



EXPLORING THE RELATIONSHIP BETWEEN THE WORK OF ADMINISTRATIVE TRIBUNALS AND INDIGENOUS LAW

2021 BCCAT CONFERENCE – *ACCOUNTABLE ADJUDICATION: FROM AWARENESS TO ACTION*
INCORPORATING INDIGENOUS LEGAL PERSPECTIVES/RESPONDING TO CALLS FOR ACTION

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INDIGENOUS LAW IN ADMINISTRATIVE FORUMS

1. How does Indigenous law arrive at and/or relate to the work of tribunals

- Individuals
- Land, territories, communities
- Adjudication and Indigenous law
- Incorporation of Indigenous law

2. Challenges and Opportunities

INDIGENOUS LAW AT TRIBUNALS - INDIVIDUALS

- Individuals carry law (not just culture)
- Indigenous law obligations shape expectations (with respect to process, substance, what matters, what does not matter) as well as conduct
- Those obligations and expectations may or may appear to clash with the framework of administrative proceedings



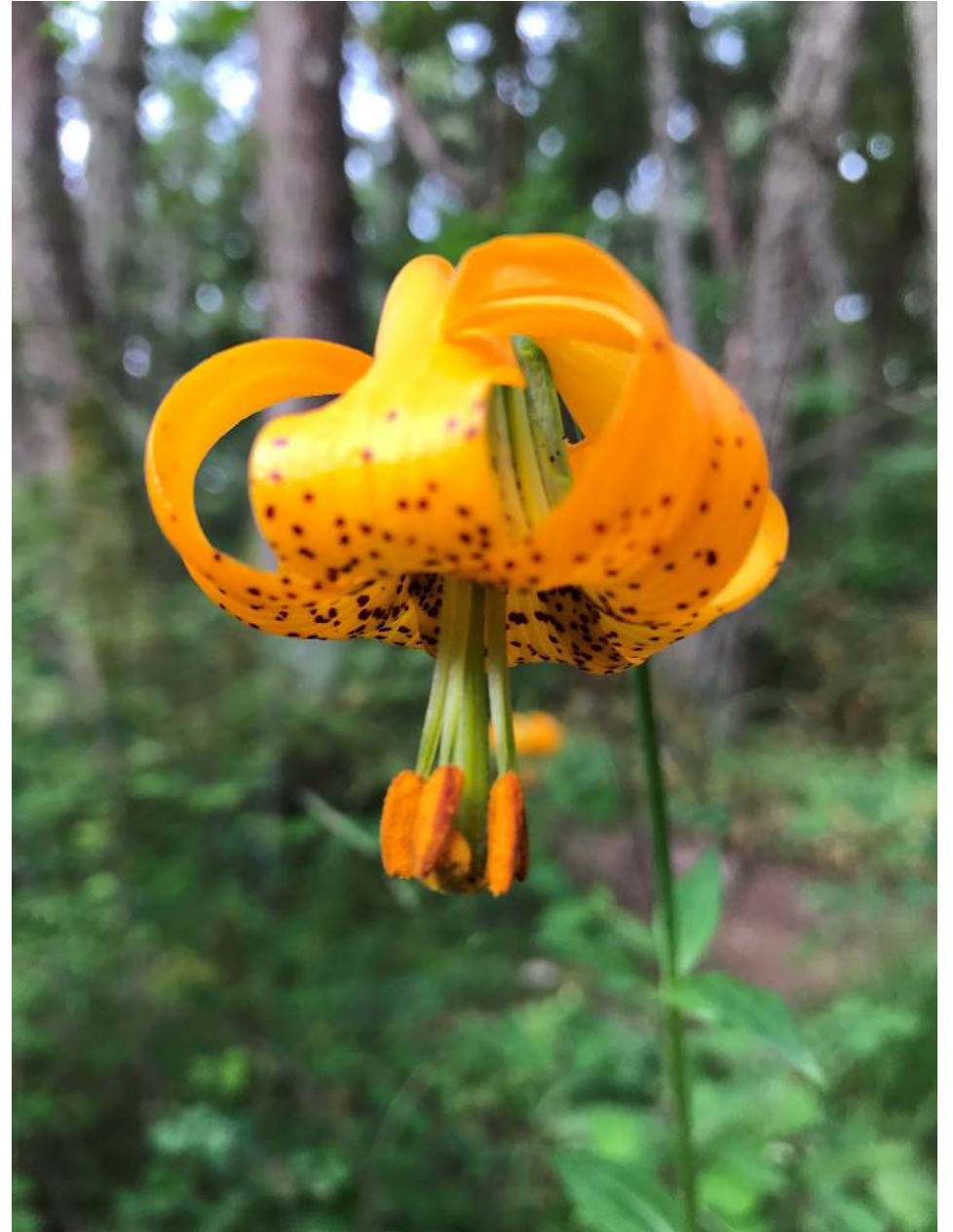
INDIGENOUS LAW AT TRIBUNALS – LAND, TERRITORY, COMMUNITIES

- Seeing law as grounded in the geographies of the work and the peoples of those territories
 - Where is the tribunal located? Where does it do its work?
 - Does the tribunal have a relationship with the nation/nations in whose territories it works? Does the ministry?
- Recognizing Indigenous law and jurisdictions at a general level is not the same thing as the application of Indigenous law to guide the resolution of particular matters.
- Whether (and how) Indigenous law applies in non-Indigenous forums depends on the nature of the matter, and/or the work done with the nation/nations/communities whose territories and jurisdictions are affected by the non-Indigenous forum.



ADJUDICATION & INDIGENOUS LAW

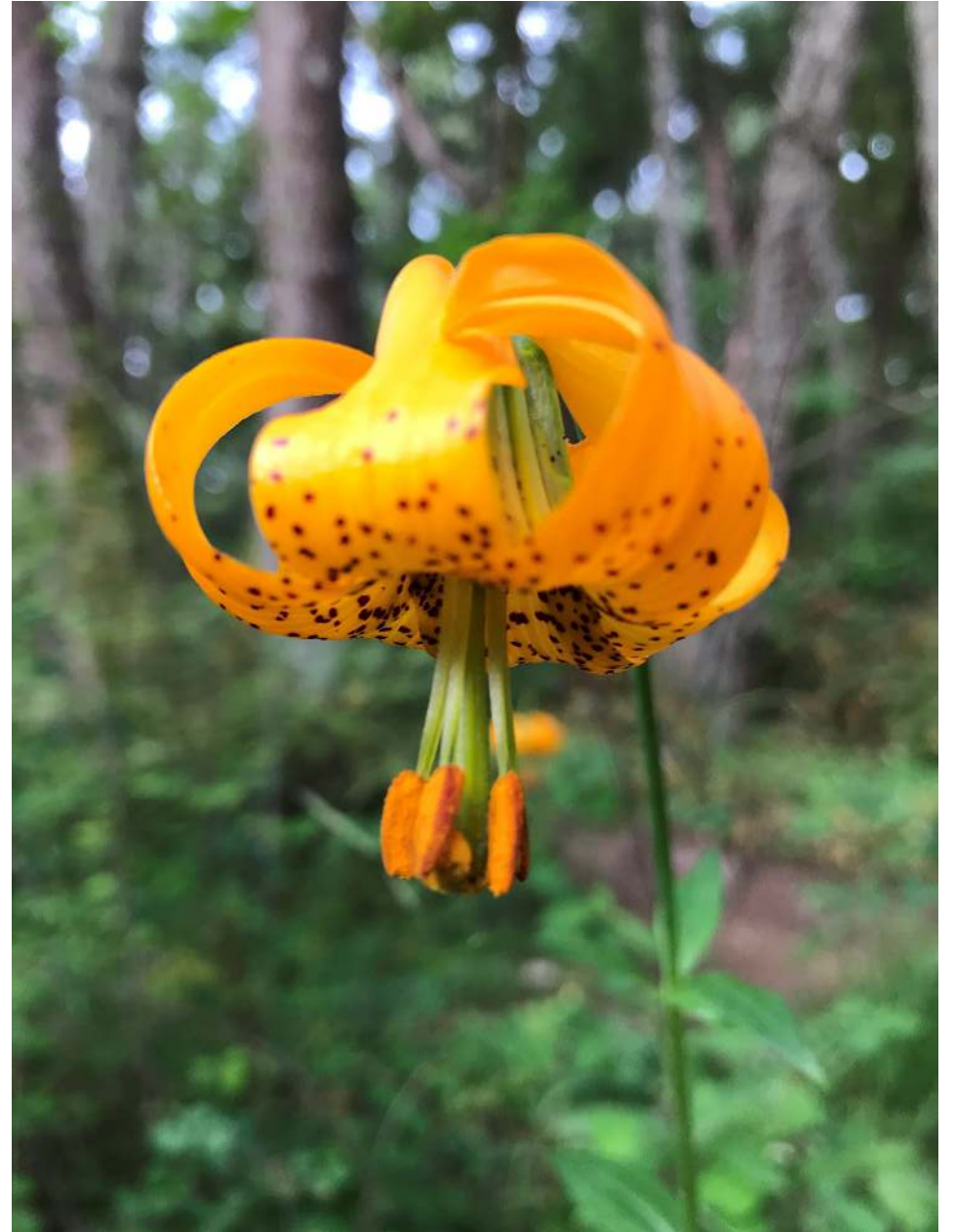
- The law of particular Indigenous peoples is adjudicated as law in Canadian courts in several contexts, and is incorporated in the proof of claims and the hearing process in others. For example:
 - Aboriginal rights and title adjudication (incorporation in hearings/adaptations of process, interpretation of rights): *Restoule v Canada (Attorney General)*, 2018 ONSC 7701
 - Statutory interpretation, customary adoption/family law: *Casimel v ICBC* (1993), 82 BCLR (2d) 387: “there is a well-established body of authority in Canada for the proposition that the status conferred by aboriginal customary adoption will be recognized by the courts for the purposes of the application of the principles of the common law and the provisions of statute law to the persons whose status is established by the customary adoption.” (para 42).



ADJUDICATION & INDIGENOUS LAW

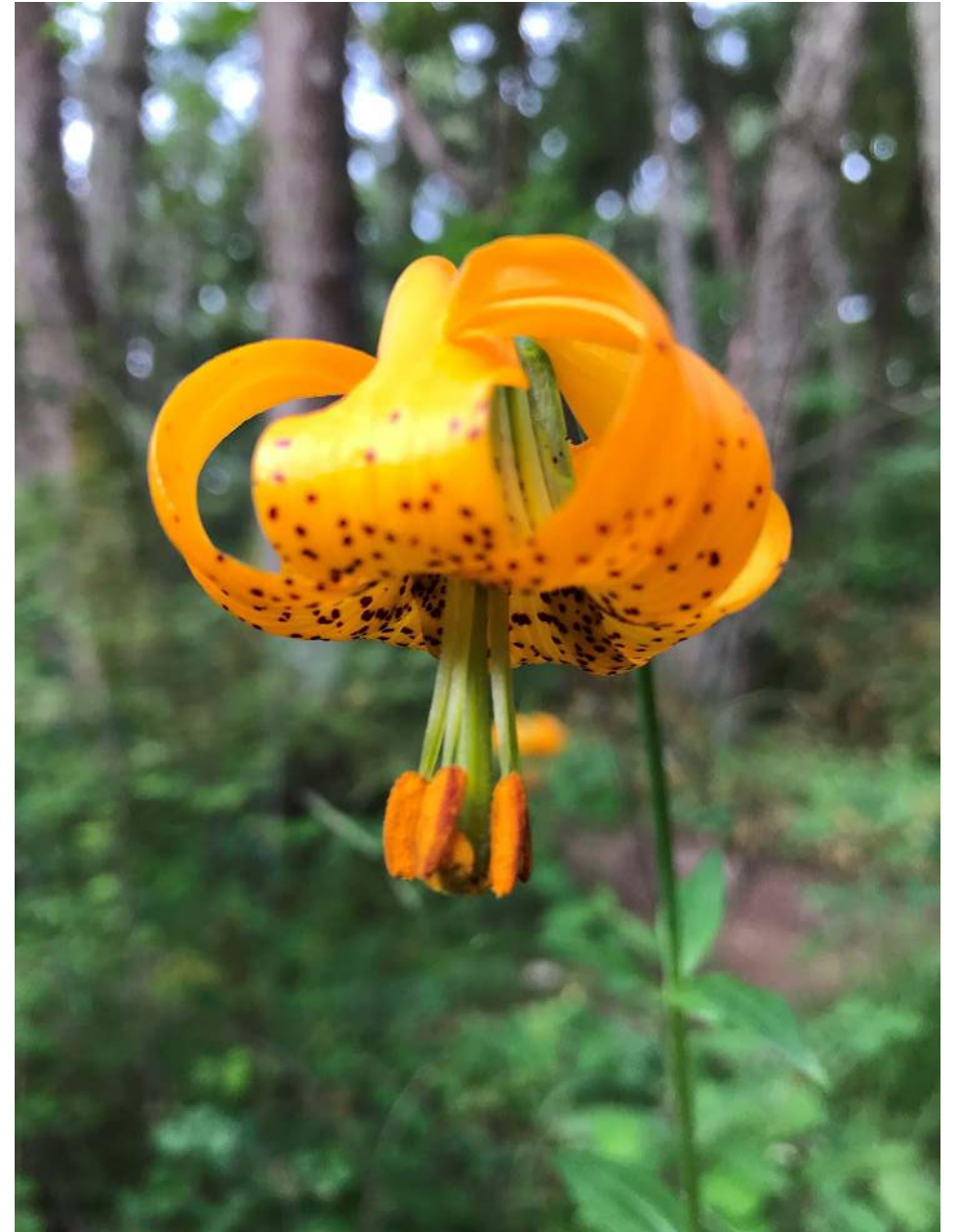
More examples:

- ❑ Election disputes, reserve communities: *Pastion v Dene Tha' First Nation*, 2018 FC 648
- ❑ In relation to the *Charter*, s. 25 and self-government agreements:
 - ❑ *R v Ippak*, 2018 NUCA 3 (Berger JA, concurring reasons, arbitrary search & seizure and admissibility of evidence)
 - ❑ *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 3



INCORPORATION OF INDIGENOUS LAW

- The law of particular Indigenous peoples can also be made applicable to law through the instruments of Canadian law – e.g., statute, contract:
 - New federal and BC environmental assessment legislation – provide for delegations to, agreements with “Indigenous governing bodies” (federal legislation)/Indigenous nations (BC legislation) around carrying out assessment processes
 - Contracts – [Witness Blanket example](#)
 - Procedural rules – e.g., (Federal) Specific Claims Tribunal, *Specific Claims Tribunal Act*, s. 13: the Tribunal may “take into consideration cultural diversity in developing and applying its rules of practice and procedure”. See [SCT 2019-2020 Annual Report](#), at p. 12-13.
 - Potentially policy/soft law instruments within tribunal authority



INDIGENOUS LAW AT TRIBUNALS

The law of particular Indigenous peoples can also be relevant to exercises of discretion.

- Government-to-government agreements
- Discretionary authority and constitutional and fundamental values, international human rights principles
 - Reconciliation
 - Values relating to Aboriginal rights



CHALLENGES: ADAPTING PROCESSES

Example: Impartiality and incorporating ceremonial practices of law:

- May be misunderstood: Enbridge hearings – Eagle down blown by Wet'suwet'en elder over Enbridge reps and members of the joint review panel understood as an act of hostility. See G&M article [here](#).
- May give rise to arguments of a reasonable apprehension of bias: Participating in community events, ceremonies. E.g., [Restoule](#) : Justice Hennessey before Elder Fred Kelly is sworn in (to minute 7:15 approx)

Consider: Do land/territorial acknowledgements potentially result in a reasonable apprehension of bias at a particular tribunal? Do other efforts to welcome, accommodate Indigenous participants introduce a perception of bias, threaten impartiality?



CHALLENGES

Responses:

- Blessings, ceremonies
 - Proceedings without such ceremonies also happen in a legal and cultural context. They are not neutral.
- Land acknowledgements (esp where land rights may be in issue)
 - These generally recognize the colonial context and geography of the work taking place, and the incompleteness of reconciliation and not the specific matter being adjudicated
 - Suggestion - clarify why tribunals perform land acknowledgements in a public document



OPPORTUNITIES (OR HOW DO YOU DEVELOP AN AGENDA THAT RECOGNIZES INDIGENOUS LAW AS LAW?)

- Identify what you know and what you don't (information, data work), and how to make services more accessible
- Consider the relationships required, who to work with, and who should lead the work
- Lessons from *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41
- Respect community priorities



OPPORTUNITIES

- Consider existing mandates, adaptations, and current issues
- E.g., Adapting processes for oral history evidence – with particular communities and/or with particular litigants
- Consider the place of tribunal work in larger picture of reconciliation

