

Introduction: What First Nations Peoples Have at Stake

On the final day of August 2001, the Inter-American Court of Human Rights, the western hemisphere's highest human rights tribunal, delivered a landmark decision on the rights of indigenous peoples in international human rights law.¹ In its decision in *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, a case originating in Nicaragua, the Court affirmed, on the one hand, the collective rights of indigenous peoples to the free and full enjoyment of their lands and resources in accordance with their customary laws, practices, and values, and, on the other, the corresponding duties of states within whose boundaries they live to formally recognize, give effect to, and respect those rights. As a key step in its reasoning, the Court described the importance of the land to indigenous peoples as follows:

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but [have] a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.²

Essentially, the Court recognized that to be indigenous is, collectively speaking, to be in a special relationship with the land.³ By so doing, the Court committed itself to the proposition that anything that undermines indigenous peoples' special relationship with their lands threatens "their cultures, their spiritual life, their integrity, and their economic survival" or, in other words, threatens their existence *qua* indigenous.

The Court also, it should not be overlooked, identified what it is that makes indigenous peoples' relationship with their lands special. What makes it special or distinctive is that it includes, in addition to the ordinary

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possessory and productive aspects, “a material and spiritual element.” The Court was saying, then, that the existence, survival, and, not least, well-being of indigenous peoples depend not only on their ownership and occupation of their lands but also, more crucially, on their material and spiritual connections to the same.⁴

The Court did not elaborate on the material and spiritual aspects of the special relationship. Nonetheless, a few general characterizations are ready to hand. For instance, the material aspect of the relationship certainly includes not only a physical presence but also a physical dependence on the land – the land (including its plants and animals), then, is understood as physically sustaining. The spiritual aspect of the relationship is exemplified by indigenous peoples’ widespread belief that the land is a gift given into their care. Because indigenous peoples commonly refer to the spiritual realm to explain the (believed) facts that the land has been given to them and that they have been charged with caring for the land,⁵ their relationship with the land as a gift is a spiritual relationship. Clearly, the Court was correct in stating that indigenous peoples’ relationship with their lands has both material and spiritual aspects.

Just as there is far more to the material aspect of the relationship than what I have mentioned, so too there is far more to the spiritual aspect. Here I want to mention just one more common feature. For indigenous peoples generally, the land is never merely physical. It is permeated by the spiritual.⁶ The land is, therefore, never spiritually desolate. Because indigenous peoples look upon the land as permeated by the spiritual, their relationship with their lands must always have a spiritual aspect.

Before turning my discussion in a less abstract direction, I want to delve just a little further into indigenous metaphysics. Indigenous peoples generally hold not only that the world is permeated by but also that it is enveloped by the spiritual.⁷ The world is enveloped by the spiritual because it is not, physically speaking, self-sufficing. To put it another way, the world is not the source of its ultimate significance. Not surprisingly, indigenous peoples look to the spiritual realm for the ultimate significance of their lands, of their relationship with their lands, and consequently of themselves. Their relationship with their lands is therefore fundamentally and irreducibly spiritual.⁸

It is a testament to the care with which the Inter-American Court of Human Rights crafted its words that the statement quoted above aptly describes the importance of the land (including waters⁹) to the First Nations (or Native American) peoples of Canada and elsewhere in North America.¹⁰ Being First Nations is, indeed, a collective way of being in a relationship with the land. First Nations peoples’ relationship with the land includes not only the usual possessory and productive aspects but also material and spiritual aspects. Thus, anything that undermines their relationship with

the land, and especially their material and spiritual connections to the land, threatens "their cultures, their spiritual life, their integrity, and their economic survival."

As with other indigenous peoples, First Nations peoples' relationship with the land is fundamentally and irreducibly spiritual.¹¹ But more can and, for my purposes, should be said about their spiritual relationship with the land. The spiritual connection First Nations peoples have to the land is a connection not only to the land as a whole but also to particular portions of the land. First Nations peoples do not view the land as spiritually homogeneous or uniform. Although the land as a whole has spiritual significance, certain portions of it have their own special spiritual significance. First Nations sacred sites are paradigmatically places of special spiritual significance. For First Nations peoples, their sacred sites are places of the greatest convergence of the physical and spiritual. First Nations peoples are, therefore, spiritually connected to particular portions of the land through their sacred sites.

It is clear, then, that their sacred sites are crucial to the existence, survival, and well-being of First Nations peoples, for their sacred sites distribute their spiritual connection to particular portions of the land. Without their sacred sites to distribute their spiritual connection to the land, First Nations peoples would be left with a mere shell of their spiritual relationship with the land. Absent the spiritual connection to particular portions of the land afforded by their sacred sites, First Nations peoples would have only their spiritual connection to the land as a whole to sustain their spiritual relationship with the land. Such a diminished spiritual connection, lacking specific anchors in the land, would be tenuous and, hence, vulnerable to modernity's onslaughts. Thus, what endangers First Nations sacred sites endangers their spiritual relationship with the land. Furthermore, because the spiritual aspect is an integral aspect of their overall relationship with the land, what endangers their sacred sites endangers their overall relationship. Finally, because to be First Nations is to be in a special relationship with the land, what endangers their sacred sites ultimately puts their existence, survival, and well-being in jeopardy. Their sacred sites are therefore crucial to their existence, survival, and well-being.

A different argument supports a similar conclusion. First Nations spirituality and religion are rooted in the land. Sacred sites are their taproots. First Nations sacred sites serve a variety of spiritual and religious functions (as places, for example, associated with creation events, utilized for cleansing rituals, or suitable for vision quests), all fixing First Nations spiritual and religious beliefs and practices in the land. Whatever endangers their sacred sites threatens to uproot and thus to harm their spirituality and religion. But their spirituality and religion are integral parts of First Nations cultures. Thus, whatever endangers their sacred sites undermines their cultures.¹²

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Moreover, because other cultural elements (such as history, ethics, law, and politics) are intricately interwoven with their spirituality and religion, First Nations sacred sites often serve other cultural functions (as historical sites or places for political deliberation, for example). Again, whatever endangers their sacred sites undermines their cultures. First Nations sacred sites are therefore crucial to First Nations cultures.

Thousands of First Nations sacred sites in Canada and elsewhere in North America have been destroyed or seriously damaged. Thousands more are under imminent threat of the same. Throughout Canada and the rest of North America, First Nations peoples' access to and use of their remaining sacred sites are often hindered or even denied. It is against this grim background that First Nations peoples are fighting to maintain or regain access to, to use, to protect, and to preserve their sacred sites. In light of the foregoing analysis, it is clear what First Nations peoples have at stake in their fight for their sacred sites – in a word, everything. For starters, the possibility, not to mention the actuality, of their well-being is at stake, for their well-being as First Nations peoples is impossible without their sacred sites. Short of this but more fundamentally, their very being as First Nations peoples is at stake. To put it plainly, their fight for their sacred sites is a fight for their collective lives.

Not surprisingly, then, given what is at stake, First Nations peoples have occasionally taken their fight for their sacred sites to the courts. For First Nations peoples living within Canada's boundaries, the legal weapon of choice has been Canada's constitutional commitment to recognize and affirm Aboriginal and treaty rights. Normally, when First Nations peoples have taken their fight for their sacred sites to Canada's courts, they have tried to leverage their constitutional rights into protection for their sacred sites. This book is about how Canada's courts have responded.

In Chapter 1, I sketch the outlines of a general theory of sacred sites. The theory's key explanatory concepts include a distinction between a sacred site's surface and deep symbolism, a distinction between a sacred site's practical religious and theological/cosmological significance, and the notions of a sacred site's status and its ethic. The theory proves its explanatory worth throughout Chapter 5 and intermittently in Chapters 3, 4, and 6.

I must emphasize here that Chapter 1 contains only the *outlines* – indeed, only the *partial* outlines – of a general theory of sacred sites. A full-blown general theory would require a book of its own. To reiterate, this book investigates how Canada's courts – Canada's appointed guardians of the law – have dealt with sacred site claims of First Nations peoples. To whatever extent a theory of sacred sites emerges in this book, it is wholly in service of that larger purpose.

In Chapter 2, I describe the historical and legal context in which First Nations peoples carry their fight for their sacred sites to Canada's courts.

I divide my discussion into four sections. In the first, I explain why First Nations have had to fight for their sacred sites. In the next, I discuss the potential of Aboriginal and treaty rights as a means whereby First Nations may gain a measure of constitutional protection for their sacred sites. Although I conclude that Canada's Aboriginal rights regime is moribund, I suggest that the British Columbia Court of Appeal's decisions in *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* (January 2002) and *Haida Nation v. British Columbia (Minister of Forests)* (February 2002) may breathe new life into it. (I discuss these decisions and their implications for First Nations sacred sites in Chapter 4.) In the third section, I touch upon the use of interim measures and other negotiated agreements to protect sacred sites. Finally, I discuss the obstacles First Nations peoples face in having their interests in their sacred sites fairly translated into legal language and ritual and, so translated, fairly interpreted by the courts.

In Chapters 3 and 4, I set forth and discuss nearly a dozen court cases in which First Nations peoples have attempted to leverage their constitutionally guaranteed Aboriginal and treaty rights into protection for their sacred sites. (The cases were chosen for their *legal* significance, for what they tell us about the courts, about the law. They are not necessarily the foremost cases on what First Nations peoples or anyone else may consider the most important religious or spiritual issues.) I have sorted the cases into two groups based on whether the First Nation in question has employed what I call the Meares or the Haida litigation strategy. Chapter 3 is concerned with cases based on the Meares strategy and Chapter 4 on cases based on the Haida. Regarding the cases based on the Meares strategy, I first show how the strategy developed, then demonstrate that it has largely failed to protect sacred sites, and finally explain why it has failed. Regarding the cases based on the Haida strategy, I again show how the strategy developed and then discuss its potential for protecting sacred sites. On the latter point, I argue that First Nations sacred sites have the potential to test most severely the limits of, on the one hand, the Crown's constitutional duties towards First Nations peoples as articulated by the British Columbia Court of Appeal in the *Taku River* and *Haida* cases and, on the other, a reviewing court's ability to assess whether the Crown has fulfilled those duties in undertaking an activity that affects a sacred site.

My discussion of the cases in Chapters 3 and 4 is extended and detailed, for two reasons. First, judicial remarks bearing directly on First Nations sacred sites are few, fragmentary, and unsystematic, even in those cases explicitly concerned with First Nations sacred sites. This means that if we are to gain a good sense of the courts' thinking on the subject, logical gaps must be filled in, unstated (often extralegal) assumptions stated, implications drawn, and positions teased out. Undertaking these analytical tasks required a relatively detailed and long discussion. The second and more

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important reason is that readers, I believe, should be able to conveniently test my conclusions – especially as they are critical of the courts – against what the courts have actually said and done. Most readers, I assume, do not have easy access to cases. Moreover, some of the cases I refer to are difficult and/or costly to access. Thus, most readers, I assume, will have to – or, as a matter of convenience, will want to – rely on my presentation of the cases to form their judgments as to whether my conclusions are fair or not. Obviously, the usual case summaries with which legal textbooks are replete and to which lawyers are professionally habituated would not have sufficed.

In Chapter 5, I draw my main conclusions about how First Nations sacred sites have fared in Canada's courts. My conclusions are mostly critical. I assess the performance of the courts by examining the results and the judiciary's reasoning about First Nations sacred sites. I conclude that First Nations sacred sites have fared poorly on both counts. In support of the latter conclusion, I argue, among other things, that the courts' efforts to gain an understanding of First Nations' perspectives on their sacred sites have been deplorably inadequate, that the courts have failed to treat First Nations sacred sites fairly, and that their unfair treatment of First Nations sacred sites betrays a bias against First Nations peoples and their sacred sites.

Chapter 6 contains my final remarks. There I do two things. First, I suggest ways in which Canada's courts could improve on their treatment of First Nations sacred sites. Second, I show that Canada too has something significant at stake in the fight of First Nations peoples for their sacred sites. What Canada has at stake is nothing less than its national soul.