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## IMPLEMENTING FIRST NATION LAND USE PLANS: CHALLENGES AND RESULTS

### I. INTRODUCTION

British Columbia has a natural resource-based economy largely built on timber, minerals and energy. The physical beauty and diversity of the natural environments within British Columbia also drive a healthy tourism and recreation industry. As a result, British Columbia is coming under ever-increasing development, resource use, and extraction pressure. The communities that are feeling this pressure most are First Nation communities. These communities are largely located in the more rural parts of British Columbia, which are a hotbed of natural resource development.

Increasingly, these First Nation communities are questioning the number and types of proposed developments in their territories. This stems in part from the affirmations by our highest court of the ongoing Aboriginal title and rights to land and resources (*Guerin v. The Queen*, [1984] 2 S.C.R. 335), as well as from the Province's response to directions from the courts to consult with First Nations on potential impacts to Aboriginal title and rights (*Haida Nation v. BC*, 2004 SCC 73). The result is the referral of pending government decisions to a First Nation with the expectation that the First Nation will identify its concerns. This requires an internal assessment and decision-making process on the part of the First Nation, which may in turn result in the identification of potential economic opportunities and some form of impact benefit agreement between the proponent and the First Nation.

The requirement to respond to external requests for information about potential impacts of decisions regarding resource use on Aboriginal title and rights has made it clear to First Nations that a plan is required. First Nations have realized that they need a plan not only to respond to the large number of referrals and information requests, but also to provide strategic level direction for how development in their traditional territories should proceed.

This paper will discuss First Nations land use planning generally, in the context of the land use planning in which the Lil'wat Nation has engaged. It will also set out the steps the Lil'wat Nation is taking to implement its Lil'wat Land Use Plan, including government to government discussions with the Province in relation to the recently completed Sea to Sky Land and Resource Management Plan (Sea to Sky LRMP).

## II. THE LIL'WAT NATION LAND USE PLAN

### A. The History of Lil'wat Land Use Planning

The Lil'wat Nation's forays into strategic level planning for its Traditional Territory began in 2002, with the completion of a draft *Cultural Heritage Land and Resource Protection Plan* (CHLRPP) in March of 2004. The CHLRPP incorporated a number of layers of information, including archaeology, bio-geoclimatic zones, place names, oral history and other information provided by Elders and other community members, and mapped Lil'wat Territory based on this traditional use information. The Lil'wat Lands and Resources Department has used the CHLRPP in responding to referrals of proposed activities and developments in Lil'wat Territory.

The Lil'wat Nation was already anticipating a further round of land use planning, but the Province's development of a Draft Sea to Sky Land LRMP, of which a consultation draft was released in April of 2006, accelerated expedited the process. The Province developed its plan with input from stakeholders but not from First Nations. In an effort to complete the Draft Sea to Sky LRMP, the Province sought to engage in government to government discussions with potentially affected First Nations.

The Lil'wat Nation's response to the Province's overture for government to government discussions was that before it could have a reasonable discussion about the Province's plan, it needed to develop its own land use plan. With funding provided by the Province, the Lil'wat Nation developed the *Lil'wat Land Use Plan*, or LLUP. The LLUP differs from the CHLRPP in that it is a forward-looking document, setting out the future vision of the Lil'wat people for their Territory, today and for the future.

### B. The Lil'wat Land Use Plan

The full title of this plan is *Lil'wat Land Use Plan: Phase 1, The Vision and Plan for the Land and Resources of Lil'wat Nation Traditional Territory*. It is a living document, which will evolve over time as further cultural, environmental, and economic information is gathered.

The LLUP incorporates available information compiled from past studies, project reports, land use plans, Aboriginal Interest and Use Studies, archaeological assessments, and input from Elders and other community members. This paper does not cover the land use planning process that the Lil'wat Nation engaged in to develop its LLUP in detail,<sup>1</sup> but will instead look at the use and implementation of the LLUP.

The LLUP covers the entire territory of the Lil'wat Nation, an area that stretches from south of Whistler to Ts'yl-os in the north, the Stein Valley in the east and the Toba watershed in the west. It covers an area of close to 800,000 hectares and includes 13 watersheds, including the Birkenhead, Lillooet, Soo, and Elaho River watersheds. Lil'wat Territory also includes 11 provincial parks and the communities of Mount Currie, Pemberton and Whistler, as well as the Callaghan Valley.

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<sup>1</sup> Rahul Ray and David Harper of Westland Resource Group have written an article about this process, due to be published in the June edition of *Plan Canada*, the magazine of Canadian Institute of Planners.

The LLUP is a strategic level plan, and does not delve into detailed planning. The Lil'wat Nation is currently conducting detailed level planning in the Birkenhead River watershed and eventually intends to complete such detailed planning for all the watersheds in Lil'wat Territory.

The LLUP takes a proactive approach to the management of Lil'wat Nation Territory and identifies the types of activities considered acceptable in various parts of the Territory. It outlines strategic zones, including areas identified as *Nt'ákmen* (Our Way) areas, Collaborative Management areas, Cultural Education areas, Stewardship areas, Conditional Economic Development areas, and Managed Resource Use areas. These zones are presented in the Plan on a map titled *Preferred Land Uses*. Each of these zones permits specific activities and prohibits others, with the caveat that the Lil'wat people will continue to engage in traditional use of the entire Territory.

### **III. IMPLEMENTING THE LIL'WAT NATION LAND USE PLAN: CREATING MOMENTUM**

Implementing a First Nation's land use plan comes with a number of challenges. The biggest challenge is the Province's assertion of jurisdiction over the First Nation's territory, and the Province's legislative authority that results from this assertion of jurisdiction.

A First Nation may develop and publish laws that apply within its territory, but there is little a First Nation can do to enforce these laws. Similarly, a First Nation can seek to implement its own land use plan. The reality, however, is that a First Nation's land use plan does not have the same authority of law as provincial or federal legislation. The implementation, therefore, may have to rely on voluntary compliance.

Despite the limitations on a First Nation's ability to implement and enforce a land use plan, a First Nation can take a number of steps to elevate a land use plan from being a set of maps and principles on paper to being enshrined in voluntary compliance mechanisms, provincial policies or legislation. These are:

- Make the plan public;
- Use the plan: adhere to it, live it, and push it; and
- Enlist help.

#### **A. Make the Plan Public**

The first thing a First Nation should do is make the plan public. The plan should be developed with the eventual publication in mind and contain information that is suitable for such public release.

The publication of a plan serves two purposes: it provides the public with the information in the plan, and it shows that the First Nation has a vision and preference for the use of resources in its territory. Proponents trying to do business in a particular First Nation's territory may think twice about locating a project in a highly sensitive spiritual area if there is a suitable alternative location in an area that is less sensitive under the First Nation's plan.

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First Nations may be hesitant to release comprehensive territory-wide information into the public domain, based on concerns about confidentiality, intellectual/cultural property, and misuse. The confidentiality concerns are associated particularly with archaeological and spiritual sites. Intellectual property/cultural property concerns are associated largely with ethno-botanical resources. Misuse concerns stem largely from the fear that once the territory is “mapped”, proponents and the Province may rely on the fact that a portion of the territory is identified as potentially suitable for development to argue, wrongly, that there are no Aboriginal title or rights issues.

All these concerns are surmountable. The final plan product should be in a form that contains information that is certain enough to make the plan useful but does not reveal unnecessary detail about archaeological, cultural or spiritual sites. The plan should set parameters about the nature, purpose and use of the plan. Finally, the plan should contain appropriate caveats on the relationship of the plan to Aboriginal title and rights.

For example, the LLUP sets out high level strategic zones but does not pinpoint specific spiritual, cultural or archaeological sites. In addition, the LLUP contains the following language to guide its use:

The LLUP is a living document, which will evolve through time. The cultural, environmental, and economic information base that supports the Plan is being updated as interviews are conducted, documents are reviewed, and archeological sites are found. The management direction in the Plan is based on the best available information, including the views of the community. Revisions to this Plan can be expected as new information is brought forward.<sup>2</sup>

This plan is not intended to serve as a comprehensive historic land use and occupancy study for the Lil'wat Traditional Territory.<sup>3</sup>

Each and every part of the Territory is important in supporting the needs of our Nation. ... The following zone designation should not be misconstrued as favoring one area over another.<sup>4</sup>

For commercial or development activities of any sort, consultation with the Lil'wat regarding the Nation's aboriginal title and rights interests must be undertaken and an appropriate accommodation achieved.<sup>5</sup>

And:

The Lil'wat Nation is the rightful owner of our collective intellectual and property rights to our botanical resource knowledge, innovations and practices. Written

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<sup>2</sup> *Lil'wat Land Use Plan: Phase I, The Vision and Plan for the Land and Resources of Lil'wat Nation Traditional Territory*, p. 5.

<sup>3</sup> *Ibid*, p. 9.

<sup>4</sup> *Ibid*, p. 56.

<sup>5</sup> *Ibid*, p. 56.

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permission must be obtained from the Lil'wat Culture, Heritage, and Language Authority prior to disseminating this knowledge.<sup>6</sup>

By including caveat language like this in a land use plan, a First Nation can seek to minimize the potential for misuse of the information in the plan or of the plan itself. An alternative to making the actual plan public is to make the existence of the plan public and to direct the public to a particular location, such as a Band Office, or a Lands and Resources department, for further information about the plan.

#### **B. Use the Plan: Adhere to It, Live It, and Push It**

If a First Nation has developed a land use plan and wants the public to adhere to it, the First Nation will have to adhere to it first. It is important, therefore, when developing a land use plan, to be clear that it is for use by the First Nation, government, and third parties.

Next, the First Nation should integrate the land use plan into existing processes and use it in external relationships. The LLUP contains specific implementation directions. These include:

- Decisions made by the Lil'wat Nation will be consistent with achieving the vision and goals of the LLUP, and will advance the LLUP's management actions. Actions, programs, and policies of Lil'wat Nation departments and corporations will be consistent with the LLUP.
- The contents of the LLUP and progress toward its implementation will be monitored and subject to regular review and reports to Council and the community.
- The Lil'wat Nation will share the LLUP with neighbouring First Nations and aboriginal associations;
- The Lil'wat Nation will publicize the LLUP with non-aboriginal people and groups in the Traditional Territory;
- The Lil'wat Nation will support others' initiatives that support and advance the implementation of the LLUP;
- Development plans or other documents referred to the Lil'wat Nation for comment will be assessed in light of their consistency with the LLUP; and
- The Lil'wat Nation Referral Consultation Policy will be applied to agencies and developers in the Traditional Territory to ensure that the Lil'wat Nation is fully engaged and that the Land Use Plan is adequately considered in development and planning decisions.

The LLUP was adopted by the Lil'wat Nation community and leadership in August of 2006, made public shortly thereafter, and is now available on the Lil'wat Nation's website.<sup>7</sup> Since the LLUP was adopted by the community, it has been consistently used and referred to in discussions with government and proponents about potential development or use of resources within Lil'wat Territory.

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<sup>6</sup> *Ibid*, p. 86.

<sup>7</sup> [www.lilwat.ca/+peopleland/storyst/peoplelandstory11.html](http://www.lilwat.ca/+peopleland/storyst/peoplelandstory11.html).

Finally, the land use plan should be pushed. The land use plan should be explained and presented in the context of the First Nation's Aboriginal title and the chosen uses for its territory. It should be referred to in referral responses, and the First Nation should seek to engage government and proponents in discussions about potential development in the territory based on its land use plan.

The promulgation and use of a land use plan are important steps in seeking to implement it. Although it may not have the force of provincial legislation, a First Nation's land use plan can be used persuasively to influence how and where development will occur within a First Nation's territory.

### **C. Enlist Help**

First Nations do not exist in a vacuum, and other sectors, stakeholder or communities may have interests that overlap with the interests a First Nation in portions of the First Nation's territory or with respect to a component (or components) of a land use plan.<sup>8</sup> Help may be available from these stakeholders in implementing a First Nation's land use plan.

The most obvious of these sectors is the Environmental Non-Governmental Organization, or ENGO, sector. The goals of the ENGO sector and First Nations often have a degree of overlap with respect to protection and preservation of wildlife, wildlife habitat and ecosystems, and with respect to processes for ensuring that development occurs in the most environmentally sustainable manner. Clayoquot Sound on the west coast of Vancouver Island is one of the earliest examples of a coordinated effort by First Nations and environmental activists working together, with the result that the coastal old-growth rainforest in Clayoquot Sound has been protected. While ENGO's and First Nations interests rarely completely overlap, their goals for management of land and resources may be similar enough to warrant working together.

Recreation clubs and commercial recreation stakeholders may also have interests that overlap with First Nations interests. For instance, the Sea to Sky area is heavily used for both motorized and non-motorized recreation. In fact, there is ever increasing tension between the two sectors as they compete for access to territory. In particular, the non-motorized recreation sector is seeking to establish non-motorized zones for the peaceful enjoyment of nature. It may be possible to work with hiking clubs and backcountry ski clubs to lobby the Province to create non-motorized recreation zones in portions of a First Nation's territory, if this is a goal of its land use plan.

Finally, British Columbia is also actively engaged in land use planning. Engaging with the Province on a government to government level can lead to the implementation of strategic level zoning that takes into consideration and promotes some of the goals of a First Nation's plan. Even where provincial land use planning has already been completed, these plans may be amended to incorporate serious First Nation concerns. British Columbia's *A New Direction for Strategic Land Use Planning* contains the following direction on updating completed plans:

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<sup>8</sup> For example, the planning forum for the Sea to Sky LRMP included representatives from the following sectors: forestry, non-motorized recreation; motorized recreation; tourism (frontcountry); tourism (backcountry); agriculture; minerals; fish & wildlife; and conservation & environment.

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Establish a list of priority circumstances that may warrant plan component updating or amendment. This list should include the need to align plan recommendations with policy and legislative changes, to reflect critical new information such as FN's interests and values, and major environmental changes such as Mountain Pine Beetle infestation.<sup>9</sup>

In summary, there are a number of steps a First Nation should take to implement its land use plan: make the plan public, promulgate the plan, and identify opportunities to work with third parties to implement the plan.

#### **IV. WORKING WITH GOVERNMENT: THE LIL'WAT EXPERIENCE**

The rest of this paper will examine the process the Lil'wat Nation engaged in with the Province that has enabled the Lil'wat Nation to implement aspects of its land use plan by taking advantage of provincial strategic planning initiatives.

##### **A. A Brief Overview of Land Use Planning in British Columbia**

The Province's approach to land use planning and First Nation engagement has changed over time. Land use planning in British Columbia began in the early 1990s. The British Columbia land use planning process is considered to consist of five distinct phases that have occurred over the past 16 years. Over 85% of British Columbia is covered now by a regional land use plan or LRMP.<sup>10</sup>

As case law on Aboriginal rights, including Aboriginal title, has evolved, the Province's approach to land use planning has also evolved to keep pace with the legal developments. The most recent phases have involved government to government negotiations with First Nations on planning recommendations. Future plans, such as the anticipated Sunshine Coast Plan, are expected to proceed in accordance with the processes and policies in the New Direction, and will also include the involvement of interested First Nations on a government to government basis.

The Sea to Sky LRMP process commenced in 2002. Government, working together with various stakeholders in the Sea to Sky area, developed recommendations in 2004, which were then compiled into a Consultation Draft of the Sea to Sky LRMP, released in April of 2006.

The Draft Sea to Sky LRMP was developed without any input from First Nations. After the development of the draft, the Province engaged interested First Nations in government to government discussions and amended the Draft Sea to Sky LRMP as a result of those discussions.

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<sup>9</sup> *A New Direction for Strategic Land Use Planning in BC*, Integrated Land Management Bureau, BC Ministry of Agriculture and Lands, December 2006, p. 8.

<sup>10</sup> *A New Direction for Strategic Land Use Planning in BC*, Integrated Land Management Bureau, BC Ministry of Agriculture and Lands, December 2006, pp. 4-5.

## **B. Lil'wat – British Columbia Government to Government Process**

Shortly after the Lil'wat Nation had finalized its LLUP, it engaged in without prejudice government to government discussions with the Province aimed at determining how the Consultation Draft of the Sea to Sky LRMP and the LLUP could be harmonized.

Over the course of almost two years, the Lil'wat Nation held regular meetings with the Province to discuss how the provincial planning initiatives could integrate aspects of the LLUP. Since Lil'wat Nation Territory spans both the Sea to Sky and the Lillooet LRMP area, the discussions between the Lil'wat Nation and the Province addressed the Draft Lillooet LRMP as well.

In April of 2008, the Lil'wat Nation and British Columbia entered into a Land Use Planning Agreement (LUPA), which sets out how the Draft Sea to Sky LRMP was to be amended to incorporate Lil'wat concerns, as well as other provincial commitments in the context of the Sea to Sky LRMP. The Sea to Sky LRMP has recently been finalized and was made public on April 16, 2008.

## **C. Successful Implementation of Aspects of the LLUP**

Through its government to government discussions with the Province, the Lil'wat Nation has been able to achieve a number of the LLUP goals through zoning and management direction in the Sea to Sky LRMP. These include:

- The Lil'wat Territorial Vision is included in the Sea to Sky LRMP;
- The Lil'wat *Nt'ákmen* areas achieve a degree of protection, as conservancies, cultural wildland, or cultural management area;
- Lil'wat Spirited Ground Areas, which represent important spiritual, cultural and food gathering areas, are protected;
- Special management direction is provided for the:
  - ❖ Owl Creek Cultural Education Area
  - ❖ Birkenhead River Corridor
  - ❖ Lillooet Lake buffer;
- British Columbia has committed to collaborative management of the new conservancies as well as existing protected areas;
- British Columbia has committed to deeper consultation in Lil'wat *Nt'ákmen* and Stewardship areas;
- Lil'wat has the opportunity to create additional old growth and sensitive ecosystem management areas;
- British Columbia has agreed to protect visual quality from viewpoints within Lil'wat communities;
- British Columbia has committed to a pilot project for the development of a small scale forestry program; and
- British Columbia has agreed to defer issuing new commercial recreation tenures in certain parts of Lil'wat Territory.



The Sea to Sky LRMP does not displace the LLUP, and the Lil'wat Nation will continue to rely on the LLUP as a tool. The management objectives set out in the Sea to Sky LRMP and commitments made in the LUPA will help, however, to implement aspects of the LLUP.

#### **D. Challenges to Working with the Province**

The Lil'wat Nation faced a number of challenges in working with the Province in the land use planning context. These challenges included timelines and funding issues, the rights and interests of other parties, including other First Nations, and a lack of legislative tools designed to achieve First Nation land use planning goals.

##### **1. Levelling the Playing Field: Funding and Timelines**

One challenge that First Nations face on an ongoing basis in discussions or negotiations with government is finding a level playing field. Whenever a First Nation engages in discussions or negotiations with the Province, the First Nation is confronted with a provincial bureaucracy that comes with its own ideas of timelines and resources to be allocated to the process. This often has the effect of putting the First Nation in a disadvantaged negotiating position from the outset.

It is important that a First Nation engage in government to government discussions on land use planning on a level playing field. The Lil'wat Nation was not prepared to start discussing the Sea to Sky LRMP with the Province until it had developed its own land use plan. The Province provided funding for the development of this plan and agreed to defer government to government discussions until after the completion of this plan.

##### **a. Funding**

The playing field also needs to be levelled from a funding and resources perspective. The Lil'wat Nation needed to be able to dedicate a team of people to the government to government discussions, and the Province agreed to provide some funding toward this.

The funding issue is sometimes the most difficult one to overcome, but if both the Province and the First Nation are willing to be creative, it may be possible to conduct land use planning work together with projects or initiatives funded under other programs to obtain additional benefit. For example, the detailed level planning that the Lil'wat Nation is currently undertaking in the Birkenhead River watershed is being funded under a BC Capacity Initiative grant. The deliverables from this initiative will include capacity development and training, as well as land use and resource planning recommendations.

##### **b. Timelines**

It is not always possible to meet the Province's timelines, for various reasons. It is important to recognize that the Province's timeline is often driven by external factors, such as fiscal year ends or pending elections, rather than the requirements of the process. Both parties need to be ready, however, to allow the process to develop in a meaningful way, even if this means a longer process.

The Province's initial goal for finalizing government to government discussions on the Draft Sea to Sky LRMP and finalizing the plan was March 31, 2007.<sup>11</sup> This timeline proved impossible, given a number of issues that arose during the government to government discussions. The Lil'wat Nation community suffered a number of deaths near the end of the government to government process, causing meetings to be cancelled. Further, the decision of Justice Vickers in *Tsilhqot'in v. BC* (2007 BCSC 1700) came down near the end of the government to government discussions, resulting in a delay while the decision was analyzed.

Ultimately, the government to government discussions went on over a year longer than the Province had intended. The result of this longer process was that both parties had to contribute more resources to the process than anticipated. Nevertheless, it was important to give the process adequate time.

## **2. Information: Volume and Flow**

As set out above, Lil'wat Territory covers approximately 800,000 hectares. The Sea to Sky LRMP area covers approximately 1,091,000 hectares. Developing land use planning for an area this large necessarily involves large amounts of information. In the Lil'wat Nation's government to government discussions with the Province, the Province provided detailed information about current land uses to the Lil'wat Nation. This included information on harvestable timber lands, existing tenures, roads and approved cutblocks, old growth management areas, mineral tenures, and commercial recreation tenures.

The Lil'wat Nation and the Province exchanged information in two predominant ways during the government to government discussions: in person at meetings, and via the internet. Large-scale planning maps were the focus of meeting discussions, as zoning boundaries were proposed, reconsidered, and redrawn. Later in the process, the parties developed a joint issue tracking document. Between meetings, the parties exchanged information and updates electronically, as available, to keep the process moving forward.

The volume and technical detail of information required for land use planning makes it important for a First Nation to make sure it has the capacity required to deal with this information. The Lil'wat Nation is well equipped to handle this information, with in-house expertise, including GIS mapping, and with access to a land use planning consultant. If a First Nation is not yet equipped to deal with large amounts of technical information, it should consider developing this capacity or ensuring that it will be provided with adequate funding to allow it to access external assistance before entering into government to government discussions on land use planning.

## **3. Rights and Interests of Other Parties**

British Columbia has an obligation, under principles of administrative fairness, to consider the rights and interests of all parties that may be affected by its land use planning decisions. This obligation applies both to third parties with vested rights of interests in land and resources, and to other First Nations with overlapping territorial claims.

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<sup>11</sup> *A New Direction for Strategic Land Use Planning in BC*, Integrated Land Management Bureau, BC Ministry of Agriculture and Lands, December, 2006, p. 4.

British Columbia's obligations to other parties may restrict the extent to which the Province can accommodate a First Nation's vision for its territory in provincial land use planning. For example, one aspect of the government to government discussions between the Lil'wat Nation and the Province was the protection of portions of Lil'wat Territory through the creation of new conservancies.<sup>12</sup>

Prior to creating a new conservancy, the Province must inventory the existing tenures within the proposed conservancy area and determine the extent to which the creation of a conservancy would expropriate existing rights or interests. There may be an obligation on the part of the Province to compensate for such expropriation. The proposed boundaries for the conservancies, therefore, had to consider existing tenures.

Further, the Sea to Sky area trenches on the territories of at least six First Nations or First Nation groups. The Lil'wat Nation's Territory is subject to several overlapping claims. Pursuant to its duty to consult, the Province must take assertions of territorial claims at face value when engaging with First Nations. While the Province was holding government to government discussions with the Lil'wat Nation, it was simultaneously engaged in government to government discussions with some of the Lil'wat Nations neighbouring First Nations.

Ultimately, it is the Province's obligation to address its duties to each First Nation. A First Nation that is in government to government discussions should be aware that these parallel discussions may be occurring and have the potential to influence the outcome of its own discussions with government. If neighbouring First Nations have similar interests and a good relationship, they may be able to work together to develop a common vision for land use in overlap areas.

#### **4. Inadequate Tools**

The Province has a suite of legislative tools available for managing land and resources in BC. The Province developed these tools in the context of its asserted jurisdiction over the land and resources in the territory. These tools therefore contemplate neither shared decision-making nor the integration of First Nation's land use planning initiatives into provincial legislation.

Discussions between the Lil'wat Nation and the Province necessarily took place within the context of existing tools for the management of lands and resources. A First Nation's perspective on land use and land use planning may not lend itself to being implemented through current provincial legislative and policy tools. These policies and tools have been developed largely in the context of providing access to land and resources and limiting this access only in particular circumstances, such as conservation or habitat protection.

A First Nation's land use plan will likely incorporate additional factors into the management of the territory, including cultural and spiritual interests. The available tools have not been developed with a First Nation's approach to land use planning in mind and are therefore not

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<sup>12</sup> Conservancies are protected areas, provided for under the *Park Act* (RSBC 1996, c. 344, as amended) and the *Protected Areas of British Columbia Act* (SBC 2000, c. 17, as amended). Commercial timber harvesting, mineral exploitation and independent power projects are not allowed within conservancies.

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always easy to apply to land use planning initiatives that flow from government to government discussions. As a result, the parties have to take a “best fit” approach and use the provincial tool that is closest to doing the job right. Alternatively, a combination of tools may have to be used.

The conservancy is a good example of this “best fit” approach. The Province developed this tool and added it to its inventory in recent years. A conservancy is set aside as protected area for a number of purposes, including “ (b) for the preservation and maintenance of social, ceremonial and cultural uses of first nations”.<sup>13</sup> The other purposes, however, are: (a) for the protection and maintenance of their biological diversity and natural environments, ... (c) for protection and maintenance of their recreational values, and (d) to ensure that development or use of their natural resources occurs in a sustainable manner consistent with the purposes of paragraphs (a), (b) and (c).<sup>14</sup>

The conservancy concept does not meet the goals of Lil’wat *Nt’ákmen* areas completely, but of all the Province’s available tools, it provides the highest level of protection from development that is consistent with potential First Nation use of natural resources consistent with social, ceremonial and cultural uses. In addition, the creation of conservancy, with its restriction on timber harvesting and mineral exploration, ensures that the land within the conservancy remains provincial Crown land and that the resources in and on this land are protected.

The limited provincial legislative tools that are available can be used in a creative way or supplemented with management directions to achieve as much of the First Nation’s management goal as possible.

Where the right tool does not exist, tools can be combined to achieve the end goal. An example of this is the Owl Creek Area, identified in the LLUP as a *Lil’wat Cultural Education Area*. The Lil’wat Nation’s LUPA with the Province commits to a combination of tools to be applied to the Lil’wat Nation’s Owl Creek Cultural Education Area. These are:

- a conditional withdrawal of the area under the *Land Act*<sup>15</sup> for new commercial recreation tenures;
- an invitation to the Lil’wat Nation to apply for a 100-hectare lease and a licence of occupation in the area;
- management and protection of the Owl Creek cultural trail;
- a commitment to tenure review; and
- a requirement that development activities in the area must be compatible with the cultural interests and values of the Lil’wat Nation.

A further example of using existing tools creatively is designating primary roles for the new conservancies. As set out above, conservancies are created for a combination of purposes, including “the preservation and maintenance of social, ceremonial and cultural uses of first nations”.<sup>16</sup> The LUPA attributes cultural heritage representation and protection as the primary

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<sup>13</sup> *Park Act*, s. 5(3.1)(b).

<sup>14</sup> *Park Act*, s. 5(3.1).

<sup>15</sup> RSBC 1996, c. 245, s. 17.

<sup>16</sup> *Park Act*, s. 5(3.1).

role for the majority of the new conservancies in Lil'wat Nation Territory, with recreation and ecosystem and habitat representation playing a secondary role. In determining whether a proposed use that requires a Park use permit is compatible with the conservancy purpose, the role of the conservancy will be considered.

The limitation on available tools, together with concerns about a level playing field and the Province's obligations to third parties, can create some challenges for a First Nation working with the Province on land use planning initiatives. The parties should work together to eliminate these challenges by approaching them creatively.

## **V. CONCLUSION**

First Nations land use planning is increasingly becoming an important tool for First Nations dealing with development pressure in their traditional territories. The development of a comprehensive plan can assist a First Nation in dealing with referrals of pending government decisions, assessing opportunities for benefit agreements and joint ventures, and guiding the First Nation's own aspirations and development.

Once a land use plan has been developed, there are a number of steps a First Nation should take to implement the land use plan. Where there is an opportunity to work with the Province to incorporate aspects of the land use plan into provincial initiatives, the First Nation may be able to take advantage of provincial legislative powers to assist in the implementation of its plan, as the Lil'wat Nation has been able to do in the Sea to Sky LRMP process.