value in the far north and the protection of ecological systems in the far north by including at least 225,000 square kilometers of the far north in an interconnected network of protected areas.*
- 3. The maintenance of biological diversity, ecological processes and ecological functions, including the storage and sequestration of carbon in the far north.*
- 4. Enabling sustainable economic development that benefits the First Nations.”*

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<sup>7</sup> Ibid, Consolidated Recommendations, pages 13 and 14.

**Section 7** provides for a far north land use strategy “to assist in the preparation of land use plans in the far north under section 8.” Section’s 6’s objectives are to be “taken into account in the preparation of the strategy.” “The Minister shall provide opportunities for the involvement of First Nations in the preparation of the far north land use strategy.” “The far north strategy shall contain all far north policy statements issued from time to time and may contain,

- a) Geospatial information, including maps, on areas of natural resource value and areas of ecological and cultural value;
- b) Policy, scientific and technical guidelines that the Minister establishes for the purpose of land use planning in the far north; and
- c) Any other things that the Minister considers advisable and relevant to the strategy.”

With respect to policy statements, “the Minister may issue policy statements relating to the following matters in the far north:

- 1) Cultural and heritage values.
- 2) Ecological systems, processes and functions, including storage and sequestration of carbon.
- 3) The interconnectedness of protected areas.
- 4) Biological diversity.
- 5) Areas of natural resource value for potential economic development.
- 6) Electricity transmission, roads and other infrastructure.
- 7) Tourism.
- 8) Other matters that in the opinion of the Minister are matters of provincial interest to land use planning.”

Section 8 provides for community based land use plans. “If one or more First Nations having one or more reserves in the far north indicate to the Minister their interest in preparing terms of reference to guide the designation of an area in the far north as a planning area and the preparation of a land use plan for the purposes of this section, the Minister shall work with them to prepare the terms of reference.”

“One of more of the First Nations that work with the Minister... may work with the Minister to prepare a land use plan for the planning area.” “A land use plan... shall,

- a) Specify the prescribed category of land use designation to which areas in the planning area belong, if categories of land use designation have been prescribed;

- b) *Specify land use designations in the planning area and the land uses and activities that are permitted in the area to which each such designation applies, if no categories of land use designation have been prescribed;*
- c) *Designate one or more areas in the planning area as protected areas;*
- d) *Specify to which category of protected area each protected area belongs, if categories of protected areas are prescribed;*
- e) *Specify when the parties that prepared the plan are required to review it, which shall not be more frequently than once every 10 years after the plan is approved as a community based land use plan; and*
- f) *Contain the other matters that are prescribed.”*

*“A land use plan... may contain other matters related to land use planning in addition to the matters required” above.*

*“A land use plan.... Has no effect until,*

- a) *The Council of each of the First Nations mentioned.. has passed a resolution approving the plan;*
- b) *After the First Nations approved the plan under clause (a), the Minister, by order, approves the parts of the plan under subsection (8) that requires be included in the Plan.”*

Procedures are also provided for amendments to the terms of reference, the planning area and the plan.

**Section 11** states *“if there is no community based land use plan for an area in the far north, no person shall undertake any of the following developments in the area except if the required authorization for the development has been obtained before this Act comes into force:*

1. *Opening a mine in the prescribed circumstances.*
2. *Commercial timber harvest.*
3. *Oil and gas exploration or production. Constructing wind power or waterpower facilities.*
4. *Constructing wind power or water power facilities.*
5. *Constructing electrical transmission facilities and lines, or all weather roads associated with them.*

6. *Constructing all weather roads that are not associated with electrical transmission facilities and lines if the construction has not commenced before the day this Act comes into force.*

7. *Any other land use or activity that is prescribed.*”

**Section 12** with respect to mining provides that *“if there is no community based land use plan for an area in the far north, a First Nation that would be affected by the making of an order described in this subsection may request that the Minister make an order designating the area as an area of provisional protection.”*

Where there is an approved land use plan, **Section 13** states *“if there is a community based land use plan for a planning area, no person shall make any decision under an Act respecting the allocation, disposition or use of public land and natural resources in the area or carry on any activity in the area that is related to that allocation, disposition or use unless the decision or the activity, as the case may be, is consistent with the land use designations and permitted land uses in the plan and the permitted activities prescribed for the purposes of the plan.”*

**Section 15** states *“the Minister may enter into agreements for the purpose of enabling land use planning in the far north.”*

**Section 16** says *“the Minister shall establish one or more bodies to advise the Minister on the development, implementation and co-ordination of land use planning in the Far North... When establishing a body..., the Minister shall consider what role First Nations should play in the establishment of the body and the extent to which First Nations should particulate in the work of the body.”*