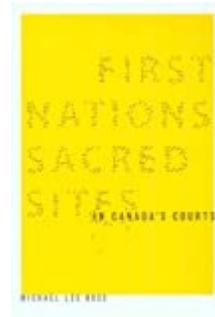


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Michael Lee Ross. *First Nations Sacred Sites in Canada's Courts (Law and Society)*. Vancouver: UBC Press, 2005. xii + 234 pp. \$35.95 (paper), ISBN 978-0-7748-1130-9.



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First Nations have not fared well in Canada's courts at any time in the nation's history. This is true in spite of the great cases, *Sparrow* and *Delgamuukw*, for example, that have advanced First Nations rights.[1] Section 35(1) of the Constitution Act, constitutionally enshrining "existing aboriginal rights," was intended to redress this, and many hoped it would bring in a new era in respect for First Nations' rights in Canada's courts. Now, twenty five years later, it is clear that this has not occurred.

There is a good deal of thinking and writing on these issues happening right now in Canada. In *First Nations Sacred Sites*, Michael Lee Ross makes a very understated contribution to this discussion with a meticulous analysis of nine cases. These nine cases each, in some way, raises an issue regarding sacred sites, some explicitly, others implicitly. For Ross, these are watershed cases, because the issue of sacred sites goes to the heart of First Nations cultures. And, in general, the Canadian courts fail to understand what is at stake, fail to comprehend the meaning of aboriginal cultures, fail to understand what sacred sites mean to First Nations peoples, and fail to develop adequate legal measures to protect these rights.

His legal argument is highly technical, comparing two strategies: the Meares strategy, based on seeking interlocutory relief for threats to sacred sites, and the Haida strategy, seeking full judicial review of the issue. Each

has strengths and limitations turning on legal details not relevant here. But, with each, the courts have been unwilling to give full weight to First Nations concerns. At worst, this leads to a "balancing test" where a sacred site is balanced against "200 jobs and a timber company investment" (p. 43). At best, the First Nations sacred site is analyzed within the context of a 35(1) right as best understood by a Canadian judge with only a rudimentary understanding of the depth and meaning of an Aboriginal culture. Ross is very sharp with his analysis of details, effectively analyzing judicial reasoning as he proceeds through his analysis.

As sharp as his legal analysis is, he leaves the reader wanting to know more details about the aboriginal people and the sacred sites involved in this litigation. The best writing about First Nations peoples and Canadian law puts the cultures of the First Nations at the center of the analysis. This is what the lawyers brilliantly did in the *Delgamuukw* case: put the chiefs and elders at the center of the case, let the ancient laws speak for themselves, and force the judges to extend their imaginations to try to understand this meaning within the context of Canadian law. Ross means to do this, as is clear in his conclusion, but he does not draw the aboriginal cultures into the center of his argument. The reader needs to know more about these sacred sites and about the people who

hold them sacred.

Ross's conclusion is striking—and absolutely right. “What is at stake for Canada?” he asks, “nothing less than its national soul” (p. 178). In his analysis, the First Nations are increasingly being forced to fight to protect their sacred sites because the Canadian state is putting increased pressure on their natural resources. Like indigenous peoples all over the world, the First Nations of Canada live on land that holds the natural resources that the developed world needs. The sacred sites are under constant threat and the process of “cutting away” at their land, their sacred sites, and their cultures. “But peoples,

like persons, may bleed to death from one large or a thousand small cuts” (p. 177). By causing this harm to its First Nations, Canada risks its entire national culture. Judges are only actors in this process, but they are significant actors. The failure of Canadian law to respect sacred sites is only one element of the failure of law under Section 35(1), but because of the nature of sacred sites to First Nations cultures, it is among the hardest felt.

Note

[1]. *R. v. Sparrow*, (1990) 1 S.C.R. 1075; *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010.

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