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**BETWEEN JUSTICE AND CARE: TOWARDS A NEW
MODEL OF ENVIRONMENTAL MEDIATION FOR
CARING COMMUNITIES**

JACQUELYN LOWE

(B.A. Hon., Carleton University)

A Master's Thesis

Submitted to the Department of Law

In Partial Fulfillment of the

Requirements for the Degree

Master of Arts in Legal Studies

Carleton University

2001

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**BETWEEN JUSTICE AND CARE: TOWARDS A NEW
MODEL OF ENVIRONMENTAL MEDIATION FOR
CARING COMMUNITIES**

Submitted by

Jacquelyn Lowe, B. A. Hons.

**in partial fulfilment of the requirements for
the degree of Master of Arts**

Thesis Supervisor

Chair, Department of Law

**Carleton University
September 2001**

ABSTRACT

This thesis explores the potential of mediation as an alternative form of dispute resolution for marginalized groups seeking greater public participation and decision-making in environmental conflicts affecting their communities. In particular, I explore the implications of integrating the concept of an 'ethic of care' with the 'ethic of justice' to extend both and thereby create a more complete model of dispute resolution that captures more adequately the principles of environmental justice. The aim is to illustrate how this approach to environmental mediation could assist parties in finding better and more workable solutions to environmental disputes. I emphasize the importance of developing mediation to include the characteristics of care that promote connection and interdependence and analyze the possibility of incorporating human and non-human caring relations into Canadian legislative reforms. This approach is contrasted with the current reliance on processes that apply mechanical rules to solve complex legal/moral dilemmas relating to the environment.

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INTRODUCTION

Environmental conflict in Canada became a prominent national concern in the 1980's and 1990's, as growing awareness of environmental degradation led to increased advocacy and new legislation intended to offer environmental protection. In Ontario, as elsewhere, the political system has come under increasing pressure from citizens who have demanded more access to public policy and decision-making processes. This is especially evident in the area of environmental conflict. Often these disputes pose powerful challenges to society. Many of the projects and activities involve government, industry, environmental organizations and local communities. The extent of concerns and interests is diverse, ranging from quality of life issues, to institutional and procedural matters, to moral and ethical questions. As result, there is a growing interest in Canada in alternative forms of dispute settlement.¹

Alternative mechanisms for addressing environmental conflicts have been stimulated by the limitations of conventional forms of adjudication. Evaluations of the

¹ B. Sadler, "Common Ground", in a Background Paper Prepared for the Canadian Environmental Assessment Research Council, *The Place of Negotiation in Environmental Assessment* (Hull, QC: CEARC, 1987) at 1.

Canadian experience with environmental assessment and project review have identified a number of problem areas. For example, public hearings and meetings, the conventional participatory instruments used in these processes, typically involve minimal interaction and dialogue among contending parties and do not necessarily involve seeking mutually acceptable solutions.²

Mediation as a form of alternative dispute resolution (ADR), has been widely advocated for its potential to yield more meaningful, satisfying and contextually-based solutions to disagreements between parties who would traditionally resort to adversarial litigation in order to resolve their conflicts.³ Mediation has emerged as a prominent, albeit controversial, form of alternative dispute resolution that lends itself to accessibility, equity and cooperation between parties.⁴ As practitioners and administrators begin to integrate alternative means of dispute settlement with more traditional procedures such as public consultation, important questions remain about advantages and disadvantages of institutionalizing these measures within the Canadian system of decision-making.

² *Ibid.*, at 2.

³ This is a very popular notion and virtually all writings in the field at least implicitly acknowledge that the “A” in ADR refers to an alternative to the adversarial (i.e. traditional) legal process predominant in modern western cultures. See for example R.A.B. Bush and J. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco, CA: Jossey-Bass Publishers, 1994) [Hereinafter *The Promise of Mediation*].

⁴ G. Bingham, reported 78% of mediated environmental disputes were resolved in *Resolving Environmental Disputes: A Decade of Experience* (Washington, DC: The Conservation Foundation, 1986).

The term environmental mediation, as used in this thesis, is defined quite broadly to incorporate environmental dispute resolution generally. Environmental dispute resolution means the variety of approaches that allow parties to meet face-to-face to reach a mutually acceptable settlement of the issues in a dispute or potentially controversial situation.⁵ Environmental disputes refer to disagreements between parties which concern, or are directly relevant to, the natural environment. Of specific interest to this thesis are public interest disputes affecting a broader range of both human and non-human communities.⁶ An important feature of these conflicts is the irreversibility of decisions involving fundamental alternations to a communities' physical surroundings and possibly their health and safety.

Objectives

This thesis contains two preoccupations. The central objective is to construct an alternative model of mediation informed by an ethic of care. In order for mediation to fulfill its potential as an effective method of settling disputes, I argue that there is a growing need to shift to a more relational transformative approach to dispute resolution. I contend that mediation practice informed by a feminist ethic of care, with its emphasis on connection and interdependence, combined with an ethic of justice could potentially fulfill this goal. The secondary objective of this thesis is to explore the potential of

⁵ *Ibid.*

⁶ As opposed to “party-to-party” disputes between private individuals (such as neighbours) are in disagreement.

mediation as an alternative technique of dispute settlement for marginalized groups seeking greater public participation and decision-making in environmental conflicts affecting their communities. I argue that this reformed model of environmental mediation has the potential to serve as a vehicle through which environmental justice principles can be realized.⁷

This perspective is premised on the idea that conflicts need not be viewed solely as problems, but rather “disputes that emerge from people’s substantive concerns, dissatisfaction and interpersonal or relational tensions can be seen, not as problems, but as opportunities for human growth and transformation.”⁸ This framework views society as comprised of individuals with particular needs and desires, but in addition to this, it involves realizing that others have their own valued concerns as well.⁹ Transformation then is an interactive process through which empathy, understanding and valuing of others’ concerns is brought about.¹⁰

⁷ This thesis uses the term “environmental justice” because it encompasses a broader definition of injustice. Although the term “environmental racism”, frequently used in the literature, captures the sense of discrimination often associated with the movement, it fails to capture the injustice that white communities may also face. Use of the term “environmental justice” does not mean that race issues are irrelevant; instead, it broadens the range of relevant issues.

⁸ R.A.B. Bush and J. P. Folger, “Ideology, Orientations to Conflict, and Mediation Discourse” in J.P. Folger and T. S. Jones (eds.), *New Directions in Mediation* (Thousand Oaks, CA: Sage Publications, 1994) at 15 [*Hereinafter New Directions*]

⁹ *Ibid.*, at 19.

¹⁰ Transformation is generally comprised of two crucial capacities: empowerment and recognition. Empowerment involves an individual or group’s abilities to deal with adverse circumstances and recognition similarly involves the enhancement of abilities to experience and express concern for others. There is debate over the ability of “groups” to realize transformation. The thesis contends both individual and group transformation are

I contend that the process of mediation is influenced by the ethical perspective through which the participants and the mediator express themselves. According to psychologist Carol Gilligan, some people emphasize an ethic of rights and justice way of thinking, where as others emphasize an ethic of care and relationship.¹¹ Mediators and participants sensitive to both these approaches can enhance their likelihood of developing resolutions that ethically meet the needs of the parties involved. In addition, a focus on an ethic of care rather than rights can facilitate efforts of participants to consider the perspectives of both care and justice in working out the terms that will govern their agreement.

To assess and rethink environmental mediation I draw on feminist, mediation and environmental justice theory to inform my analysis of the legal, social, economic and political aspects of environmental conflicts and their transformation. Where feminist literature allows me to broaden the perspective of traditional thinking and practice, the general mediation literature allows to me to understand the concept of transformation. These two perspectives are not as mutually exclusive as I describe them, but these divisions serve to highlight the direction of my research and thinking. Therefore, while mediation literature gives me the tools to consider a transformative process to resolve

possible. See for example discussion in C. Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court*. (Greenwood Press, 1985) at 15.

¹¹ C. Gilligan, *In A Different Voice: Psychological Theory and Women's Development*. (Cambridge, MA: Harvard University Press, 1982) [Hereinafter *IDV*].

conflicts, feminist literature gives me the necessary critical lens from which to analyze their potential to promote greater environmental justice.¹²

Methodology

The work in this thesis is primarily theoretical, based on conceptual thinking and writings in the fields of mediation, generally, environmental dispute resolution, specifically and environmental justice scholars. I have selected those works that address some of the most fundamental issues in mediation and environmental mediation today. These include books and journal articles from scholars and practitioners, such as; Lawrence Susskind, Paul Emond and Douglas Amy in environmental mediation and law; Carol Gilligan and Joan Tronto in feminist ethics; Trino Grillo and Carrie Menkel-Meadow in the critique of family mediation; and Robert Bullard and Luke Cole in environmental justice.

In the last chapter, a case study example involving the siting of a landfill facility in the northern Ontario community of Kirkland Lake is examined. The analysis draws upon various primary sources taken mainly from Internet sites. They include: written presentations by the public to the project's Public Liaison Committee; a report

¹² The movements of environmentalist justice, feminism and mediation attempt to challenge the conditions and structures that maintain unjust relationships, whether they be between peoples, men and women, humans and nature. Explicit in these social movements is the desire to influence social change. However, implicit in their dynamic and transformative nature is a diversity of viewpoints, opinions and conceptions that both enrich and confuse one's understanding as to the appropriate application of theory and practice. In order to present a succinct and clear portrait these movements at times they will be treated as a unified whole, even if in reality the case may be quite different.

commissioned by the Responsible Economic and Environmental Prosperity Association of Kirkland Lake; the development company's landfill assessment report; and various comments, observations and arguments made by concerned citizens involved in the process. This provides a means of analyzing how the proposed model of mediation informed by an ethic of care can address a specific issue of environmental injustice. Not only would the facility have potentially posed a health risk to local and surrounding communities, but Kirkland Lake's residents also persistently questioned the justice of decision-making that imposed risks on them without asking for their participation.¹³

Organization of the Thesis

The following chapter discusses mediation and the environment. The first section of the chapter outlines why traditional methods of dispute resolution, mainly the adjudicative court process, do not adequately address environmental disputes. The chapter then focuses on environmental justice and how it relates to alternative dispute resolution and mediation. Chapter Two, 'A Theoretical Analysis of an Ethic of Care in Mediation' gives an account of Carol Gilligan's ethic and how it could be used to further the goals of transformative mediation and more specifically its role in promoting environmental justice through public policy reform. Chapter Three 'The Dangers of Mediation: Implications for Environmental Disputes,' examines Douglas Amy's

¹³ Within the context of this thesis, the Adam's Mine waste facility proposal is used only as a way of demonstrating how my model could address issues of environmental justice. It is not intended to show an improvement of an existing mediation process, since

substantial contribution to the area of environmental mediation, as well as, the feminist challenge, prominent in family and divorce mediation, that raises some additional concerns for mediation practices in general. I then use both critiques to discuss the overall implications for environmental justice. Chapter Four, 'Towards a Reformed Model of Mediation Informed by an Ethic of Care' contextualizes my approach to environmental mediation. I discuss how it addresses some of the concerns outlined in Chapter Three and apply the process to a concrete example of a recent debate over the potential location of a landfill site for the city of Toronto's waste at Adam's Mine in Kirkland Lake, Ontario. I consider how a reformed process, generally and participation and empowerment, specifically could bring about a transformation in environmental mediation and justice. It relies mainly on scholars who have built on Carol Gilligan's theory by combining both an ethic of care with a justice orientation. Such theorists, include Joan Tronto's formulations of care as "attentiveness" and "responsibility". "Environmental Mediation in the 21st Century" concludes this thesis with a summary of the strengths and weaknesses of environmental mediation. While I suggest that some transformation is possible in the short-term, I argue that effective changes to environmental mediation will require an on-going commitment by all parties, including citizens, to participate in the decisions that potentially jeopardize their communities' quality of life. This suggestion is based on the belief that the dominant environmental mediation process must change from a management perspective to a transformative

mediation was never attempted during this dispute.

orientation informed by an ethic of care. Suggested legislative changes reflect an explicit expression of the direction environmental mediation must take in order to promote the goals of environmental justice in the context of greater social, legal, economic and political concerns.

CHAPTER I: MEDIATION AND ENVIRONMENTAL DISPUTES

Air pollution, excessive solid waste in urban areas, degradation of lands, destruction of forest ecosystems, contamination of ground water, long-range transport and storage of toxic chemicals, industrial development and its harmful effects, loss of biodiversity – these are a small sampling of the range of environmental disputes that are of public concern in Canada and around the world today.

There has been a growing recognition over the past decade by environmentalists, lawyers, policy-makers, corporations and citizens, that the traditional mechanisms for resolving these disputes are inadequate. As Paul Emond notes in his article “The Greening of Environmental Law,”

...the problem is that the approach has generally been wrong. It has proceeded from an adversarial, competitive, rights-oriented model that was destined to siphon off creative energies in a contest of rights regulated only by the logic of justice and due process. The focus has been on defining rights and fine-tuning the dispute resolution process, rather than on solving environmental problems.¹⁴

¹⁴ P. Emond, “The Greening of Environmental Law”, (1991) 36:3, *McGill Law Journal* 742 at 759.

These adversarial methods, which include the courts and other adjudicative hearings, have been widely criticized for their inability to address the complexities of environmental disputes. Environmental disputes often require long-term, comprehensive, creative and cooperative solutions, criteria generally absent from decisions made by the courts and other adversarial bodies.

The question to be considered is whether a more informal, voluntary process which emphasizes greater participation of the parties can be used to achieve more comprehensive solutions in environmental disputes. Many individuals and groups believe that the possibility of such a solution lies within the process of alternative dispute resolution (ADR). ADR processes include negotiation, mediation, facilitation, arbitration and various combinations thereof. Decision-makers within the environmental arena in Canada have begun to explore these processes. These methods of dispute resolution involve a consensual form of decision-making in which co-operation and flexibility are the basis of the process.

As stated in the introduction, the focus of this chapter is to assess the inherent problems of the adjudicative process in dealing with environmental conflicts and to suggest that ADR, generally and mediation specifically, offers a more appropriate and effective alternative to the traditional mechanisms of environmental decision-making and conflict resolution.

Taking this one step further, the chapter then examines the United States environmental justice movement and suggests that the mediation movement offers more

potential for resolving environmental injustices than the current emphasis placed on the movement's use of a rights-based approach. The literature appears to suggest that the environmental justice movement's reliance on traditional civil rights law of the 1960's is inadequate for addressing current injustices in environmental law. Historically, civil rights have focused on obtaining economic and political rights for people of colour. Civil rights will only recognize the deprivation of a specific right where it can be shown that the harm was caused by an alleged perpetrator. This requirement of causation has been difficult to establish in disputes working within this framework. No harm is said to have occurred unless there is a demonstrable link between the exposure of an environmental hazard and a probable loss of health or death. By moving environmental justice issues into a judicial setting, corporate counsel have been able to emphasize the courts' preference for individual rights over community rights. As a result, mediation may offer the movement a greater possibility of achieving environmental justice goals.

Also within this chapter, several additional research objectives exist. These include: to provide an outline of the nature and characteristics of environmental disputes and to assess their compatibility with mediation models; to examine the traditional method of conflict resolution and assess its limitations when used for environmental disputes; to explore some of the issues and concerns with mediation in general, and environmental mediation specifically, and to demonstrate how the environmental justice movement could potentially benefit from using the proposed model of mediation informed by an "ethic of care".

Characteristics of Environmental Disputes

Environmental disputes differ from other types of disputes in several important ways. Susskind and Weinstein, in their article "Towards a Theory of Environmental Dispute Resolution," outline the major characteristics of environmental disputes.¹⁵ First, environmental disputes involve irreversible ecological effects, such that any decisions made may translate into permanent consequences. For example, once a decision had been made to strip-mine an area, it may not be possible to reclaim the land or completely repair damage. Second, they involve many indeterminate aspects, such as boundaries, participants, and costs. For example, there are often problems of setting geographic boundaries. The implications of an agreement to compensate environmentalists for the adverse impacts of a project are not easily determined. By defining the geographic boundaries of an environmental dispute, additional parties are either drawn-in or excluded. It is also difficult to attach a monetary value to adverse impacts that accumulate or continue for generations. In contrast, labour dispute issues, for example, are reasonably clear. Contract terms such as wages, benefits and working conditions provide a common starting point. Parties can compare competing offers in dollar terms, the disputants are known and there is little question as to the impact of the settlement.

Environmental disputes may also involve many different parties, sometimes with diverse interests and points of view. Several of the parties involved in an environmental

¹⁵ L. Susskind and A. Weinstein, "Towards a Theory of Environmental Dispute Resolution", (1980) 9:2 *Boston College Environmental Affairs Law Review* 325 at 336.

dispute may claim to represent the broader “public interest”, including interests of non-human species, plant life, and unborn generations. Finally, in such disputes, special problems may arise with respect to the implementation of any agreement reached. As a result of specified time requirements and money, it may be necessary for the continual involvement of the parties.

In addition to these characteristics of environmental conflict, several more can be identified. First, there are generally numerous parties who have an interest in an environmental dispute. The parties may include government agencies, individual citizens and property owners, private corporations, aboriginal peoples’ groups, local citizens’ groups and public interest groups, including business, labour and environmental groups.¹⁶

By nature, these conflicts involve entire communities, industries and governmental agencies. In proposing the use of a model of dispute resolution that emphasizes an “ethic of care”, it is believed that the result will be a move away from polarized positions to a focus on strategies that better allow the affected parties to listen and openly communicate with one another. The long-term benefits of involving the communities in decisions concerning their neighbourhood would facilitate more productive relationships between communities, developers and government agencies.

The complexity of these disputes is one of their main hallmarks, including the complicated financial questions, complex regulatory procedures and detailed scientific

¹⁶ E. T. Smith, “Environmental Conflict Management” in D. Sandole and I. Sandole-Staroste (eds.) *Conflict Management and Problem Solving: Interpersonal to International Applications* (London, UK: Frances Pinter Publishing, 1987) 150.

information involved. As Smith outlines, the issues involved in environmental conflicts are frequently "multiple, intertwined, complex - in a word difficult to understand. It is not a simple case of a mine opening or not opening."¹⁷ These disputes also concern various social, economic and political issues. For example, a controversy over the siting of a solid waste facility may not only raise environmental concerns, but also human health, economic and aesthetic questions.¹⁸

Another characteristic of environmental disputes is the importance of technical information in understanding the nature of the problem and in finding alternatives to a conflict.¹⁹ Information is specific to each conflict and its scientific nature makes it difficult for the average person to understand. Often there is a lack of technical data that is necessary to adequately assess the situation and sometimes the data is contradictory.²⁰ Smith also points out that the long range effects of decisions may be uncertain. Adding to this complexity is the fact that environmental disputes deal not only with events that occurred in the past, but also with those in the future. In many disputes, the decisions

¹⁷ *Ibid.*, at 150.

¹⁸ This type of project also implicates environmental justice issues. The spread of industry to use untainted land spreads the risk of contamination to more and more outlying areas. These projects involve facilities that use, store and/or manufacture hazardous substances and add environmental risk to neighbourhoods where predominantly low income and minority residents already bear a disproportionate share of society's toxins. See for example D. A. McWilliams, "Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization", (1994) 21 *Ecology Law Quarterly* 705 at 712.

¹⁹ S. L. Carpenter and W.J.D. Kennedy. *Managing Public Disputes* (San Francisco: Jossey-Bass Inc., 1988) at 9.

²⁰ Smith, *supra* note 16 at 150.

being made are potentially affecting un-born generations and at present we do not know how to represent these interests adequately.²¹

Not only is the nature of the conflict subject to variety; there is also diversity among the various parties. Those involved are either individuals or groups who represent diverse and often competing interests. Interests may range from purely economic to a combination of environmental, social, political and economic factors. Groups may focus solely on the benefits humans receive from the environment, while others may attempt to protect more intrinsic values (including plant and animal life) which exist apart from any human valuation.²² These parties often introduce socio-economic, racial and ethnic differences to environmental disputes. Giving voice to groups that may have previously been left out of environmental decision-making is important and part of what an “ethic of care” approach strives to achieve. Resolving these conflicts and deciding the appropriate level of environmental quality are not just economic choices. They are ultimately political and moral choices. These are decisions for an inclusive democratic process that invites all of the effected parties to participate, not for the courts and not for the marketplace.

Parties involved in environmental disputes often possess varying levels of experience and power. For some parties this may be their first experience, such as the resident of a community or a local citizens’ group who find themselves protesting a local

²¹ *Ibid.*

²² Carpenter & Kennedy, *supra* note 19 at 5.

industrial development for the first time. On the other hand, some parties may have more extensive involvement in environmental conflicts, such as corporations, governments, and environmental groups. This difference in experience translates into varying levels of influence between the parties. As Carpenter and Kennedy note, “power comes in a variety of forms, including that derived from financial resources, legal authority, knowledge and skills, access to decision-makers, personal respect and friendships.”²³ Varying degrees of power are evident between governments, the private sector and the public. These are linked to varying levels of access to resources: governments may possess power through its administrative policies and regulations and through its command over technical information; the private sector may hold substantial power because of financial resources that enable it to gather technical information, hire technical experts and engage in public relations campaigns; and the public may possess power through its ability to exert political pressure.²⁴

All of the above characteristics and elements assist in establishing the unique nature of environmental conflicts. No two environmental conflicts will be exactly alike. The number of parties involved in the dispute, the relative degree of environmental harm in question, the geographical scope of the conflict, the financial costs involved, the time frame of the dispute and the technical information involved vary from one conflict to another. I argue that diversity makes it necessary to gain a contextual appreciation for the

²³ *Ibid.*, at 6.

²⁴ *Ibid.*

dispute. In order to reach suitable decisions, these characteristics must be acknowledged within the chosen dispute resolution method.

The failure of traditional adversarial mechanisms to resolve environmental disputes in an efficient and equitable manner has led to the search for solutions through mediation and related responses. Mediation offers particular promise in the environmental arena for a number of reasons. First, I contend that it fosters a mutual learning process through which parties can advance their understanding of the issues stemming from the complex interconnections between natural and human systems. Second, it seeks to engage all interested and affected parties and promotes better understanding and accommodation of collective interests.²⁵

Direct involvement of the parties in the resolution of the dispute generally has led to a greater commitment on their behalf to seek a solution acceptable to all. Accordingly, the necessary contact between the parties is intended to lead to greater understanding of all the parties' varying points of view. Dedication to the settlement process is a necessary commitment to open and equal access to information. In order for the process to work, all sides must voluntarily provide equal access to the information in their possession. The personal participation of the parties in the resolution potentially saves the time and expense of costly, drawn out litigation.²⁶

²⁵ B. Glaoviv, E.F. Dukes, J.M. Lynott, "Training and Educating Environmental Mediators: Lessons from Experience in the US", (1998) *Mediation Quarterly* 15:4, 269 at 273.

²⁶ F.F. Kandel, "Situating Substantive Expertise: An Ethnographic Illustration and a Proposed Standard of Practice for Mediators", (1998) *Mediation Quarterly*, 15:4, 303 at 318.

The next section examines the traditional methods of environmental decision-making and dispute resolution. It will demonstrate why the unique characteristics of environmental conflict, are such that judicial and adjudicative type processes are unlikely to result in a resolution of the important substantive issues underlying the dispute.

Traditional Forms of Environmental Dispute Resolution

Many of the environmental disputes that have occurred in Canada over the past three decades have been resolved within the traditional forum of adversarial decision-making. A consultation report prepared in 1990 for the Law Reform Commission of Canada outlined that:

the predominant mode of settling environmental conflicts had been judicial or quasi-judicial decision-making. Courts, regulatory agencies, government departments and bureaucrats or even provincials or federal cabinets have been the primary adjudicators.²⁷

The traditional model involved the process of adjudication, a process by which the parties put their case before a neutral third party for resolution. Adjudicative decision-making is seen in every facet of decision-making: "adjudication is used to fashion environmental policy; adjudication is used to put policies, to the extent that they are ever expressed, into effect; and of course, adjudication, in the form of prosecutions, is used to enforce

²⁷ Law Reform Commission of Canada, *Dispute Resolution in Canada: Present State, Future Direction. A Consultation Paper* by A.J. Pirie (Ottawa, LRCC, ON: April 1990).

policy.”²⁸ Traditional modes of conflict, for the purposes of this thesis, include litigation, hearings before various boards, tribunals, commissions and public hearings.

Litigation occurs within the court system and is used when legal proceedings are initiated by one party against another. For example, the Attorney General of Ontario may bring an action in public nuisance against someone who has caused unreasonable interference with the use of public lands. Private citizens may also initiate legal actions stemming from common law rights, such as private nuisance, trespass, strict liability and negligence. Litigation may also be initiated pursuant to various pieces of legislation. For example, the Ontario *Environmental Bill of Rights* provides that any resident of Ontario can bring action against any person who has contravened an act, regulation or instrument and whose contravention has caused or will cause significant harm to the environment.²⁹

Many defend tort law as an effective, flexible means of spreading risk and shifting resources from the wrongdoer to the victim. Yet, others cite the cost of litigation, the problem of identifying the victims of widespread environmental damage as justifications for shifting the focus to public regulation.³⁰ However, it has also been argued that the current public regulatory model is subject to special interest capture.³¹ As a result, they claim that it really only maximizes the wealth of a few powerful interest groups.³² It

²⁸ Emond, *supra* note 14 at 758.

²⁹ *An Act Respecting Environmental Rights in Ontario, 1993*, S.O. 1993, c. 28, s. 84.

³⁰ J. E. Smith, “Public Versus Private Environmental Regulation”, *Ecology Law Quarterly* 21 (1994) 431 at 431.

³¹ R. Lazarus, “Public Versus Private Environmental Regulation”, *Ecology Law Quarterly*, 21 (1994) 438 at 439.

³² The spectrum of environmentalists now ranges from “deep ecologists”, concerned

follows that the regulatory model of environmental protection is not actually the result of democratic processes.

Numerous types of hearings are also considered part of the traditional model of decision-making. For example, in Ontario the Environmental Assessment Board conducts public hearings to assess proposed developments that may have environmental impacts. It conducts hearings under several laws, including the *Environmental Protection Act*, the *Environmental Assessment Act* and the *Ontario Water Resources Act*.³³ These public hearings are conducted along the same lines as court proceedings; each participant is given an opportunity to make his or her case and to cross-examine the presentations of all other parties. These hearings may be less formal than judicial dispute resolution, yet they still exhibit an adjudicative character.³⁴

The primary characteristic of traditional dispute resolution processes is their adversarial nature. In such processes, the parties are pitted against each other as proponents and opponents, as plaintiff and defendant. The focus is on the differences

with the rights of trees for example, to the market-oriented conservative reformists. The very success of the environmental movement has brought to the fore leaders (especially in the US) with more moderate views. A few environmental groups have become a part of a fairly powerful establishment (to the exclusion of smaller grassroots organizations) with strong support from federal agencies and private philanthropies. These more moderate environmentalists, who have sought to persuade legislators of "appropriate courses" of action, have in many ways only worked to maintain the economic status quo in the US political establishment.

³³ D. Estrin & J. Swaigen (3rd ed.), *Environment on Trial: A Guide to Ontario Environmental Law and Policy* (Toronto, ON: Emond Montgomery Publications Ltd, 1993).

³⁴ *Ibid.*, at 202.

between the various parties, and as a result it has the effect of polarizing input and encouraging parties to take adversarial, highly confrontationist positions.”³⁵

Within the adjudicative process it is the responsibility of the parties to initiate, research and present their cases. The judge plays a passive role: s/he has “neither the responsibility nor the opportunity to carry out independent investigation of facts nor the power to conduct her/his own review of the issues.” Within this adversarial forum, there is limited room for public involvement and the parties are usually limited to those directly involved in the dispute. There is no guarantee that the parties involved in adjudication will be representative of the numerous parties that are directly and indirectly affected by the dispute. This limited scope of public involvement is a consequence of restrictive standing rules. These rules dictate who can initiate environmental actions and who can participate in public hearings. The result is that localized environmental problems, environmental groups, having suffered no direct damage, do not have standing to obtain the appropriate remedies. Where the effects of a problem become widespread, neither citizens nor citizen’s groups have standing to take legal action to protect the environment.³⁶ Emond questions whether the relevant population is represented in the various presentations in the public hearing process and concludes that many parties go

³⁵ P. Emond, “Environmental Law at the Limits of Incremental Development”, in P. Finkle and A. Lucas (eds) *Environment Law in the 1980's: A New Beginning* (Calgary: Canadian Institute of Resources Law, 1982) 29.

³⁶ F. Gertler, P. Muldoon and M. Valiante, “Public Access to Environmental Justice” in Canadian Bar Association *Sustainable Development in Canada: Options for Law Reform* (Ottawa: Canadian Bar Association, 1990) 85.

un-represented and have no forum for expressing their views.³⁷ Following from this, he argues that if one of the relevant parties to the dispute is unable to participate in its resolution, there is a very real possibility that the decisions-makers will have a lopsided view of the dispute and the way in which it should be resolved.³⁸

Another consequence of the adversarial nature of the traditional model of environmental decision-making is that the outcome is generally of a win-lose nature: “in traditional rule-making, the economy wins and the environment loses, or the environment wins and the economy loses.”³⁹ Since the parties are pitted against each other; what they are fighting for is seen as an ‘all or nothing’ approach. If one party is making the case to build a hydroelectric dam then the other party is making the opposite case - to block the building of the dam. There is no room within the process for any compromise. And when decisions in a dispute are seen as choices between winners and losers, the interests of one, and sometimes all of the parties to the dispute, often remain unsatisfied.⁴⁰

The structure of the traditional model dictates that disputants often end up arguing “shadow issues”, while the larger questions that are at the core of dispute, the real differences between the parties, remain unaddressed.⁴¹ This follows from the fact that parties within the adversarial process are encouraged to specifically and narrowly frame

³⁷ Emond, *supra* note 14 at 810.

³⁸ *Ibid.*, at 815.

³⁹ D. Richard, “Regulatory Negotiation: An Assessment of Its Application” (1993) 13 *Environmental Impact Assessment Review* 189 at 189.

⁴⁰ Bingham, *supra* note 4 at 2.

⁴¹ L. S. Bacow and M. Wheeler. *Environmental Dispute Resolution* (New York, NY: Plenum Press, 1984) at 3.

the issues to be decided.⁴² Completely missing from the analysis - both in terms of the way in which the problem is defined and the way in which potential solutions are canvassed - is any thought as to how the issues might be defined in terms of alternatives to the creation of toxic substances in the first place, or how to recover and reuse these substances. Even the less radical alternative of combining a reuse and recycling policy with an upgrade or retrofit of an existing toxic waste disposal facility is often not examined. Such a focus also dictates that decision-making will be piecemeal; any other issues related to the specific issues that are being adjudicated will have to await for separate cases to be adjudicated later.⁴³

A focus on procedural aspects means that decisions are sometimes raised solely as procedural questions to the exclusion of equally important substantive questions. For example, a decision by an environmental assessment board may focus on whether there was sufficient public involvement in the environmental assessment process of building a new highway and neglect the equally important issue of addressing the actual impact of the proposal on the human and non-human communities. Disputes between provincial and federal governments may be framed in terms of the constitutional division of powers and whether these powers are *ultra vires*, instead of focusing on the substantive issues involved, such as the distribution of environmental effects of a proposed policy. Emond

⁴² Law Reform Commission of Canada and University of Western Ontario. *Environmental Mediation Study* by P. Mercer and H.I. Rounthwaite (London, ON: LRCC, 1990) at 2.

⁴³ Emond, *supra* note 14 at 748.

argues that, because of this procedural focus, this model cannot appreciate the many values that may be expressed, such as the commitment to certain environmental ideals, feelings of obligation toward the natural environment and expressions of respect for all living things.⁴⁴

In addition to procedure, the traditional method of dispute resolution is focused on rights and precedents. The typical questions before a judge include: Does one party have a right? Does another party have a duty? These questions generally do not include those of alternatives or the best outcome for all parties. Donald Horowitz pointed out several years ago, that this initial focus on rights merely defers the assessment of any alternatives to a much later stage of the process. He writes that, “for the judge, alternatives may be relevant, but they are relevant primarily to the subsequent issue of what ‘remedies’ are appropriate to redress ‘wrongs’ done to those who possess ‘rights’”.⁴⁵

In many cases it has been argued that it is impossible to assign rights in environmental disputes.⁴⁶ For example, where the pollutant and the impact are distant from one another, the geographical separation is simply too great to be able to assign and enforce a right. If the sulphur emission occurs in Ohio, it is difficult to assign rights that can be enforced to acid rain damaged lakes in Southern Ontario. There are also significant separations in time that make a rights-based approach difficult to defend.

⁴⁴ Emond, *supra* note 35 at 29.

⁴⁵ D. Horowitz. *The Courts and Social Policy* (Washington, DC: The Brookings Institute, 1977) at 34.

⁴⁶ Lazarus, *supra* note 31 at 440.

How are we to assign 'rights' to future generations that can be enforced against actors today?

By moving regulation into the judicial forum, corporate counsel is also able to exploit the law's preference for individual rights (usually of the polluter, but sometimes of those dependent on the accused, such as employees) over community rights which tend to be more diffuse and harder to identify. Again, judicial safeguards relating to the onus and burden of proof, standing, and the recent development of the "due diligence" defence have all helped ensure that polluters received the benefit of the doubt.⁴⁷

A reliance on precedent can also be problematic. Decision-making by adjudication must be based on some rule, standard or principle that is generalizable and can be applied to future cases. Most of the decisions that have been made in environmental disputes cannot be based on any single, generalizable criterion.⁴⁸

One further drawback of using the adversarial process to resolve environmental disputes is that it can often be reactive and passive. In some disputes, courts can only wait until litigants call and government organizations can do only what public law and regulations enable them to do in terms of public hearings. This reactive nature does not lend itself to attempts to resolve disputes at their early stages, nor to the prevention of a

⁴⁷ Emond, *supra* note 14 at 750.

⁴⁸ See for example L. Fuller, "The Forms and Limits of Adjudication," (1978) 92 *Harvard Law Review* 353; M. Bailey [relying up Lon Fuller's work in] "Unpacking the 'Rational Alternative': A Critical Review of Family Mediation Movement Claims," (1989) 8 *Canadian Journal of Family Law* 61; in environmental disputes more specifically see J. Jowell, "The Limits of the Public Hearing as a Tool of Urban Planning," (1969) 21 *Administrative Law Review* 123; and Emond, *supra* note 14 at 809.

further crystallization of the issues and further environmental harm.⁴⁹ Public interest groups attending public hearings tend to now play more of a critical role. They regard their function more as opposing a proponent's plans - exposing weaknesses in its evidence - rather than attempting to facilitate long-term solutions between the parties that need not always fit within permitted classes of legal remedies.

More recently, legislation requiring environmental assessment and remedial legislation has been developed and at least at the outset appeared to offer a process for enabling greater accountability and public participation. In theory, privately initiated audits and risk assessments were designed to rely more on co-operative approaches to identifying and rectifying problems. At first glance, one of the more positive outcomes of this type of preventative legislation was to substantially expand the rights of affected persons. Proponents of new activities are now required not only to assess potential environmental impacts of new undertakings, but also to examine the relative impacts of a broad range of alternative technologies and alternatives to a proposed undertaking. However, this process is not without its problems. Audits have been criticized for lacking the structure and rigour of a formal hearing. Quality assurance, accuracy and thoroughness of the findings may be being compromised in the interest of moving forward with a project as quickly as possible.⁵⁰ In addition, even though regulatory departments, notably the Ontario Ministry of the Environment, have formulated

⁴⁹ See Jowell and Emond, *Ibid.*

⁵⁰ Emond, *supra* note 14 at 757.

guidelines to encourage public involvement in assessment processes, they do not give 'the public' a seat at the table where negotiations over the terms of an order are debated.⁵¹

Another drawback of the adjudicative process is the inability to ascertain social facts, which is defined as the recurrent patterns of behaviour on which policy must be based.⁵² Complex social facts play an integral role in defining the nature of environmental disputes and the possibilities for the resolution of these disputes. Resolving these conflicts over environmental impacts and deciding the appropriate level of environmental quality are not just economic choices. They are policy choices. Ultimately, setting the standards in the first instance is a political decision.

The adversarial forum is not only inappropriate for the ascertainment of social facts; it is also unable to comprehend the technical and scientific information that is very much a part of environmental disputes. Although it appears that some judges in Canada are beginning to receive specialized education in these areas, they by-and-large are trained as generalists and as a result, are not well-suited to processing specialized information, such as the threshold limit of pesticide use that may cause cancer in laboratory animals, or the complexities of habitat destruction that may result from building a dam. Some commentators views the adversarial process as anti-scientific, since it forces simplistic answers when the truth is really a matter of complexity and uncertainty.⁵³ Horowitz concludes that judges lack experience and possibly skill to interpret such information.⁵⁴

⁵¹ Estrin and Swaigen, *supra* note 33 at 220.

⁵² Horowitz, *supra* note 45 at 45.

⁵³ See for example S.L. Smith as quoted in M.I. Jeffrey "Science and the Tribunal"

Furthermore, the burden of proof that is necessary in most environmental cases, based on common law doctrines, is very strict. This level of proof may be difficult to achieve simply because of the fact that the realm of scientific knowledge itself has been unable to establish a direct casual link between the pollution and polluter and between the pollution and the related health and environmental effects.⁵⁵

Finally, within the adversarial process there is an inability to formulate the creative and sometimes complex solutions that may be necessary in environmental disputes. In the Canadian context, Leigh West notes that, "the Canadian judiciary is reluctant to play an active role in evolving the common law to respond to the problems created by environmental degradation."⁵⁶ Common law is focused on economic remedies such as damages, which are inappropriate in environmental disputes because environmental values can rarely be reflected in strictly economic terms.

Common law is also ill equipped to include affected parties that are yet un-born. By-and-large, the courts are designed to be reactive, not proactive. As a society we must

(1988) 15:2 *Alternatives* at 27; and feminist critiques by S. Harding *Whose Science? Whose Knowledge?* (Ithaca, NY: Cornell University Press, 1991); and D. Haraway *Simians, Cyborgs and Women: The Reinvention of Nature* (New York, NY: Routledge, 1991).

⁵⁴ Horowitz, *supra* note 45 at 31.

⁵⁵ It must be noted that the ability of boards and other tribunals to comprehend scientific and social facts may be greater than the courts because they are usually composed of individuals with some specialized background. For example, the Nova Scotia Environmental Protection Act requires that members of the Environmental Control Council be from various representative groups, such as the health profession, legal profession, the engineering profession, industry, municipalities, conservation and ecology groups and the academic community. Emond, *supra* note 14 at 814.

⁵⁶ L. West, "Mediated Settlement of Environmental Disputes: Grassy Narrows and

first decide how to define ourselves in relation to future generations. We must also decide how to value goals of fairness. These have traditionally been viewed as decisions for a democratic process, not for the courts. The failures of regulatory law and common law have been economic, as well as, political and social. Some of the inability to craft appropriate environmental decisions and ensure that they are implemented stems from the fact that participants in an adversarial setting are often constrained by rules and precedents that do not allow them to undertake progressive action. The adversarial forum of decision-making does not foster co-operative relationships between parties who may be required to work together on implementing a decision for many years to come.

This section has pointed out many of the characteristics of the traditional method of dispute resolution, which also serve in many ways to be its main drawbacks. In these adversarial proceedings, parties focus on winning and risk loss of everything if they fail. Even if they 'win', the victory may not solve the core problems, because the legal decisions are made on points of law and not on technical or social criteria. Animosity harboured by the losing side often increases, making the next confrontation with the same parties even more difficult to handle.⁵⁷

The nature of environmental disputes dictates that the adversarial forum will continue to be problematic. These drawbacks have been acknowledged by many judges, lawyers, environmentalists, and policy-makers, yet substantive changes have not occurred

White Dog Revisited" (1987) 18 *Environmental Law* 131 at 139.

⁵⁷ Carpenter and Kennedy, *supra* note 19 at 21.

within the adversarial process to address these issues. Therefore, if the adversarial process is not able to change, it is necessary to approach environmental disputes in a different way. The next section will examine the potential use of mediation as an alternative form of dispute resolution.

Mediation as an Alternative

Drawbacks of the traditional, adjudicative model of decision-making have been realized in many fields including, labour, international, public policy, interpersonal, commercial and family disputes. This recognition spurred the growth of the alternative dispute resolution (ADR) movement in the 1970's. The proponents of ADR hoped that these processes would, "result in resolutions more suited to the parties needs, reduced reliance on laws and lawyers, rebirth of local communities, maintenance of long-term relationships and relief for non-parties affected by conflict."⁵⁸

In recent years, people have advocated the use of ADR processes in environmental disputes. In this context, ADR is sometimes called environmental dispute resolution or EDR. The push for the use of ADR processes in environmental disputes has been accelerated by three factors: the costs of environmental conflicts, the growing dissatisfaction with traditional dispute resolution mechanisms and the success that has materialized from preliminary efforts of using these methods.⁵⁹

⁵⁸ S. Golberg, F. Sander and N. Rogers (eds) *Dispute Resolution: Negotiation, Mediation and Other Processes* (Boston, MA: Little, Brown and Company, 1992) at 6.

⁵⁹ Susskind and Weinstein, *supra* note 15 at 314.

The use of ADR in resolving environmental conflicts has been more extensive in the United States than in Canada. In Canada, ADR processes have mainly been used to resolve native land claims and treaty disputes and in environmental assessment and land use decisions.⁶⁰

The adjudicative processes tend to be more formal, structured, binding and adversarial than all of the “alternative” dispute resolution processes. As Crowfoot and Wondolleck outline, “this difference...is rooted in the structure of the process itself: who is involved, how they are involved, how issues are framed and then acted upon in making and then implementing decisions.”⁶¹

It is critical to distinguish between mediation and other forms of community interaction such as public hearings, citizen advisory committees and other activities that gauge citizen reaction. Public participation programs are fairly standard in the decision-making process, however the participation is advisory. Suggestions from the public need not be accepted. Citizen and interest group participation has distinctly different objectives. It is not a comprehensively participatory process. In mediation, participation is limited to representatives of groups that actively support or oppose a specific course of action. It holds out the promise that if a solution can be found, it will be implemented.⁶²

⁶⁰ R. Ralston Baxter, *Conflict Resolutions and Sustainable Development: An Alternative Dispute Resolution Policy for Ontario* (Toronto, ON: Ontario Round Table on the Environment and Economy, 1992) at 1.

⁶¹ J. E. Crowfoot and J.M. Wondolleck (eds), “Introduction,” *Environmental Disputes: Community Involvement in Conflict Resolution* (Washington, DC: Island Press, 1990) at 8.

⁶² J. McCarthy & A. Shorett, *Negotiation Settlements: A Guide to Environmental*

Again, mediation is a co-operative process through which the parties seek a mutually acceptable solution with the help of a third party, the mediator. The purpose of the mediation is to assist the parties in reaching a solution where the process of negotiation or adjudication will not succeed. A mediator helps to focus the parties and in theory helps to place all parties on a more even playing field, removing the disadvantages of unequal bargaining power that would not exist at strictly public hearing opportunities.

Mediation involves more active involvement of the third party neutral in the resolution process. A widely accepted description of mediation has been developed by Gerald W. Cormick:

in mediation, disputing parties voluntarily choose to jointly explore the issues in order to arrive at a mutually acceptable settlement of their dispute. The parties are assisted in their efforts by a neutral third party with no power to impose a settlement.⁶³

Thus, the mediator in environmental disputes assists in framing the issues so that productive discussion can be encouraged.

There are several advantages that may be realized in using mediation in environmental disputes. First, there is the possibility of maintaining the focus of the negotiations on the issues as opposed to the procedures. Such a focus allows the parties to identify and attempt to satisfy the interests of all those involved.⁶⁴ Second, there is flexibility in the process that may allow for an appreciation of the contextual realities of

Mediation (New York, NY: American Arbitration Association, 1984) at 4.

⁶³ G. Cormick quoted in D. Shafoe (ed.) *Responding to Changing Times: Environmental Mediation in Canada* (Waterloo, ON: The Network, 1993) at 3.

⁶⁴ *Ibid.*, at 131.

each dispute. In this way, the mediator and the parties can adopt or alter procedures and methods in order to meet the specific needs of the situation.

Mediation and Issues of Social Justice

There is some doubt however, as to how far alternative dispute resolution mechanisms can go in resolving conflicts involving issues of fundamental values and morality. Some critics have argued that ADR actually hurts those who are less powerful in our society- like women⁶⁵ or racial and ethnic minorities⁶⁶ - by leaving them unprotected by formal procedures and rules in situations where informality permits the expression of power and domination that is unmediated by a formal system of justice. In other critiques, proceduralists have argued that various forms of ADR compromise our legal system by privatizing law-making, shifting judicial roles, compromising important legal and political rights and principles, and failing to grant parties the benefits of hundreds of years of procedural protections afforded by our civil and criminal justice rules.⁶⁷

⁶⁵ See for example T. Grillo, "The Mediation Alternative: Process Dangers for Women", (1991) 100 *Yale Law Journal* 1545.

⁶⁶ See for example R. Delgado, C. Dunn, P. Brown, H. Lee and D. Hubbert, "Fairness and Formality: Minimizing the Risk of Prejudice in ADR", (1985) *Wisconsin Law Review* 1359. E.K. Yamamoto, "Where have all the critics gone?" (1996) 36 *Santa Clara Law Review* 1055.

⁶⁷ See for example O. Fiss, "Against Settlement", (1984) 93 *Yale Law Journal* 1073; J. Resnik, "Adjudicatory Procedure in Decline", 53 (1986) *University of Chicago Law Review* (1986) 494.

Critiques of mediation in general and environmental mediation specifically will be elaborated in Chapter Three. For the purposes of this section, this begins to raise many issues for social movements attempting to use ADR as a way to bring about substantial political and legal changes. I argue that what is needed is a new model of mediation that will redirect the way legal decisions are made towards more practical/workable solutions to real environmental problems. I propose that this model must be based on principles that emphasize interdependence, connectedness, respect, obligation and co-operative approaches to dispute resolution. It is no small ambition, however by integrating a concern for rights with a concern for needs and interrelationships, mediation can provide new more effective ways of dealing with environmental disputes, specifically in its application to some of the concerns raised by the environmental justice movement in the siting of waste facilities to be discussed in the final chapter.

Environmental Justice Issues

The current 'environmental justice' or 'environmental equity' movement is a combined effort of grassroots activists, academics, lawyers and bureaucrats, government agencies and concerned citizens to address allegations of 'environmental racism' and other environmental issues relating to communities of colour and poor communities.⁶⁸

⁶⁸ See C. Lee, "Toxic Waste and Race in the United States" in B. Bryant and P. Mohai (eds.) *Race and the Incidence of Environmental Hazards: A Time for Discourse* (Boulder, CO: Westview Press, 1992) 12. (Describing the role of activists, academics, government agencies and other in shaping the current movement) [Hereinafter *Race and Incidence*].

While the civil rights movement has historically focused on obtaining economic and political rights for people of colour, the environmental movement has traditionally focused on preserving and conserving our natural habitat as well as halting the proliferation of toxins and other pollutants into the environment. The convergence of the two movements has not occurred without considerable tension and disagreement over the primary issues to be included as concerns in seeking environmental justice.

Throughout the literature on environmental justice, there is the claim that “low-income and minority communities continue to bear greater health and environmental burdens while the more affluent and whites receive the bulk of benefits.”⁶⁹ In support of this claim, members of the environmental justice movement point to a wide range of scientific research. In a review of sixteen previous studies, Paul Mohai and Bunyan Bryant note that the findings “indicate clear and unequivocal class and racial biases in the distribution of environmental hazards.”⁷⁰ Of these studies, the one most frequently mentioned by environmental justice activists is a 1987 report commissioned by the United Church of Christ entitled *Toxic Wastes and Race*. This was the first national study to analyze the demographic composition of communities surrounding toxic waste sites.

⁶⁹ R. D. Bullard, “Overcoming Racism in Environmental Decision-Making,” (May 1994) *Environment* at ii.

⁷⁰ The sixteen studies cover a period from 1971 to 1992. P. Mohai and B. Bryant, “Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards,” *University of Colorado Law Review* 63 (1992) 921 at 927.

The report found that race was consistently a more prominent factor in the location of commercial hazardous waste facilities than any other factor examined.⁷¹

Although environmental laws promise uniform protection from known environmental hazards, as we have seen above this is not always a guarantee. Environmental justice advocates believe that governmental intervention aggravates the distribution of environmental hazards. Because of the procedural emphasis in many laws, waste facility siting decisions are often political decisions, which leave historically excluded people out of the decision-making processes. Luke Cole has argued that in the end, it is those with political clout who win in the administrative process or siting decision.⁷²

I suggest in this thesis that environmental rights advocates should look to the proposed transformative model of mediation in order to better pursue environmental justice. Given the limitations of a right-based approach as outlined above, an alternative approach involving environmental mediation is potentially better suited to address issues of environmental injustice. Currently, public participation models are not designed to include discussions on which alternatives are “better”. They simply request that the community comment on a remedy that has already been chosen.

⁷¹ As summarized in S. Sandweiss, “Social Construction of Environmental Justice”, in D. E. Camacho (ed.) *Environmental Injustices, Political Struggles: Race, Class and the Environment* (Durham, North Carolina: Duke University Press, 1998) 31 at 35 [Hereinafter *Environmental Injustices*].

⁷² L. Cole, “Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law,” (1992) 19 *Ecology Law Quarterly* 619 at 643; R. Bullard, “Environmental Blackmail in Minority” in *Race & Incidence*, *supra* note 68 at 82.

To remedy this situation, the environmental justice movement has mainly demanded respect for the environmental rights of human communities that fall into two categories: (a) the right to participate in the regulatory process and (b) the right to live free from pollution. This demand for both procedural and substantive rights was formally codified in the seventeen “Principles of Environmental Justice” adopted in Washington, DC, at the First National People of Colour Environmental Leadership Summit in 1991.⁷³ For example, principle seven “demands the right to participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement, and evaluation,” while principle four asserts a “fundamental right to clean air, land, water and food.”⁷⁴

Within the environmental justice movement, however, differences of opinion exist concerning the relative emphasis that should be placed on strategies for achieving these rights. Some advocate a legislative and administrative approach, arguing that solutions must come from a federal level.⁷⁵ Others insist that the primary focus should be at the grassroots level, with community empowerment as the key to remedying environmental injustice.⁷⁶ Still others set their sights on structural transformation of the “capitalist

⁷³ The “Principles of Environmental Justice” as printed in R. Hofrichter (ed.) *Toxic Struggles: The Theory and Practice of Environmental Justice* (Philadelphia, PA: New Society Publishers, 1993) 237-239 [*Hereinafter Toxic Struggles*].

⁷⁴ *Ibid.*

⁷⁵ See D. Ferris, “A Broad Environmental Justice Agenda: Mandating Change Begins at the Federal Level,” (1995) 5:1 *Maryland Journal of Contemporary Legal* 115; or G. Torres, “Changing the Way Government Views Environmental Justice,” (1994) 9 *St. John's Journal of Legal Commentary* 543.

⁷⁶ See R.D. Bullard (ed.), *Confronting Environmental Racism: Voices from the*

system”, envisioning economic democracy as the only possibility for eliminating both the procedural and substantive violations of the rights of all citizens to a healthy environment.⁷⁷ This thesis proposes an additional strategy. An alternative dispute resolution model of mediation that has the potential of addressing some of the movement’s primary concerns; such as more inclusive and meaningful participation; empowerment; respect; and greater justice for both human and non-human communities generally excluded from the decision-making process.

The environmental justice movement has traditionally built on the US civil rights movement of the 1960's. This frame, which emphasized such values as individual rights, equal opportunities, social justice, full citizenship and self-determination, legitimized the struggles of other disenfranchised groups. By framing the problem of disproportionate exposure as a violation of civil rights, the environmental justice movement was able to integrate environmental concerns.⁷⁸ However, mobilizing activists and achieving agenda status is one thing: winning substantive policy change is another. Although there is general consensus regarding the definition of the problem, there remains considerable disagreement over the causes of disproportionate exposure to environmental hazards, the extent of health risks associated with such exposure and the appropriate remedies for this problem.

Grassroots (Boston: South End Press, 1993).

⁷⁷ See J. O'Connor, “The Promise of Environmental Democracy” in *Toxic Struggles*, *supra* note 73, 47-57.

⁷⁸ R. D. Bullard, *Dumping in Dixie: Race, Class and Environmental Quality*, (2nd ed) (Boulder, Colorado: Westview Press, 1994) 29 at 29 [Hereinafter *Dumping in Dixie*].

Since 1992, a number of bills have been introduced in the US Congress intended to address environmental justice and equity concerns. To date, none of the proposed legislation has been enacted. The solutions incorporated into the environmental justice movement demand both procedural rights (i.e. access to information, fair hearings, meaningful participation in the decision-making process) and substantive ones (i.e. reduction of toxic threats to all communities, increased employment opportunities, better housing, improved health care). To date, the remedies offered do not appear to offer much in the way of change in environmental policies. Despite a greater US and Canadian commitment, on the part of federal, state and provincial governments, to giving people access to the decision-making process about what happens in their communities and neighbourhoods, the performance has demonstrated otherwise.

When elected officials fail to support a movement's agenda, some organizations turn to the courts to redress their grievances. Groups struggling for recognition of their full rights as citizens have been able to draw on constitutional doctrines. In the past five years in the United States, the legal community has displayed considerable interest in the issue of environmental justice: filing lawsuits, offering law school courses, establishing environmental justice legal clinics and publishing dozens of law review articles.⁷⁹ Yet as outlined above there is a danger in using this type of action to the extent that legal strategies shift struggles out of the control of local activists and into the hands of lawyers. As a result, laws and litigation are seen as the only solution to the problem of

⁷⁹Sandweiss in *Environmental Injustices*, *supra* note 71 at 50.

environmental injustices, as opposed to the possibility of community empowerment. Instead of being viewed as a means of achieving transformative change “environmental justice” becomes just another issue for the courts.

This suggests that traditional dispute mechanisms employ a different frame than the one advocated and adopted by many grassroots activists. Court-based strategies for remedying environmental inequities require talking about the problem in complex legal terms and regulatory and administrative hearings require talking about the problem in technical, scientific, bureaucratic language. Neither of which arguably mobilized the environmental justice movement in the first place.⁸⁰

Incorporating social justice and equity issues into the environmental framework will undoubtedly involve challenging implications for environmental law and policy. The remainder of the thesis will explore some of those implications, and specifically, what the quest for ‘justice’ in environmental mediation will mean for the proposed model.

The next chapter will outline the theoretical approach behind a proposed model of mediation that attempts to bridge the gap between a more formal justice approach to environmental disputes and a more transformative process that appeals to the important substantive issues raised in environmental conflicts. The proposed theory for practice will draw from scholarship in the area of transformative mediation and feminist ethics. It

⁸⁰ While there is a role for both scientific analysis and legal tactics in the quest for environmental justice, political pressure is likely to subside if the movement engages in a debate that takes place within a scientific or legal frame, as opposed to a political one.

will be argued that a model of mediation informed with a feminist “ethic of care” would foster more equitable and democratic resolutions to environmental conflicts.

The following chapter discusses these transformative ideals and goals within the context of a mediation model informed by an ethic of care. The chapter will isolate the transformative components from mediation that coincide best with the theory first articulated by Carol Gilligan⁸¹ and subsequently elaborated and developed by herself, as well as many other scholars concerned with feminist ethics. In order to conceive of a framework that has practical application for environmental mediation and justice, I propose an approach that summarizes these components and then use them to analyze and develop a process for the siting of waste facilities in Canada in the final chapter.

⁸¹ Carol Gilligan has developed this theory over a number of years and as attempted to address many of the initial criticisms. See for example her more recent work with W.J. Taylor and A. Sullivan in *Between Voice and Silence: Women and Girls, Race and Relationships* (Cambridge, MA: Harvard University Press, 1995).

CHAPTER II: MEDIATION AND A THEORETICAL ANALYSIS OF THE FEMINIST ETHIC OF CARE

Environmental disputes are likely to involve fundamental conflicts that challenge us to define our relationships with both human and non-human communities. Even now, we see societies struggling with basic disagreements over the allocation of resources and their management. How should disputes between contesting groups and interests be resolved? More recently, the range of concerns have broadened considerably to include such environmental justice issues as quality of life, health and safety and moral and ethical questions. As a result, there is a growing interest in Canada in alternative forms of dispute settlement. One particular approach, environmental mediation, has gained considerable profile in the United States.

Despite the considerable coverage that mediation has received during the last two decades, there is no agreement as to what constitutes the theory and practice of mediation. I contend that the dominant modes of legal decision-making embrace a focus on rights. A focus that gives little direct attention to the possibility of other considerations involving care and responsibility for others. The following chapter presents a theoretical overview

of the ethic of care. My purpose is to consider how the ethic of care could potentially alter the contours of mediation's responsibilities to broader issues involving environmental justice. Carol Gilligan, and her theoretical development of the ethic of care and justice, has had a noteworthy effect on legal theory. Feminist legal theory in particular has sparked and continued to express the dissatisfaction with traditional approaches to law. Whether or not one believes that caring, empathy, compassion and emotional understanding have some link to femaleness (feminists themselves are still divided on this question), it is indisputable that an interest in feminism has helped to sustain attention to these issues as part of the conception of what it is to lead a "moral" life. Gilligan's challenge to her colleague Lawrence Kohlberg's orthodoxy in excluding female subjects from his child development research findings and conclusions, serves as a valuable reminder that the appeal to principle typically associated with law ought not to exclude care and concern for particular others.

Gilligan's concepts, ideas and subsequent influence suggest a new way of understanding and interpreting the development of environmental mediation and open new areas for creative dispute resolution processes. I argue that Gilligan's approach opposes some of the central assumptions of the dominant practice of mediation: positional-based argumentation; economic efficiency; and the strict maintenance of mediator neutrality/impartiality. The ethic of care challenges these assumptions, which are strongly linked to the beliefs of many practitioners and theorists of mediation, and thus provides a starting point to critically evaluate environmental mediation as it is

currently practiced. I contend that a focus on the central characteristics of an ethic of care could facilitate efforts of participants to consider the perspectives of both care and justice in working out the principles that will eventually underlie and govern their final agreements. To develop this argument, I first discuss conflict resolution and mediation in general. I then follow with a review of Carol Gilligan's basic tenets of her theory. Next, I discuss the process of environmental mediation and argue that a theory of mediation influenced by an ethic of care serves as a better model for improving democratic resolutions in disputes where environmental justice issues are concerned. I contend that mediators sensitive to both the language of rights and care can enhance their likelihood of assisting participants in crafting resolutions that are morally satisfying to the parties involved. A focus on needs and interests, in addition to rights, can facilitate efforts of participants to consider the perspectives of both care and justice in working out the principles that will govern their agreement.

My approach differs from approaches frequently taken to the care/justice debate. The relationship between the ethic of care and the ethic of justice depends on the characterization of the two perspectives. Some versions of the ethic of care are more compatible with the ethic of justice than others. In this chapter, I focus on the features of the two ethics which are typically emphasized and which serve to define the ethics in opposition to one another. Although I contend that the ethic of justice and the ethic of care are in many ways compatible, I challenge the attempt to assimilate the ethic of care into the ethic of justice. Doing so, I argue, does not provide the ethic of care with equal

status to the ethic of justice. Instead, it serves to maintain the traditional hierarchy in which that which is coded as masculine is regarded as more important than that which is coded as feminine. Even though the ethic of justice's emphasis on general principles does not preclude attention to context, it creates the impression that general principles are both distinct from and more important than contextual details. Likewise, while the ethic of justice's individualism does not literally imply that social connections are unimportant, it does serve to reinforce the implication.⁸²

Before presenting a model of mediation informed by an ethic of care, I provide an examination of some of the theoretical debates within mediation today. This provides a framework from which to evaluate the possibility of an ethic of care providing greater communication and public participation strategies within a transformative model of mediation.

Conflict Resolution, Mediation and Transformation

Developing and promoting a practical model of mediation has become an important preoccupation in mediation literature.⁸³ Consensus on the underlying ethical principles, however, has been elusive and various frameworks have been suggested. Even assuming agreement on the principles and decision-making strategies that should

⁸² C. Calhoun, "Justice, Care, Gender Bias", (1988) 85 *Journal of Philosophy* 451 at 452.

⁸³ See for example introductory comments in Bush and Folger. *The Promise of Mediation*, *supra* note 3.

inform mediation, their integration into practice poses significant challenges. As mediators clarify their responsibilities to the law and to the parties, they must also develop the capacities necessary to make difficult moral judgments involving the broader public interest.

Several authors review conflict resolution literature and practice in order to assess theoretical development and claims to transformative mediation.⁸⁴ Perspectives differ in precisely what constitutes transformative mediation, however all stress to some degree, that mediation can transform individuals, relationships and institutions in a given society. Thus, transformative mediation can permit individuals and groups to define their problems and goals in their own terms, taking into account the full context of their lives. It allows the parties to enforce self-determination and gain more self-reliance. It also purports to give parties a non-coercive chance to “humanize themselves to one another” and express, despite their differences, a mutual acknowledgement and concern for each other as integral human beings.⁸⁵ A debate arises from these articles regarding the

⁸⁴ S. Cobb, “A Narrative Perspective on Mediation,” in *New Directions supra* note 8, 48; R. J. Fisher, “General Principles for Resolving Intergroup Conflict”, (1994) 50:1 *Journal of Social Issues* 47.; J.P. Folger, “Epilogue: Toward Furthering Dialogue Between Researchers and Practitioners,” in *New Directions, supra* note 8, 209.; C. Harrington and S. Engle Merry, “Ideological Production: The Making of Community Mediation,” (1988) 22:4 *Law and Society Review* 709.; C. Menkel-Meadow, “The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices,” (1995) 11:2 *Negotiation Journal* 217.; C. Moore, “Mediator Communication and Influence in Conflict Management Interventions”, in *New Directions, supra* note 8, 209.; J. Rifkin, “The Practitioners Dilemma, in *New Directions, supra* note 8, 204.; and J.A. Wall Jr. and A. Lynn, “Mediation: A Current Review,” (1993) 37:1 *Journal of Conflict Resolution* 160.

⁸⁵ Bush and Folger, *supra* note 3 at 20.

validity of transformation claims in mediation. Although transformative aspirations remain controversial and contested, tensions emerge between the perspectives held by mediators and researchers and the directions these perspectives lead us in resolving conflict.

There are differing opinions as to how to characterize mediation. Nonetheless, the following brief definition offers commonly accepted views of the term mediation:

It can be defined as the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate dispute issues in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs.⁸⁶

A general account of mediation theory suggests that there are two concurrent ideologies that seek to change both our perspective of and approach to conflict. Where one ideology seeks to transform an individual's approach to and thinking of conflict, the other ideology seeks to change the structural arrangement which shapes these individuals' perceptions, thoughts and actions. Thus, on a micro-level there exists an ideology focusing on individuals' perspectives, beliefs, values and behaviours, while at the same time there is a macro-level ideology focusing on a range of relationships structures, among which there exist social, psychological and political factors. It appears that individual ideology emphasizes personal transformation in mediation, whereby social ideology emphasizes overall structural transformation in conflict resolution processes.

⁸⁶ J. Folberg and A. Taylor. *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco, CA: Jossey-Bass Publishers, 1984) at 7.

Carrie Menkel-Meadow has considered the important question of: What transformative potential does mediation have to change people, situations and political and social structures?⁸⁷ The significance of this question is useful particularly when considering the transformative goals that mediation often implies. Menkel-Meadow suggests that there is “an ongoing tension between a conceptualization of mediation as therapeutic, helping, or communication work with individual contrasted to a more structural or political analysis of root causes of social problems, conflicts and collective action.”⁸⁸ Along these lines, transformation takes on several meanings. Menkel-Meadow has reviewed three books that critique the promise of transformation as told by practitioners working in various fields and at different levels. Her analysis deals with a mediator’s agency to affect either personal or social change among clients. In all of these approaches, attempts to transform stay within the prevailing systems and structures. Thus, the emphasis is on change from within. Whether change is seen as a reform or improvement, the mediator must divide their focus among, personal, local and social levels. In an analysis of the above mentioned literature and guided by the transformative potential, in general, mediation purports to embrace, I will outline the four most commonly reviewed approaches to mediation: the management; social justice; individual agency; and communication perspectives.

⁸⁷ Menkel-Meadow, *supra* note 84 at 217.

⁸⁸ *Ibid.*, at 218.

i) Management Approach

The management perspective stresses efficiency and cost savings in the delivery of conflict resolution services.⁸⁹ Conflict management attempts to sort problems into appropriate avenues of solutions, thus its attraction is towards conflict settlement and satisfied customers.⁹⁰ Mediation along with arbitration and negotiation are forms available to resolve conflict, but they are also seen as alternatives to litigation within the state's already established legal system.⁹¹ Bush and Folger call these changes the 'satisfaction story' to illustrate that changes are made to satisfy participants but not to change the overall setting in which disputes take place and are resolved.⁹² Bush and Folger argue that this approach best describes the current theory and practice of mediation. Thus, the approach only talks to what happens in a specific, isolated mediation case and pays almost no attention to the sociocultural context at large.

Although the focus of change is towards greater informalism, change itself becomes infused in the bureaucratic and organizational network. Mediation becomes a process of facilitated and assisted negotiation which guides parties towards settlement in the form of reconciliation and restitution. In this scenario, the negotiation model is shaped around problem-solving predetermined goals. The mediator guides parties

⁸⁹ See for example E.F. Dukes, "Public Conflict Resolution: A Transformative Approach," (1993) 9:1 *Negotiation Journal* 45 at 47; Harrington and Merry, *supra* note 84.; Rifkin, in *New Directions*, *supra* note 84.

⁹⁰ See for example Harrington and Merry, *Ibid.*; Menkel-Meadow, *supra* note 84.

⁹¹ See Harrington and Merry, *Ibid.*; and J. Rifkin, "Mediation From A Feminist Perspective: Promise and Problems," 2 (1984) *Law and Inequality* 21.

⁹² Bush and Folger, *supra* note 3.

towards a focus on shared interests and a sense of fairness as opposed to concentrating on individual legal rights and moral positions.

Despite the focus towards greater empathy between parties, the overall direction of transformation is in the improvement and efficiency of service. Thus, the outcome or final product of a mediation determines its success, where the criteria consists mainly of party satisfaction.⁹³ A management approach to conflict privileges the settlement of conflict over that of process⁹⁴. Bush and Folger illustrate the benefits of a management approach to environmental and public policy mediation which “have produced creative and highly praised resolutions, while avoiding the years of delay and enormous expense that court action would have entailed.”⁹⁵

This approach does nothing to influence personal, moral, political and interpersonal development. Nor does it seek to change the social political dynamics affecting the participants. Mediation practices are governed by the instrumental rationality of a system which is maintained by virtue of its ability to produce settlement contracts.

⁹³ Bush and Folger, *Ibid.*; Harrington and Merry, *supra* note 84; Wall and Lynn, *supra* note 84.

⁹⁴ Menkel-Meadow, *supra* note 84.

⁹⁵ Bush and Folger, *supra* note 3 at 17.

ii) Social Justice Approach

This approach presents mediation as a process that seeks social harmony within a community by focusing on political development and social cohesiveness.⁹⁶ Thus, the process takes on an agenda to develop people's emotional, intellectual, social and political bonds. While such an agenda entails a combination of individual and social empowerment, Laura Nader suggests that the overall goal is social harmony.⁹⁷ This perspective has a clearly defined sense of community and justice based on mutual agreement and consent.⁹⁸ Parties hold democratic values of participation and self-government which give them a sense of their own authority and agency.⁹⁹ This approach presents mediation as a way to ease the organization of individuals around common interests and thus encourage the creation of stronger ties and structures in the community. Matched with an understanding of consensual justice, that of an individual's agency and involvement in a process - free from coercion and external authority¹⁰⁰ - parties are given the authority and responsibility to work through their conflict. Parties active in their own conflict resolution become empowered by combining understandings of agency and justice. Therefore, these parties grasp the concept that their agency is driven by sharing,

⁹⁶ Harrington and Merry, *supra* note 84; Menkel-Meadow, *Ibid.*; L. Nader, "Harmony Models and the Construction of Law," in K. Avruch, P.W. Black and J.A. Scimecca (eds.) *Conflict Resolution: Cross-Cultural Perspectives* (Westport, CO: Greenwood Press, 1991) 41.

⁹⁷ Nader, *Ibid.*

⁹⁸ Harrington and Merry, *supra* note 84 at 715.

⁹⁹ Menkel-Meadow, *supra* note 84 at 223, 229.

¹⁰⁰ Harrington and Merry, *supra* note 84 at 718.

responsibility and moral consideration towards other people. Within this perspective, conflict resolution aims to reconcile disputants and restore social harmony. Bush and Folger suggest that the social justice approach is akin to their account of the transformative model of mediation.¹⁰¹ Thus, conflicts create opportunities for participants to redirect their efforts towards changing the direction of political and social events.

However, tensions may arise between community cohesiveness and individual self-interest. While mediation provides an opportunity for parties to decide their own terms and conditions - exclusive of a central authority imposing a decision - their agreement is framed by an expectation of communal harmony. As Nader suggests, while harmony models differ in time, region and cultural setting, the focus is on creating and enforcing social cohesion rather than allowing discussions of difference within the community.¹⁰² This can result in the stifling of important differences such as, race, cultural background or economic class within the community, for the sake of a “greater good” that may not be in the best interests of everyone.

¹⁰¹ Bush and Folger, *supra* note 3.

¹⁰² Nader, *supra* note 96.

iii) Individual Agency Approach

This approach focuses on individual agency as it highlights the notions that personal growth and development assist people to work through their conflicts.¹⁰³ Bush and Folger suggest that the focus of transforming the character of dispute resolution and conflict that falls within this approach is on viewing disputes not as problems but “as opportunities for moral growth and transformation.”¹⁰⁴ Decision-making centres around each parties’ authority, maturity and responsibility to reach an agreement.¹⁰⁵ Success is built around enhancement of interpersonal skills and the fulfillment of human needs. The rationale behind individual agency is that as people become more able to decide for themselves, they become more apt to govern and lead their lives, thus improving the general quality of their personal lives as well as their civic lives.¹⁰⁶

Despite an open process which encourages freedom in exploring issues and options, individual agency is confined by a specific design and technique which reinforces both the individuation of conflict and its resolution. Transformation in this perspective is kept within the sphere of specific cases where agency is directed at personal change and growth, rather than encouraging one’s agency to affect societal relationships and causes.

¹⁰³ Harrington and Merry, *supra* note 84 at 715.

¹⁰⁴ Bush and Folger, *supra* note 3 at 82.

¹⁰⁵ Harrington and Merry, *supra* note 84 at 715; Menkel-Meadow, *supra* note 84 at 225-227; and Wall & Lynn, *supra* note 84 at 171-175.

¹⁰⁶ Harrington and Merry, *supra* note 84.

iv) Communication Approach

This recent perspective in mediation research seeks to analyze the narratives amongst all participants. In particular, its focus is on the directives mediators give to their process design.¹⁰⁷ This is not a methodological approach per se; however, it suggests that attention to the substantive content of the discussion (narrative or story-telling) links mediation to a larger context beyond the parties' conflict. That the methods in which people communicate to each other - through words and their descriptions - illustrates a personalized view of their conflict as well as a larger context beyond the negotiation table. The premise of this approach is to identify and link these individual circumstances and relationships to similar socio-political structures in order for the possibility of change to occur. Of concern is the linkage between a mediation process and a conflict's context.

Communication analysis suggests that "the context is key to understanding the nature of effective mediation".¹⁰⁸ The linkage occurs at three junctures: definition of the context of the conflict and parties' relationships within the greater context; understanding of its implications; and adjustment of mediation procedures to accommodate the contextual concerns. Communication theorists place the mediation process at the centre of their examination. Analysis is directed at mediators' use of skill and technique in how they arrange speaking order, set time limits and schedule frequency of meetings.¹⁰⁹

¹⁰⁷ See for example Cobb in *New Directions*, *supra* note 84; Menkel-Meadow; and Wall & Lynn, *supra* note 84.

¹⁰⁸ See Folger in *New Directions*, *supra* note 8.

¹⁰⁹ *Ibid.*

Christopher Moore illustrates this approach by suggesting that mediators can be effective when they are “able to analyze and assess critical situations and design effective interventions to counteract the causes of conflict.”¹¹⁰ Discourse during the resolution process is the focus of attention. A mediator’s verbal directives affect how parties relate to each other and how they conceive events and arguments.¹¹¹ As well, the parties’ communication skills also reflect the construction of the agreement. Cobb notes that more coherent stories dominate the content of agreements which marginalizes less coherent stories. Less coherent stories tend to lose legitimacy, therefore these stories do not provide a basis from which agreement is formed.¹¹² The implication is that the mediator’s skill and ability in reframing stories directly relates to the substantive content of the agreement. If a mediator chooses not to assist in bringing coherence, the effect of changing dynamics is lost.

Each of these approaches is different in the way it positions mediation to resolve disputes and to assist people in working through conflicts. These approaches also place differently the responsibility for transformation either within individual or in socio-political contexts. That which is explicit in this responsibility is an awareness of the dynamics of social and political relationships that frame conflicts. Mediators play a powerful role in directing parties towards closure of a dispute. Their understanding of

¹¹⁰ C. Moore, “How Mediation Works”, *The Mediation Process: Practical Strategies for Resolving Conflict* (San Francisco, CA: Jossey-Bass, 1986) 13 at 26.

¹¹¹ See Cobb, *supra* note 84; and Moore, *Ibid.*

¹¹² Cobb, *Ibid.*, at 48.

bias within their process design, their awareness of the general context of the dispute; and their insight regarding the relationships of the disputants outside the conflict all factor into their perception of the resolution.

Each of these approaches also implies a different tangent of change. In redirecting the prevailing dispute resolution process towards a perspective that combines an environmental justice sensitive awareness with a model of mediation informed by and ethic of care, I will argue that transformative goals can be met by adopting a perspective that incorporates the goals of both a communication and social justice approach.

For the purposes of this thesis, a transformative perspective views environmental disputes as not only policy stalemates but as indicators of the non-cohesion and fragmentation of communities. Thus, the role of a mediator is not only important in assisting to move beyond these stalemates, but also in creating opportunities to provide a means for strengthening community, enhancing public debate and building a responsive and effective (or at least improved) system of governing.

This transformative approach draws from the communicative approach by recognizing the need for and potential of improved public dialogue. A communication perspective suggests that mediation is an interactive process where mediators and disputants have a joint influence on each other through an active exchange of dialogue.

In brief, this transformative approach is consistent with the main tenets of an ethic of care in that the settlement of disputes is merely one of a range of important goals of environmental mediation, including such intangible benefits to disputants and

communities as enhanced environmental awareness, strengthened citizenship, and improved relationships. A transformative practice of environmental mediation seeks not only to help parties find common ground, but to create a higher ground for engagement in environmental conflict - a ground where qualities such as fairness, openness and responsibility for public good are both discussed and rewarded. These types of goals align more with the social justice perspective. While I draw on the communication approach to inform my understanding of the practice of mediation, the social justice approach also assists in developing a transformative perspective which challenges the dominant management practice in current environmental mediation processes.

The following section discusses these transformative ideals within the context of a mediation model informed by an ethic of care. I argue that the ethic of care and justice are useful perspectives for mediation theory and practice. The ethic of care's reliance on context, particularism, relationships and connectedness appears to reflect many of the same characteristics associated with a model of transformative dispute resolution as suggested above. In what follows, I will begin to assess the implications and challenges the ethic of care perspective brings to mediation in general and environmental mediation more specifically.

An Ethic of Care / Justice - The Two Perspectives

Whether we employ the perspective of an ethic of justice or ethic of care will affect how we interpret the various issues involved and what we recommend as institutional policies or individual actions in mediation. The recent and ongoing care/justice debate has focused on questions about the relationship between predominant approaches to ethics, labeled the ethic of justice, and the more newly articulated ethic of care.¹¹³

The two ethics are generally distinguished in three ways: (1) the ethic of justice takes an abstract approach, while the ethic of care takes a contextual approach; (2) the ethic of justice begins with an assumption of human separateness, while the ethic of care begins with an assumption of human connectedness; and (3) the ethic of justice has some form of equality as a priority, while the ethic of care has the maintenance of relationships as a priority.¹¹⁴

¹¹³ Because of the dominant, liberal paradigm premised on a society of composed of autonomous individuals who interact with others by choice out of self-interest, we have traditionally looked for resolutions to our problems in an ethic of justice and rights. In this analysis, rights are understood as barriers to interference by others. In recent years, a considerable body of literature has developed around the search for an approach to "justice". Perhaps beginning with John Rawl's *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) many theories have emerged to contest the grounds on which the justice of both institutional mechanisms and the distribution of goods in society are measured. These theories range from Rawl's liberalism to the communicative ethics of Jurgen Habermas [J. Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, Vol I, trans T. McCarthy (Boston, MA: Beacon Press, 1984) to Michael's Walzer's communitarianism approach. M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York, NY: Basic Books, 1983).]

¹¹⁴ A number of widely know essays that debate the issues are in Larrabee and Meyers general discussion of these differences. The standard differences are normally

The first distinction between the two perspectives is their relative abstractness or concreteness. The primary focus of an ethic of justice is a set of abstract principles. In order to act justly in a particular situation we must abstract from the particular features of that situation to see how it comes under a general rule. As Seyla Benhabib writes, this requires taking the "standpoint of the generalized other," in which we "abstract from the individuality and concrete identity of the other."¹¹⁵ In contrast, the ethic of care has as its primary focus the unique and particular features of a situation. In Benhabib's language, we take the "standpoint of the concrete other"; "we view every individual as an individual with a concrete history, identity, and affective emotional constitution."¹¹⁶

The difference between these approaches was seen in Carol Gilligan's documentation of the responses to a hypothetical problem known as the Heinz dilemma. It was found that those who approached this dilemma from the justice perspective reached

illustrated by referring to the Heinz dilemma first elaborated by Lawrence Kohlberg in his studies on moral development. see M.J. Larrabee (ed.) *An Ethic of Care: Feminist and Interdisciplinary Perspectives* (New York, NY: Routledge, 1993) and D. Meyers. *Self Society and Personal Choice* (New York, NY: Columbia University Press, 1989) Section 1 and 2, For example John Broughton defends Kohlberg against advocates of the ethic of care in writing that justice is "intended as the abstract form that caring takes when respect is maintained and responsibility assumed for people whom one does not know". In M. J. Larrabee, *supra* at 112-142. Also in Larrabee is a reprint of Carol Gilligan's Special Issues of Signs Reply from *Signs* (1986) 11: 324-333 (at 207-214) Rosemarie Tong makes the same point in terms of the abstract/concrete distinction between the two ethics. R. Tong. *Feminine and Feminist Ethics*. (Belmont, CA: Wadsworth Publishing Company, 1993) 126.

¹¹⁵ S. Benhabib, "The Generalized and the Concrete Other," in E.F. Kittay and D.T. Meyers (eds.) *Women and Moral Theory* (Totowa, NJ: Rowan and Littlefield, 1987) 154 at 163.

¹¹⁶ *Ibid.*

different conclusions about whether Heinz was justified in “stealing” a drug for his dying wife or not. Those who approached the dilemma using an ethic of care were generally more frustrated by its lack of detail. They were resistant to closing off all options for getting the drug short of stealing it. Surely, they insisted, Heinz could reason with the druggist about the situation. Or he could have found a way to borrow the money from friends or family.¹¹⁷ Those approaching the dilemma from the care perspective were also more worried about Heinz being imprisoned for stealing the drug, thereby abandoning his wife when she needed him most. From an ethic of justice, such questions would reveal an inability to identify the real moral issue, but from a care perspective such questions are essential to understanding the situation and thus resolving it.

Allied to this abstract/concrete distinction is a distinction between reason and emotion. From the justice perspective, feelings are seen as threatening the universality demanded by moral judgment, and thus we should seek to abstract from our particular feelings and focus on universal principles. Thus, at its extreme, in Kant’s ethics, an action motivated by feelings, has over time become associated with having less moral worth than an action motivated by principle.¹¹⁸

The second standard distinction between the ethic of justice and ethic of care is based on their different conceptions of the self. The ethic of justice begins with an

¹¹⁷ Gilligan, IDV, *supra* note 11 at 28.

¹¹⁸ From the justice perspective, feelings are seen as threatening the universality demanded of moral judgment, and thus we should seek to abstract from our particular feelings and focus on universal principles to be properly moral. See E. Barcalow. *Moral Philosophy: Theories & Issues* (Belmont, CA: Wadsworth Publishing Co., 1994) at 203.

assumption of human separateness, so that in order to be obligated to others, we must in some sense consent to those obligations.¹¹⁹ Thus, the ethic of justice emphasizes choice in understanding our moral obligations. In contrast, the ethic of care begins with an assumption of human connectedness, the result of which is that to a large extent we recognize rather than choose our obligations to others. In other words, the ethic of justice takes freedom as its starting point, while the ethic of care takes obligation as its starting point. This means that the general challenge of the ethic of justice is to show how one's obligations to others arise without violating one's individual autonomy, while the challenge of the ethic of care is to show how one can achieve individual freedom without violating one's moral obligations to others.

The different starting points of the two ethics are reflected in two different ways of constructing the problem in the Heinz dilemma. Those using the ethic of justice assume the important question is whether Heinz should "steal" the drug as opposed to not "stealing" it. Heinz and his wife are separate individuals and the question is whether Heinz has a particular obligation to his wife or not. In contrast, those using the ethic of care assume the important question is whether Heinz should "steal" the drug, as opposed to getting it some other way. From this perspective, the point that Heinz and his wife are

¹¹⁹ I recognize that individual theorists who might be understood as defending an ethic of justice may not accept this view. For example, Kant's "will" is not choice, and "consent" is what any rational being could will. However, I do believe Kant to be saying that we recognize rather than choose our obligations to others. This type of contractual thinking is an important element in many versions of the ethic of justice, including such philosophers as John Rawls. (See V. Held, "Non-contractual Society" in M. Hanen and K. Nielsen (eds.) *Science, Morality and Feminist Theory* (Calgary, AB: University of

importantly connected is a given. It is assumed that Heinz has an obligation to help his wife, the question is not whether Heinz should help his wife, but how he should do so.

This brings me to the third standard distinction between the ethic of care and the ethic of justice, the distinction between their priorities. The ethic of care has two interrelated priorities, maintaining one's relationships and meeting the needs to whom one is connected. In contrast, the ethic of justice takes some form of equality as a priority.¹²⁰

These priorities of care and justice are reflected in different responses to the Heinz dilemma. Those who approach the dilemma using an ethic of justice seek to promote equality as they understand it: some argue that Heinz's actions are wrong because they deprive the druggist of his equal right to use his property as he chooses, while others argue that Heinz's actions are justified because they are necessary to fulfill Heinz wife's equal right to medical treatment. Conversely, those who interpret the dilemma using the ethic of care hold that Heinz should meet his wife's need for medical treatment but be wary of the solution of "stealing" the drug because doing so would sever his relationship to the druggist, and possibly his relationship to his wife as well, if caught and imprisoned.

I have so far discussed three ways in which the ethic of justice and ethic of care are usually distinguished. Gilligan (1982) challenges Lawrence Kohlberg's (1981)

Calgary Press, 1987) 111 at 138.

¹²⁰ To be sure, equality is interpreted in different ways in different theories of justice; for example a libertarian would argue for the equal right to use one's resources as one's chooses, whereas a socialist would argue for the equal right to have one's basic needs met. However, both still argue for some conception of equality.

account of moral development as the ability to weigh rights claims and impartially apply universal moral principles to a given situation.¹²¹ Gilligan contends that this ideal of moral maturity (an “ethic of justice”) is a product of the all-male subjects Kohlberg used to conduct his research and systematically excluded an alternative route to moral maturity that is apparently found among many women. Those who employ this perspective do not frame moral issues in terms of a clash of individual rights, nor do they attempt to impartially apply moral principles to a particular situation. Instead, they make moral decisions by searching for understanding with particular others whom they have a connection. Caring, compassion, sensitivity to context and an effort to maintain relationships with others are the hallmarks of this “ethic of care”.

Kohlberg’s ethic of justice is filled with the classical liberalism of philosophers such as Immanuel Kant and contemporary John Rawls, whose emphasis on individualism, rationality and respect for individual rights is so much a part of the western legal framework and cultural heritage.¹²² For Kant, Rawls and Kohlberg, sound moral decision-making requires autonomous, rational and impartial choice and the application of universal principles. The morally good person is one whose deliberations are governed by a rational will. This requires that one deliberate impartially without

¹²¹ Gilligan, *IDV*, *supra* note 11; and L. Kohlberg. *Essays on Moral Development*. (San Francisco: Harper & Row, 1981).

¹²² See for example A. Wellington, “Taking Codes of Ethics Seriously: Alternative Dispute Resolution and Reconstitutive Liberalism,” (1999) 12 *Canadian Journal of Law and Jurisprudence* 297; L. C. McCain, “‘Atomistic Man’ Revisited: Liberalism, Connection and Feminist Jurisprudence,” (1992) 65 *Southern California Law Review* 1171.

giving special weight to one's particular preferences or personal attachments. In this way, by relying on impartial reason, individuals come to recognize and apply moral principles that are objective and universally binding (Kohlberg's highest, "post-conventional" stage of moral development).¹²³

Gilligan's research and related feminist literature, however, prompted skepticism regarding the adequacy of this perspective. According to Gilligan, women and some men¹²⁴ are far less likely to frame moral issues in terms of individual rights or to solve moral dilemmas by reference to moral principles. When presented with hypothetical moral dilemmas, women, more often than men, will avoid an either/or choice and seek more information relevant to assessing the problem. For many,

moral problems are embedded in a contextual framework that eludes abstract, deductive reasoning....making moral decisions required not a deductive employment of general principles, but a strategy that aimed to maintain ties where possible, without sacrificing the integrity of the self.¹²⁵

The extent to which at least some women demonstrate an "ethic of care" was at best ignored for many years by Kohlberg's development scale. At worst, it implied that an ethic of care perspective was inferior to an ethic of justice approach. Far from an isolated oversight on Kohlberg's part, this bias has been documented and debated by

¹²³ Kohlberg, *supra* note 121.

¹²⁴ See Gilligan's more recent research "Moral Orientation and Moral Development" in *Women and Moral Theory*, *supra* note 115, 19 at 25.

¹²⁵ Gilligan quoted in "Introduction," *Ibid.*, at 7.

western moral theory more generally.¹²⁶ As Seyla Benhabib observes,

The sphere of justice, from Hobbes through Locke and Kant, is regarded as the domain wherein independent, male heads-of-household transact with one another, while the domestic-intimate sphere is beyond the pale of justice.... An entire domain of human activity, namely nurture, reproduction, love, and care, which becomes the woman's lot in the course of the development of modern, bourgeois society, is excluded from moral and political considerations.¹²⁷

The public domain, traditionally open only to men, is tactically assumed to be the appropriate centre for the development of moral theory.¹²⁸ The result is an ethic of justice that emphasizes impartial reason and appeals to moral principles and that largely ignores empathy, benevolence and context.

The Care / Justice Debate

The meaning and implications of the care/justice distinction have been examined by feminists, philosophers, and researchers in psychology, sociology, political science, social work and law. Commentators and researchers have explored the distinction with

¹²⁶ See for example, W. Brown, *Manhood and Politics: A feminist Reading in Political Theory* (Lanham, MD: Rowman and Littlefield, 1988); L.M. Clark and L. Lange, *The Sexism of Social and Political Theory* (Toronto, ON: University of Toronto Press, 1979); G. Lloyd, *The Man of Reason: Male and Female in Western Philosophy*. (Minneapolis: University of Minnesota Press, 1984); S.M. Okin, "Reason and Feeling in Thinking about Justice", (1989) 99 *Ethics* 229.; S.M. Okin, *Women in Western Political Thought*. (Princeton, NJ: Princeton University Press, 1978).

¹²⁷ S. Benhabib, "The generalized and the concrete other: The Kohlberg-Gilligan controversy and feminist theory," in S. Benhabib & D. Cornell (eds.) *Feminism as Critique: On the Politics of Gender* (Minneapolis: University of Minnesota Press, 1987) 154.

¹²⁸ V. Held, in *Women and Moral Theory*, *supra* note 115, 112 at 111.

vastly different assumptions and purposes. As a result, the debate and discussion that followed the publication of Gilligan's initial research effort presents an often confusing variety of criticisms and concerns.

The still developing body of empirical research appears to show that the two perspectives are not as clearly identifiable as previously thought and that what differences remain may not be explained by gender. Gilligan (1987) has asserted that care and justice perspectives constitute different ways of perceiving moral issues that cannot be combined. In her studies, people tend to adopt either a justice or a care perspective. She found that care and justice perspectives cannot be applied simultaneously and a shift from one perspective to the other "denotes a restructuring of moral perception."¹²⁹

Even Gilligan's revised claim that there is a stable predisposition to rely on one perspective or the other has not been completely established. Some applications of Kohlberg's stages of moral reasoning have found no significant differences between the sexes.¹³⁰ It has been argued that many of the attributes associated with a distinctively feminine moral perspective have structural, rather than psychological or physiological origins. Sandra Harding's (1987) finding that there are striking similarities between ethical perspectives of African and American Blacks and American women raises the possibility that a focus on relationships rather than principles may instead be the product

¹²⁹ Gilligan, in *Women and Moral Theory*, *supra* 115 at 30.

¹³⁰ L. J. Walker, "The Development of Moral Reasoning," (1988) 5 *Annals of Child Development* 33.

of prolonged domination by others.¹³¹ Similarly, Kathy Ferguson (1983) argues that most of the traits conventionally attributed to women - that they are expressive, supportive, non assertive - have less to do with gender than with organizational powerlessness.¹³²

Although there is considerable uncertainty as to whether and under what circumstances individuals can combine both perspectives, what is clear from the current care/justice debate is that most scholars regard exclusive reliance on one perspective or the other as inadequate. As Will Kymlicka (1990) has argued, the moral capacities and problem-solving abilities that allegedly distinguish the care perspective are also necessary to the impartial application of principle. A concern with determining correct principles leads to a concern with how individuals equip themselves to act morally. Thus, for example, the kind of sensitivity to context emphasized by the care perspective is often "required to see whether principles of justice are relevant to a situation, and to determine what those principles require."¹³³ Susan Moller Okin (1989) observes that Rawl's account of developing moral law requires more than rationality and mutual disinterest and that is it best interpreted as "a theory founded upon the notion of equal concern for others."¹³⁴ Similarly, Flanagan, Jackson and Adler (1987) note that without,

care and attachment, first to those one loves and secondarily to some wider community to which one's projects and prospects are

¹³¹ S. Harding, "The Curious Coincidence of Feminine and African Moralities: Challenges for Feminist Theory," in *Women and Moral Theory*, *supra* note 115, 296.

¹³² K. E. Ferguson, "Bureaucracy and Public Life: The Feminization of the Polity" (1983) 15 *Administration and Society* 295.

¹³³ W. Kymlicka. *Contemporary Political Philosophy: An Introduction* (Oxford: Clarendon, 1990) at 266.

¹³⁴ Okin, *supra* note 126 at 246.

intimately joined, the moral disposition to justice - as opposed to the purely prudential disposition to justice - has no place to take root.¹³⁵

It is difficult to conceive of an ethic of care that avoids all reference to larger principles. In the end it would not seem to hold much appeal. As Joan Tronto warns, "If the preservation of a web of relationships is the starting premise of an ethic of care then there is little basis for critical reflection on whether those relationships are good, healthy or worthy of preservation."¹³⁶

Limitations of Gilligan's Ethic of Care

As stated above, several critics have argued that the ethic of care alone does not provide an adequate basis for sound moral and political practice. John Broughton has argued that the inability of "caring" to transcend an association with family and friends to extend to questions of citizen responsibility limits it as an ethical orientation.¹³⁷ He has also warned of the total lack of any mention of liberty in the ethic of care. Similarly, Mary Dietz has criticized the ethic of care and "maternal thinking" as inappropriate bases for political practice because of their necessary link with personal relationships rather than more abstract relations of citizenship.¹³⁸ She, like Broughton, has raised concern

¹³⁵ O. Flanagan, J. Adler and K. Jackson, "Justice, Care and Gender: The Kohlberg-Gilligan Debate Revisited," (1987) 97 *Ethics* 622 at 630.

¹³⁶ J. Tronto, "Beyond Gender Difference to a Theory of Care," (1987) 12 *Signs* 644 at 660.

¹³⁷ J. Broughton, "Women's Rationality and Men's Virtues", in Larrabee (ed.) *An Ethic of Care*, *supra* note 114, 597.

¹³⁸ M. Dietz, "Citizenship with a Feminist Face", (1985) 13 *Political Theory* 19.

that an ethic based in “love” does not adequately address the reality of freedom and oppression, claiming that “not the language of love and compassion, but only the language of freedom and equality, citizenship and justice, will challenge non-democratic and oppressive political institutions.”¹³⁹

In addition, Kathryn Tanner believes that the sense of self found in Gilligan’s ethic of care under determines moral vision. It does not itself decide between an ethic of care or an ethic of justice. It does not assist us in deciding the sort of society we should be seeking to establish. By itself, the ethic of care supports a priority of individual self-sacrifice over community needs and an uncritical loyalty to pre-existing social relations that are often oppressive.¹⁴⁰

Others however, have questioned the adequacy of the ethic of justice, suggesting that the ethic of care does provide a corrective to traditional moral theories. Jonathan Adler has argued that the stringent consistency of principle demanded by the ethic of justice can serve to undermine a person’s morality, while the emphasis found in the ethic of care on including context of our moral choice in our reasoning about those choices serves to enhance our morality.¹⁴¹ Similarly, Marilyn Friedman has argued that an adequate basis for moral choice must include the rich knowledge of the context of the choice. Further, she has challenged what she sees to be the assumption implicit in the

¹³⁹ *Ibid.*

¹⁴⁰ K. Tanner, “The Care that Does Justice”, (1996) 24 *Journal of Religious Ethics* 171 at 184.

¹⁴¹ See O. Flanagan and J. Adler, “Impartiality and Particularity”, (1983) 50:3 *Social Research* 577.

ethic of justice that the public world of government and the marketplace is of greater importance than the world of personal relationships, family and friends.¹⁴² Indeed, many of those who embrace the ethic of care have argued that it should be used to inform our political theory and practice precisely because of the priority it gives to concrete relationships.¹⁴³ Such a priority, I contend, would result in a more life-affirming and creative politics.

Gilligan herself has claimed that she is interested in elucidating the two different moral orientations, without establishing a hierarchy between them.¹⁴⁴ However, she has presented them as mutually exclusive. We can see one, and then the other, but we cannot perceive nor can we act on both simultaneously. The perception and enactment of one necessarily precludes the perception and enactment of the other.¹⁴⁵

In making this suggestion, Gilligan sets up a dualism between two ethics, which is problematic for two reasons. First, as Walker has argued, in an ethic with a duality of fundamental ethical principles, it is too easy, despite our best intentions, to establish a hierarchy in which one overrides the other.¹⁴⁶ Second, even if we could sustain a "separate but equal" positioning of these two ethics, the dualism maintains an opposition

¹⁴² M. Friedman, "The Social Self and The Partiality Debates", in C. Card (ed.) *Feminist Ethics* (Lawrence, KS: University Press of Kansas, 1991) 161.

¹⁴³ See for example Tronto, *supra* note 136; and discussions in Larrabee, *supra* note 114.

¹⁴⁴ See C. Gilligan, "Reply by Carol Gilligan," (1986) *Signs* 324- 333.

¹⁴⁵ *Ibid.*

¹⁴⁶ Walker, *supra* note 130.

between them which inhibits any examination of the possibilities of relations between care and justice.

As Tronto has suggested, when placed in the context of political theory and practice, such an examination of the proper relationship between justice becomes necessary and important.¹⁴⁷ She believes we need to ask what is the place of caring in a just society, and I would add, what is the place of justice in a caring society. Charlotte Bunch has reiterated this concern, saying, "It's a question of whether we can create a new relationship between these possible ethics. That's where the real challenge lies."¹⁴⁸

What remains to be worked out, as I see it, is how justice and care and their related concerns fit together. How does the framework that structures justice, equality, rights, and liberty mesh with a network that emphasizes care and relatedness? Whether we employ the perspectives of justice or care will affect how we interpret the moral problems involved and what we ultimately recommend as institutional policies or individual actions. If we try to see justice and care as alternative interpretations that we can apply to the same moral problem, as I think Carol Gilligan recommends, then it should follow that we can try to think of care and justice as different but equally valid. But we are still left with the question of which interpretation to apply when we act, or which to appeal to when we draw our recommendations. If we are merely describing the

¹⁴⁷ J. Tronto, "Political Science and Caring: Or, the Perils of Balkanized Social Science," (1987) 7:3 *Women and Politics* 88.

¹⁴⁸ C. Bunch, *Passionate Politics: Feminist Theory in Action* (New York, NY: St. Martin's Press, 1987) at 13.

problem and possible interpretations of it, we could maintain both of these alternative moral frameworks and not have to choose between them. But if policy decisions must be made about a problem, we will sometimes have to choose between these interpretations. A theory that purports to have a practical use should provide guidance for choice about actions and policies. The implications of these alternatives for environmental mediation will be discussed in the remaining sections of this chapter.

Environmental Disputes – Their Unique Care / Justice Characteristics

Environmental disputes often reveal deep-rooted conflicts and are often special problems that involve a variety of conflicting concerns. There is nearly always an inseparable conjunction of values and facts at the heart of most disputes. From irreversible ecological effects, to indeterminate participants and costs, to claims by groups who purport to represent the broader “public interest” (including interests of generations yet unborn) to implementation of private agreements.¹⁴⁹

A number of the unique issues to environmental disputes can be expressed in terms of an ethic of care and an ethic of justice. For example, an ethic of care would recognize that ecosystems are made up of interdependent components and are often linked to one other. As a result, events at one place in the environment are bound to have repercussions in other places at other times. In addition, because of the

¹⁴⁹ Susskind and Weinstein, *supra* note 15 at 326.

interconnectedness and complexity of the environment, some consequences are bound to be unpredictable.

From the point of view of an ethic of justice, parties often claim that they represent not just their own concerns but the interests of various publics as well. Assuming the “public interest” can be defined, these claims have the effect of opening a particular conflict to a set of larger societal values and principles. Often the dispute is recognized as one of “right against right”. The question then becomes, when concerns of justice and care conflict, how should we try to reconcile these values? Does either have priority?

Justice concerns have been central to many social and political movements, including the environmental justice movement. Asserting and gaining rights have been instrumental in transforming certain groups of people, however imperfectly, into fellow citizens whose concerns mattered, into people whose human worth mattered. As many environmental justice anecdotes reveal, much of the moral and political work that was necessary to change the viewpoints of those in power, consisted not only of claims to rights, but of attempts to draw attention to the suffering inflicted. In other words, attempts to make people care.¹⁵⁰ Narratives by cancer victim’s living near abandoned hazardous waste sites have made it difficult for those in power to believe in the myth of a prosperous community living happily and healthy among supposedly “safely” stored contaminants.

¹⁵⁰ See both S. Foster, “Race(ial) Matters: The Quest for Environmental Justice”, (1993) 20 *Ecology Law Quarterly* 721; and McWilliams, *supra* note 18.

Joan Tronto may be right in arguing that “one of the practical effects of the widespread adoption of a theory of care may be to make our concerns for justice less central.”¹⁵¹ I would like to add the converse claim, that a more serious commitment to and enforcement of the claims of justice might, at least in environmental justice cases, be a precondition for the possibility of adequately caring for and about people. Tronto herself acknowledges that “until we care about something, the care process cannot begin.”¹⁵² Social relationships of domination often operate so as to make many who have power unable to genuinely care about the marginalized and less powerful.

Although I am very sympathetic to Tronto’s idea of a politics and public policy process that is more sensitive to “needs”, I am not sure we can arrive at what she calls a “full account of human needs” without serious attention to considerations of justice that would enable less powerful people to seriously participate in the social and political arenas where such needs are contested and defined. Once again, adequate attention to justice may, in some instances, be a precondition for adequately caring policies.

¹⁵¹ J. Tronto, “Care as a Basis for Radical Political Judgments” (1995) 10:2 *Hypatia* 141. See J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York, NY: Routledge, 1993) a more sustained discussion of the dimensions of care [Hereinafter *Moral Boundaries*].

¹⁵² *Hypatia*, *Ibid.*, at 145.

A Third Way – Reconstructing An Ethic of Care and Justice

I believe it is important to point out that contrary to the prevailing view, the difference between the abstractness of the ethic of justice and the concreteness of the ethic of care is a difference in emphasis, not in kind. The ethic of care focuses on the particularities of a situation because it recognizes the dangers of applying general rules without regard for individuals and their specific needs. For its part, the ethic of justice focuses on the general principles which underlie our apparently dissimilar moral judgments because it recognizes the dangers of being so immersed in context that one loses sight of one's principles and becomes inconsistent and/or relativistic. Properly understood, the ethic of justice requires not just abstract principles but contextual details as well. For example, Will Kymlicka advances a theory of justice that is particularistic as opposed to universalistic (all human beings) involving those bound together in a "web of relationships".¹⁵³ His formulations capture a sense of a community of justice that involves the notion that relations of justice can only be predicated on individuals who are in some way connected in relationships of reciprocity (caring and cared for). Similarly, Susan Moller Okin affirms that the character and organization of caring for others involves responsibilities that are crucial for sustaining the justice of society as a whole.¹⁵⁴

¹⁵³ Kymlicka, *supra* note 133 at 202.

¹⁵⁴ S. M. Okin. *Justice, Gender, and the Family* (New York, NY: Basic Books, 1989).

Another similar reconception of an ethic of justice is put forward by Seyla Benhabib, who argues that attention to “concrete” others (that is attention to the concrete, history, identity and affective-emotional constitution of others) is necessary to make intelligible the individuation of the self presumed in universalistic moral theories that define a moral point of view in terms of taking the standpoint of others.¹⁵⁵

This attention to contextual detail characteristic of the ethic of care is often criticized for its supposed relativism, or as the view that there is can be no correct way of resolving moral dilemmas. Even Carol Gilligan seems to accept this view at times, when she writes that those who use the ethic of care have “difficulty in arriving at definitive answers to moral judgments.”¹⁵⁶ I argue that the reluctance to make a moral judgment is healthy when one knows minimal details of the situation. As Friedman puts it:

Sensitivity to contextual detail need not carry with it the relativistic view that there are no moral rights or wrongs, nor the slightly weaker view that there is no way to decide what is right or wrong. It need only be associated with uncertainties about which principles to apply in a particular case, or a concern that one does not yet know enough to apply one’s principles...¹⁵⁷

The ethic of care focuses on the particularities of a situation because it recognizes the dangers of applying general rules without regard for individuals and their specific needs. One need not be a moral relativist to be unwilling to take an absolute stand on an issue.

¹⁵⁵ S. Benhabib, *Situating the Self* (New York, NY: Routledge, 1992) 158-70

¹⁵⁶ Gilligan, *IDV*, *supra* note 11 at 101.

¹⁵⁷ M. Friedman, “Care and Context in Moral Reasoning” in *Women and Moral Theory*, *supra* note 114, 190 at 203.

The ethic of care's attention to detail is not a weakness resulting in relativism, but a strength lacking in a simplistic version of the ethic of care.

Carol Gilligan's work suggests that justice and care perspectives provide alternative accounts of moral problems and decisions, and that shifting to a care perspective foregrounds moral issues of preserving and maintaining relationships that are often not well illuminated by a rights perspective. I understand Joan Tronto and Virginia Held to be arguing that the care perspective is a wider possibly more foundational framework, within which considerations of rights and justice constitute a subset - albeit an important one.¹⁵⁸

I suggest yet another possibility. Improvements along dimensions of justice and rights might in some cases, provide what Uma Narayan has called "enabling conditions" for the provision of adequate care. That is, general principles and contextual detail are dependent upon one another. Attention to detail helps us formulate, select and apply principles, which in turn put the details in moral perspective and thus help us to select which details are relevant for considering resolutions to conflicts.¹⁵⁹

In other cases, improvements along dimensions of care, such as Tronto's "attentiveness to" and "concern for human needs" and human suffering, might provide the "enabling conditions" for more adequate forms of justice.¹⁶⁰ Attention to the needs

¹⁵⁸ V. Held, "The Meshing of Care and Justice", (1995) 10:2 *Hypatia* 128 at 131; and Tronto, *supra* note 151.

¹⁵⁹ A.M. Jaggar (ed.) "Introduction" in *Living with Contradictions: Controversies in Feminist Social Ethics*. (Boulder, CO: Westview Press, 1994) 9.

¹⁶⁰ U. Narayan, "Colonialism and Its Others: Considerations on Rights and Care

and circumstances of less economically advantaged people might result in environmental policies that institutionalize rights to adequate medical care for communities adversely affected by hazardous waste facilities. Gilligan's interpretation of the ethic of justice focuses exclusively on its attention to negative rights, or rights of non-interference. As Susan Moller Okin writes in response to Gilligan, "She tends therefore to conflate talk about rights with individualism and even selfishness".¹⁶¹ Although a libertarian ethic of justice focuses exclusively on negative rights, other ethics of justice, ranging from liberal to socialist, defend positive rights, or rights that entail correlative obligations to provide a rights holder with some benefit. And although certain versions of the ethic of care reject the concept of rights, others interpret care priorities in terms of positive rights. Rita Manning writes, "there is no reason why we couldn't adopt a language of rights to further the commitments of care. Indeed the blossoming of the language of positive rights seems designed for this purpose."¹⁶² An ethic of care which prioritizes certain positive rights has obvious applications in public contexts. Virginia Held cites some of these:

We ought to acknowledge that our fellow citizens and fellow inhabitants of the globe have moral rights to what they need to live - to the food, shelter and medical care that are necessary conditions of living and growing - and that when the resources exists for honoring such rights there are few excuses for not doing so.¹⁶³

Discourses" (1995) 10:Spring *Hypatia* 133 at 139; and Tronto, *supra* note 151 at 135.

¹⁶¹ S. M. Okin, "Thinking Like a Woman", in D. Rhode (ed.) *Theoretical Perspectives on Sexual Difference*. (New Haven: Yale University Press, 1990) 145 at 157.

¹⁶² R. Manning. *Speaking from the Heart: A Feminist Perspective on Ethics* (Lanham, MD: Rowan and Littlefield, 1992) at 154.

¹⁶³ Held, *supra* note 119 at 129.

I contend that in the context of environmental mediation, this extends to the positive right of extending participation of affected citizens into environmental decision-making.

I am suggesting that, in particular contexts, struggles for greater justice may foster more adequate or richer forms of care and that in others, the cultivation of a care perspective might foster enhanced forms of justice. For instance, an ethic of care is devoted to meeting needs, but an ethic of care cannot provide the conditions that will allow us to properly understand people's needs; only "serious attention to considerations of justice....would enable the powerless to seriously participate in the social and political discourse where such needs are contested and defined".¹⁶⁴ Justice considerations are also important in ensuring that the recipients of care are given the proper respect; as Joan Tronto writes, "Without strong conceptions of rights, caregivers are apt to see the world from only their own perspective and to stifle diversity and otherness."¹⁶⁵ In environmental mediation at least, justice and care perspectives might be seen less as contentious and more as collaborators and allies in practical and political efforts to make the world more conducive to human flourishing.

For the most part, the ethic of care has remained hidden from the conceptual lenses of social, legal and political thought. This proposed notion of the ethic constantly forces us to place into the context of people's daily lives any political or moral concerns that they might wish to raise. Consider the practice of environmental mediation. One

¹⁶⁴ Narayan, *supra* note 160 at 139.

¹⁶⁵ Tronto, *supra* note 151 at 161.

way of thinking about the issues surrounding a dispute would be from a perspective of justice, equality and rights. An interpretation of such rights within the framework of justice would then likely be to create laws, policies and regulations focused around issues of efficiency and fiscal responsibility that would include a monetary system of fines and payments for those who violate existing environmental statutes and regulations.

The suggestion that environmental policy be guided by the priorities of care need not mean that these priorities should replace equality. Instead, I am suggesting that the priorities of care can be used to guide us towards a specific conception of justice. Different conceptions of justice appeal to different conceptions of equality, ranging from the equal right to use one's resources as one chooses to the equal right to have one's basic needs met. In other words, in this context the important distinction is not between justice and care, but between the kind of rights that public policy promotes.

The ethic of justice may focus more directly on the issue of conflict resolution, however the justice perspective can not always settle conflict cases. Often principles of justice conflict, and there is no accepted principle to help in the choice between them. I am suggesting that the ethic of care would help us resolve conflict in ways that promote attention to and discussion of needs. As Kathy Ferguson wrote:

The accommodative strategies of conflict resolution that women typically use would be encouraged and legitimized, calling on the cooperative and respectful processes of talking and listening that express care and maintain connection.¹⁶⁶

¹⁶⁶ K.E. Ferguson. *The Feminist Case Against Bureaucracy* (Philadelphia, PA Temple University Press, 1984) at 198.

I also contend that the ethic of care is capable of taking conflict resolution one step further. It has the ability to focus on the prevention of conflict. The ethic of justice offers us tools for judging a given conflict, but in order to prevent a situation, we need an ethic of care and its recognition of the importance of human connection in helping to avoid further injustice. For example, an ethic of justice can easily be used to determine that a chemical manufacturer has violated a “no dumping” law and as a result should be subjected to a heavy polluters fine. However, the chemical company may decide that paying fines on a regular basis is more cost effective and less troublesome than having to pay for proper clean-up and storage facilities. The ethic of justice did not require any recognition or obligation to the surrounding community for avoiding future injustices. While this assertion may seem simplistic, it is undeniable that behind most acts of injustice is a history of abandonment and lack of care.

I do not mean that these care priorities should replace justice priorities in resolving conflicts, but that care and justice priorities are not necessarily in conflict. Care priorities need not undermine justice, but can help us distinguish between better and worse versions of justice. Unless we feel a sense of connection to those who have justice claims on us, those justice claims will not matter to us. Although this may be a psychological rather than a moral or legal point, it makes an important difference for whether we carry out our justice obligations. Nel Noddings recognizes this when she writes that “Even if we all agreed that it is unjust for some people to starve, it would still

require people who care to put things right".¹⁶⁷ Virginia Held makes a similar point when she writes, "What often appears to happen is the following: When people with social privileges come to understand what the practical implications are of the conceptions of justice they think they endorse, they often give up these conceptions of justice."¹⁶⁸ I contend this occurs because people's conceptions of justice are empty without a sense of social connectedness.

This point is essential to take into account when formulating a transformative model of environmental mediation. The need to confront fundamentally different assumptions and values is clear - if only to help understand the issues at the heart of a dispute. From a tactical or strategic standpoint, the process of confrontation can lead to changes in positions or at least to a clarification of the issues at stake. Lawrence Susskind and Alan Weinstein, two prominent US environmental mediators, have found in their practices that contending groups, holding different assumptions, are not always fated to disagree forever. In some instances, assumptions are based on faulty or insufficiently understood information. They believe that if handled properly, the mediation process can challenge such perceptions. "People do change positions on issues....it is essential to pinpoint sources that the participants admit would effectively change their views."¹⁶⁹

¹⁶⁷ N. Noddings, "A Response", (1990) 5: *Spring Hypatia* 120 at 121.

¹⁶⁸ V. Held as quoted in G. Clement (ed.), *Care, Autonomy and Justice: Feminism and the Ethic of Care* (Boulder, CO: Westview Press, 1996) at 85.

¹⁶⁹ Susskind and Weinstein, *supra* note 15 at 340.

Much of the care/justice debate has been devoted to deciding between the two ethics rather than exploring the ways in which both ethics contribute to an adequate moral perspective. Contextuality alone is really no better than abstractness alone. The priority of maintaining relationships, when unbalanced by other factors, can lead us to value the maintenance of relationships without regard for their quality. However, I contend it is a mistake to understand the ethics as converging into a single ethic.¹⁷⁰ The two ethics draw our attention to different dimensions of conflict resolution - the ethic of justice to the hierarchies among individuals, the ethic of care to the sense of connection among individuals. I believe it is helpful to think of care and justice as distinct ethics which can be integrated in the sense that they can jointly determine deliberation in public contexts.

I have attempted to show that despite the ethic of justice's focus on moral conflicts, justice considerations alone often conflict, such as in disputes over rights, and there is often no principle that allows us to reconcile these conflicts. In contrast, I contend that the ethic of care can go a long way in harmonizing conflict. The first step is the requirement of attentiveness as advocated by Tronto (until we care about something, the care process cannot begin.) Thus, a constant impulse to return to the details and structures of daily life is the starting point of care. To be attentive, furthermore, requires actual attention to be paid to those engaged in care processes. To use a simple example, the debate surrounding the new siting of a waste facility, seems quite different to someone living in a housing development across the street, who has to cope with the

¹⁷⁰ See discussion in G. Clement, *supra* note 168, 118-121.

possibility of the waste eventually contaminating their community's drinking water than to a land developer who focuses solely on "market forces." Thus, a shift occurs in what counts as "knowledge" in making political judgments. This shift is not only in terms of abstract ideas, but in whose voice(s) should count. An approach to conflict informed by an ethic of care is more than just an attempt to invite previously excluded citizens to join into the pre-existing discussions on issues of justice, fairness, and so on. Instead, it is an attempt to say that what issues are traditionally viewed as important needs to change, and those who have the most to say may not be those who speak the eloquent language of public policy-makers. I contend, it is mediation with its emphasis on informality, and not the traditional realm of adjudication that would allow for greater forms of this type of care.

Grounding disputes in the practices of everyday life rather than in abstract principles such as justice or fairness is likely to result in more change. A patriarch in a remote village might be more willing to recognize the changing of needs for the education of women than to adopt a different worldview in which gender equity is brought to the fore. Attention to the ethic of care can only add to our considerations and thus to the possible solutions to conflicts.

Relevance of An Ethic of Care to Mediation and Public Policy

Although respecting a parties rights and following formal procedures are important conditions that we would expect a mediator to meet, a response solely based on impartiality and rights ignores the network of relationships that exist within the dispute and fails to adequately address a broad enough range of possible solutions. A model of mediation informed by an ethic of care would require understanding the unique features of a particular case. A concern for each party as a valued member of the group could invite consideration of various responses that would enable the parties to maintain their on-going relationships. Once the problem is framed as a relational one, the context might be used to open up new ways of resolving the conflict – as in the case of the Heinz dilemma, when borrowing money for his wife’s drug was suggested by subjects reasoning from an ethic of care. This in no way denies a parties’ responsibility for dealing with the problem, but it directs our attention to ways in which other parties might support and assist one another, and in so doing restore the effectiveness of the entire group. The mediation collective essentially redefines the problem as a problem of relationship between the various parties - not just of one member.

The justice perspective has long been regarded as more appropriate to the public sphere of our lives, where, as citizens one must weigh the rights of others and impartially apply laws that bind all citizens alike. On the other hand, the ethic of care is often thought to be dangerously inappropriate in the public domain and relevant only to the private domain of relations with friends and family. This kind of argument rests on

drawing a sharp contrast between private and public roles - a contrast that is fundamentally problematic for many feminist theorists.¹⁷¹

The issue of insisting that the mediator's role remain politically and morally neutral has been extensively explored in mediation theory. Maintaining mediator impartiality is one of the main tenets of the dominant model of mediation. It is generally held, that in order to have the process perceived by all parties as unbiased and just for all, the mediator must keep their involvement in the discussions to a minimum and not take the side of one party over another.¹⁷² Public hearings or meetings, the standard participatory instruments used in these processes, are helpful in gaining a better understanding of what is at stake, but typically they involve minimal interaction and dialogue, in the real sense of the term among parties.¹⁷³ It is agreed among several feminist scholars that genuine enlargement of a moral vision through respect for the differences of others can come about only in active communicative interchange – conversation – with others who are able to speak their own minds and tell of their situations and needs freely.¹⁷⁴ This ability is compatible with the relational/interdependent sense of self advocated by an ethic of care and replaces the traditional

¹⁷¹ See for example E.V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston, MA: Beacon Press, 1988) c. 6.

¹⁷² See for example M. McCormick, "Confronting Social Injustice as a Mediator," (1997) 14:4 *Mediation Quarterly* 293.

¹⁷³ Sadler and Armour, *supra* note 1 at 2.

¹⁷⁴ See for example I.M. Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990); S. Benhabib, *Situating the Self*, *supra* note 155; S. Welch, *A Feminist Ethics of Risk* (Minneapolis, MN: Fortress Press, 1990).

impartial strategies of individuals for the purposes of extending the sphere of moral concern to include other people within a given community or society.

The proposed model is more adaptive and responsive to the realities of each individual dispute. My version of mediation informed by an ethic of care would allow for greater public participation and arguably better quality of participation. If mediators are open to allowing the parties to express their underlying values and principles, the mediator, as well as the parties, would become more open to applying an ethic of care to the issues. Ultimately the parties as they work out their differences through open dialogue become more attached to the final outcome and more deeply committed to seeing an agreement implemented.

Current, citizen participation requirements contained in various federal, provincial and local laws are, in theory, meant to bring all the stakeholders into a decision-making role. Many, if not most of these efforts in Canada, have been little more than window dressing. In efforts to find more efficient ways of resolving environmental disputes, many commentators have begun to look at alternative dispute resolution mechanisms. The *Canadian Environmental Assessment Act* is one of the few attempts to formally integrate a form of ADR, namely mediation, into the environmental decision-making process. The process is voluntary and consensual. The Minister cannot appoint a mediator unless all interested parties have been identified and are willing to participate in

the mediation,¹⁷⁵ The mediator is required to prepare a report, which is submitted to the minister of the environment and the responsible authority.¹⁷⁶

The quality of this current practice of mediation is unclear. Whether a project will be subject to mediation is up to the Minister of the Environment or the responsible authority, who also has substantial control over the terms of reference of such study and whether to apply the findings and recommendation of the environmental assessment. I would argue that the lack of independent public participation in the decision-making affects the vigor of the entire mediation process. Proponents are not even required to prove the comprehensiveness of their project assessment or the rationale of their consideration of alternatives.¹⁷⁷

Adequate environmental assessment is central to ensuring that all government and private decisions that affect the environment or that have potential to harm the environment or communities are infused with some form of environmental ethic. It is a crucial component of any effort to integrate environmental, cultural, social and economic effects into one coordinated planning process. The dominant form of mediation currently being practiced is in need of significant changes. That is why I am suggesting that a model of mediation informed by an ethic of care be used as a guiding principle for future resolution of conflicts.

¹⁷⁵ *Canadian Environmental Assessment Act, 1992*, S.C. 1992, c. 37, at s. 29.

¹⁷⁶ *Ibid.*, s. 32 (1) and 34(c).

¹⁷⁷ Estrin and Swaigen, *supra* note 33 at 223.

The existing traditional approach to mediation, referred to most often as the Satisfaction Story or the Management Approach, often does not allow the parties to engage each other simultaneously or participate directly in generating solutions that are technically, socially, economically and politically feasible. John Ehrmann and Michael Lesnick point out that increasingly, it appears that environmental mediation is becoming similar to the traditional model of adjudication, with single, narrow issue negotiations, party caucuses and hard-edged negotiating.¹⁷⁸

The traditional legal methods of adjudication seem to presuppose idealization and abstraction and have not been designed to incorporate context sensitivity. Mediation, on the other hand appears to have a potential for incorporating both perspectives. Onora O'Neill has stated that,

Abstraction and sensitivity to context are often treated as incompatible: abstraction is taken to endorse idealized models of individual and state; sensitivity to human differences is identified with relativism. Neither identification is convincing: abstract principles do not entail uniform treatment; responsiveness to difference does not hinge on relativism.¹⁷⁹

O'Neill believes that the incompatibility between idealized theories of justice and relativized theories of care dissolves once we see that it is based on exaggerated oversimplifications of both theories.¹⁸⁰ The point is to keep abstraction and sensitivity in

¹⁷⁸ J. Ehrmann & M. Lesnick, "The Policy Dialogue: Applying Mediation to the Policy-Making Process" in J.H. Laue (ed.) *Using Mediation in Public Policy* (San Francisco, CA: Jossey-Bass, 1988) 93 at 98.

¹⁷⁹ O. O'Neill, "Justice, Gender and International Boundaries," in M. Nussbaum and A..K. Sen (eds.) *The Quality of Life* (Oxford: Clarendon Press, 1993) at 50.

¹⁸⁰ *Ibid.*, at 58.

their place. This involves generating abstract principles which will regulate but not determine decisions of justice. The idea that impartial principles of justice might regulate our decisions leaves the door open for making an ethic of care and justice compatible.

If O'Neill is right - then a no-holds-barred adherence to the particularism of care would make any notion of environmental justice impossible to sustain. The attention only to actual situations and contexts could cause the recognition of differences to amount to relativism. Likewise, the notion of justice with a strict adherence to impartiality, would not allow for the discretion required in some cases.

Environmental Justice Issues

The transformative model of mediation informed by an ethic of care that I am suggesting must also be capable of advancing the goals of the environmental justice movement. I believe citizens have an important role to play in the selection of new waste sites, in their approval process and in the long-term monitoring of new and safer sites. Environmental justice issues are raised when the siting of new facilities are in areas that already bear a disproportionate share of society's environmental risks. The model outlined above carries with it an underlying consensual purpose to improve the environment as well as remain consistent with the goals of environmental justice.

This purpose is often lacking from the dominant model of environmental mediation. In order for society to make informed choices about the issues effecting their communities – access to information is tantamount. Private parties in mediation do have

a broader obligation to the community as a whole to release details and information contained within the settlement contract. Mediation, as it is commonly practiced, does not address the broader societal issues of informing the larger group of citizens within a community. For example, hazardous waste siting decisions are often political decisions, which leave historically excluded people out of the decision-making processes.¹⁸¹ The idea being that elected officials represent the public's interests without the need for direct participation. This model calls for greater inclusion of traditionally marginalized groups and/or their representatives and greater access to important information outlining details that will ultimately effect the final agreement.

The starting point for considerations of environmental justice, is the observation that poor people live in poor environments. Part of the interest of the environmental justice movement and its principles, according to Andrew Dobson, is that it constitutes a useful corrective to the universalism of mainstream environmentalism.¹⁸² It has always been a criticism of environmentalism from those on the left that environmentalists are wrong to claim that everyone suffers equally from environmental degradation. On the contrary, it is argued, the perception and especially the suffering of environmental risk is skewed in the direction of those least able to afford to protect themselves against it.

¹⁸¹ Bullard, *supra* note 72 at 85.

¹⁸² A. Dobson. *Justice and the Environment: Conceptions of Environmental Sustainability and Theories of Distributive Justice* (London, UK: Oxford University Press, 1998) at 19.

An ethic of care in mediation would work to enrich our current views on responsibility and attentiveness. I contend it would encourage a process that more closely reflects the experiences and understanding of the people ultimately affected by the conflict. It might mean involving all the parties to the dispute, rather than formally defined plaintiffs, defendants and interveners, as in the adjudication process. An ethic of care might also alter behaviours to include more trust and openness through communication and information exchange. As Robert Bullard suggests, as communities of colour become aware of the health risks and siting inequities resulting from environmental hazards, the appeal of economic incentives traditionally offered becomes increasingly unacceptable.¹⁸³ Economic benefits are fastly becoming insufficient to compensate for long-term and life-threatening illnesses.

Retaining rights language in the environmental justice movement at first appears at odds with an ethic of care informed model of mediation. However, I am not proposing that rights be conceived as they are in an ethic of justice with a lack of co-operativeness and only a concern for rational self-interest. The implications of re-conceptualizing an ethic of care in mediation merit special attention. To acknowledge variations amongst parties ideals and to respond to variations requires a contextualist ethic. This re-conceptualized model of mediation would acknowledge the historical, material and cultural aspects of decision-making. Values would be developed in response to, rather than abstracted from, specific situations. Values would change over time as knowledge

¹⁸³ Bullard, *supra* note 78 at 93.

and understanding were enhanced. It would be the contextual nature of the decision-making that would free the parties to respond to difference with sensitivity, guiding action on the basis of a better understanding of another's specific needs, rather than relying on the dictates of traditional hierarchies of rules and rights.

Centred in a contextualist ethic, differential treatment would be morally justified on the basis of differences in the type of responsibility and care required to address the specific interests or concerns of each party. Thus, a mediator's central task in being called to resolve a conflict of interest concerning the use of a wilderness area in developing a residential housing complex, is not to determine, in a universalist sense, whose concerns (government and industrial developers, environmentalists, indigenous human and non-human populations) are most worthy, and then privilege the interests of that particular group. The mediator does not have the option of responding to the parties by simply assigning significantly higher or lower values to the various parties' concerns. Instead the mediator and the parties are challenged to seek out and to understand the specific concerns of everyone as they are affected by the particular situation, and then to see that the entire web of concerns generated is addressed in an integrated, just and compassionate manner.

Built into this approach is the rejection of any single authoritative ethical voice that exists independent of historical context. Abstract individualism is seen as relatively unhelpful in addressing the tensions of a specific environmental conflict. Environmental dilemmas occur in a web of relationships. Each situation has a unique history, based very

particular causes and conditions. A contextual ethic represents a shift from emphasis on rights, rules and pre-determined principles to a conception of ethics grounded in specific relationships. As Karen Warren argues, “relationships of humans to non-human environment are, in part, constitutive of what it is to be human”.¹⁸⁴ This ethic is not simple; it is extremely difficult to make sound environmental decisions when relatively little is known about ecological relationships and consequences. The stakes are often very high in these disputes and the consequences of human actions could mean the loss of human as well as plant and animal lives.

To summarize, although a comprehensive description of the proposed model remains somewhat elusive, and the exact shape of any transformational change is impossible to predict, the outlines of a ethic of care informed model of mediation are sketched by a movement towards an alternative that balances issues of justice with sensitivity to difference. Within this context social oppression and environmental justice can more effectively be addressed.

This requires a substantial amount of sensitivity and flexibility. Mediation, as an institution, I believe would be more responsive to the particular differences among parties than traditional forms of adjudication. An ethic of care would require processes for communicating in-depth information about the particular needs and situations of the parties involved.

¹⁸⁴ K.Warren, "The Power and Promise of Ecological Feminism", (1990) 12

This notion of a model of mediation informed by an ethic of care allows for a re-conceptualization of the idea of justice. A just society is not simply a society that allows people to go their own way; a just society is one that actively cares for its members by providing the "institutional conditions that enable people to meet their needs and express their desires."¹⁸⁵ One of the standard works in the ADR field is Christopher Moore's *The Mediation Process*. In it, he says that mediation, "must be dedicated to the principle that all disputants have a right to negotiate and to attempt to determine the outcomes of their own conflicts."¹⁸⁶ Rather than seeing mediation as a diminution of the disputants' rights, it is, in my view, more appropriate to view the options provided by mediation as expanding rights. An ethic of care emphasizes, as does a mediation process that attempts to transform and empower parties, that a balance must be maintained between rights and needs.¹⁸⁷

Dominant mediation practices in Ontario, as elsewhere, arguably continue to manipulate and subvert the practice of mediation. Discussions or dialogues, necessary for meaningful care and responsibility are often subverted at the expense of parties pressured to produce final settlement contracts as quickly and economically as possible.¹⁸⁸ A mediator who is committed to this model informed by an ethic of care would advocate a

Environmental Ethics 124 at 143.

¹⁸⁵ I.M. Young, *supra* note 174 at 121.

¹⁸⁶ Moore, *supra* note 110 at 299.

¹⁸⁷ See R. Phegan, "The Family Mediation System: An Art of Distributions" (1995)

40 *McGill Law Journal* 365 at 365.

¹⁸⁸ *Ibid.*, at 366.

process whereby the contextual details of the parties would bring out discussion of needs, interests, rights and fairness over any specific outcome.

Conclusion

Although I believe that the ethic of justice and ethic of care are in many ways compatible, I challenge the attempt to assimilate the ethic of care into the ethic of justice. Assimilating care into the ethic of justice cannot be done in a way that gives care equal status to justice. It can only be done by interpreting care through the perspective of justice, thereby devaluing and marginalizing it. I would argue that environmental mediation informed by an ethic of care does offer the possibility of more than individual conflict resolution. Mediation represents a possibility for transformation and greater democratic process. However, mediation, like any process can be turned opportunistically to serve problematic and corrupt ends. Thus, it becomes vitally important that practitioners hold a commitment to mediation as a progressive means for socially transformative ends. The next chapter will be a critical overview of mediation generally and environmental mediation specifically.

I recognize that a theory of mediation informed with an ethic of care is hardly enough to transform modern society, however, while not sufficient, it is clearly a necessary part of any socially and politically transformative dispute resolution process. If we can not learn to have conversations with one another, to define issues, discuss problems, express rights and needs at the individual level, than it is doubtful that mass

democratic movements will do any better. Often current theories tend to polarize ways of conceiving mediation as either rights or interest-based or individualized or collectivized or political or psychological. Some critics tend to trivialize a communication-based model of mediation by opposing it to a model of justice or rights.¹⁸⁹ What this thesis is attempting to show is that good mediation deals with these levels simultaneously and it takes a skillful mediator to be able to recognize and deal with issues at the same time.

Although I contend that a model of mediation informed by an ethic of care would yield better results for parties pursuing environmental justice issues, I also recognize that a number of serious criticisms of mediation exist. The following chapter will provide a critique of mediation in general and environmental mediation specifically. One of the most substantial critiques of environmental mediation has come from Douglas Amy's important work in the area of political science and public participation.¹⁹⁰ He takes seriously the possibility that political biases are imbedded in the mediation process - resulting in procedures and decisions that favour only certain kinds of policies.

In addition, feminist critiques in the area of family law have also had a significant impact on the use of mediation more generally. Some additional noteworthy concerns, not directly raised in Amy's work, are used to highlight the critique around the appropriateness of ADR methods for resolving issues of inequality of bargaining power.

¹⁸⁹ See discussion re: Laura Nader and Barbara Yngvesson in D. Kolb, *When Talk Works: Profiles of Mediators* (San Francisco, CA: Jossey-Bass Publishers, 1994).

¹⁹⁰ D. Amy, *The Politics of Environmental Mediation* (New York, NY: Columbia University Press, 1987).

The following will bring the two critiques together to discuss their overall implications for environmental mediation. This will lead to the final chapter, where an examination of the issues surrounding the siting of waste facilities will demonstrate how a model of mediation informed by an ethic of care could be used to address some of the more important problems discussed in chapter three as well as some of the goals of the environmental justice movement.

CHAPTER III: THE DANGERS OF MEDIATION - IMPLICATIONS FOR ENVIRONMENTAL DISPUTES

Identifying the importance and complexity of power relations between disputing parties adds considerably to a more realistic understanding of environmental mediation. There is a range of critiques of mediation which start from different theoretical positions and have different implications for the practice of mediation. For the purposes of this thesis two substantial critiques will be examined. This chapter draws upon a wide spectrum of literature pertaining to mediation and conflict resolution. It is divided into two major sections: (1) Douglas Amy's critique of environmental mediation specifically and (2) additional feminist critiques of mediation in general. This critical examination assists in the conception of a possible framework from which to develop and encourage better resolutions in mediated conflicts involving issues of environmental justice. The last section of this chapter analyzes the shortcomings of both critiques and discusses their implications for environmental justice through mediation.

Douglas Amy and most feminist critiques emphasize the importance of rights. For them, rights define power, and without power, victims are not likely to be effective

participants in any form of co-operative dispute resolution. As a result, they assert that mediation, with its emphasis on accommodation over the assertion of rights, will in the end, serve the interests of the powerful against the disadvantaged. For many environmentalists there is no compromise. As environmental issues are increasingly defined in terms of values and ethics there is some doubt as to just how far mediation can respond to the value demands of citizens. However, this insight should not be taken as an indication that the goal of making environmental conflicts more humane and more caring is irrelevant or insignificant. While power imbalances will always remain a concern, the proposed model of mediation informed by an ethic of care is capable of addressing a number of these issues. Studies have shown that when individuals are placed together in a situation requiring joint effort, the result is likely to generate an increase in co-operation and understanding. As individuals get to know one another, they begin to consider and question their own sets of values and beliefs.¹⁹¹ In other words, leaving the door open to the possibility of change.

Of primary concern to both critiques is the problem of power and whether mediation is capable of addressing imbalances of power between the participants. The focus of the feminist critique has mainly been in the area of family and divorce mediation, but contains many of the same arguments as Amy's critique of environmental mediation. In contrast, however, they appear to address the problem of power in different ways. In

¹⁹¹ See D. Pruitt and J. Rubin, *Social Conflict, Escalation, Stalemate and Settlement* (New York, NY: Random House, 1986) 156-87.

general, Amy's conclusion assumes that the traditional formal justice system, with its procedural requirements of due process, protects the interests of the weak against those of the strong. On the other hand, many feminists critical of traditional litigation only reluctantly defend the formal justice system as the "lesser of two evils." Mediation, for these critics, is dangerous because it functions at an even more subtle/private level where challenging the status quo becomes impossible¹⁹².

Douglas Amy's Critique of Environmental Mediation

Douglas Amy, one of the leading critics of environmental mediation, writes in his book, *The Politics of Environmental Mediation*, that:

despite the appearance of EDR as being a purely informal process where people sit down to talk as equals, in reality it may be no different from other political decision-making processes in which the special interests with the most power and resources have substantial advantages.¹⁹³

His approach to the study of environmental mediation is influenced both by his training as a political scientist and his interest in citizen participation movements. He states in his introduction to his book that he has long been interested in how citizens might participate

¹⁹² See for example Amy, *supra* note 190 at 148; M. Schaffer, "Divorce Mediation: A Feminist Perspective." (1988) 46 *University of Toronto Faculty of Law Review* 62; M. Bailey, *supra* note 48; and E. Pickett, "Familial Ideology, Family Law and Mediation: Law Casts More than a Shadow" (1991) 3:1 *Journal of Human Justice* 27.

¹⁹³ Amy, *Ibid.*, at c. 2.

more effectively in making important political decisions. In particular, he is concerned with the question of whether mediation is being used for political co-optation.¹⁹⁴

Although Amy attempts to present a full examination of both the advantages and disadvantages environmental mediation, he spends most of the book separating what he calls the “myths from reality” by evaluating the crucial question of power. He believes that up until this point the available literature is one-sided in celebrating mediation and encouraging its widespread use.¹⁹⁵

Clearly, unequal power between participants in environmental mediation can undermine the extent to which this process is representative, fair and voluntary. But, as Amy points out, what makes matters worse is that the appearances surrounding environmental mediation often obscure the existence of larger political problems. Mediation has a strong image of being voluntary and egalitarian, and this image may mask the fact that negotiation is biased in favour of the more powerful parties.¹⁹⁶ In other words, the myths of egalitarianism and voluntariness surrounding environmental mediation lend an air of political legitimacy to these agreements - even when it is not deserved.

When evaluating any political process, it is crucial to consider the issues surrounding inequalities of power. After all, how power is distributed and used in a political process largely determines how fair that process is and ultimately, who will

¹⁹⁴ *Ibid.*, at 13.

¹⁹⁵ *Ibid.*, at 14.

¹⁹⁶ *Ibid.*, at 149.

benefit most from the resulting policy decisions. Amy points out that environmentalists usually do have some sources of power, but these sources tend to be more weaker ones. According to Amy, environmentalists often assert a “moral high ground” - that they are representatives of the “good” fight. As a result, these moral underpinnings of environmentalists may be their greatest source of power. It is a resource, that Amy believes, at least partially replaces the greater power of economic and political clout often lacking in environmentalist groups.

A local government group, for example, may have the ability to organize rallies and to gain some public sympathy, but such things are not particularly helpful if the group is faced with a well-financed corporation that has several prominent lawyers, an outside consulting firm and local political support. In other words, there can be a crucial difference between having “some power and having enough power to extract some significant concessions from one’s opponents.”¹⁹⁷ Amy argues that the issue of unequal power in environmental mediation has several different dimensions. First, there are the biases in negotiations created by these imbalances in power. Second, there is the tendency for the “mythology of mediation” to hide the existence of these biases and finally, powerful groups may be able to take advantage of this mythology to legitimize inequitable agreements.

¹⁹⁷ *Ibid.*, at 131.

i) Power and the Problem of Unequal Access

Amy points out that access is an important factor in any policy-making process. Access determines how representative these processes are, and this in turn determines how just and democratic the final policy outcomes are likely to be.¹⁹⁸ Disadvantaged groups have long argued that access to institutions is biased in favour in those who have the most political and economic power. Amy cites the example of some US environmental groups that because they cannot obtain large political action committee contributions or hire expensive lobbyists, do not enjoy the same direct access to legislators as better funded groups. Similarly, it is charged that access to the courts is often restricted to those who have the resources to fund long complicated litigation efforts.

According to this critique, part of the problem of unequal access stems from the fact that environmental mediations do not have easily identifiable parties. Environmental disputes are usually multi-party disputes, with a large number of affected interests. Moreover, at the initial stages of a dispute there is often much disagreement about which parties and organizations could or should be included. As a result, it often falls to the mediator to determine who will participate. The mediator, it is said, has a strong interest in keeping the number of participants as small as possible. Amy gives a number of reasons for this. First, and most importantly, the larger the group, the more difficult it is to generate an agreement that satisfies everyone. The more parties that are added, the

¹⁹⁸ *Ibid.*, at 132.

more difficult it is to reach a solution. Also, from a practical standpoint, large groups can be difficult to manage. Mediators may sometimes hesitate to include any party that might prove disruptive or obstructionist.¹⁹⁹ While Amy points out that this is quite understandable from the mediator's point of view, it may not always be fair or in the public interest. This kind of unequal access means that politically weak groups that have legitimate interests at stake could be left out of the process altogether - their interests unrepresented in the final agreement.²⁰⁰

ii) The Potential for "Sweetheart" Deals

Amy also argues that there is the possibility that those who do take part in the negotiation effort might intentionally conspire to violate the interest of those who are left out. This possibility is particularly disturbing to some environmentalists who suspect that out-of-court negotiations may have become a common way for government and business to construct "sweetheart deals" - deals that leave environmental concerned groups out of the picture.²⁰¹

Amy cites President Reagan's US administration as an example whereby negotiation was often substituted for regulation in many regulatory areas, including the environment. This was the case, for instance, in the Love Canal controversy where the Reagan administration quickly reached an agreement with the Hooker Chemical

¹⁹⁹ *Ibid.*, at 133.

²⁰⁰ *Ibid.*, at 134

²⁰¹ *Ibid.*, at 137.

Company - an agreement that local citizens protested, claiming it would not guarantee a clean-up or protect their health and safety.²⁰²

iii) Imbalances of Power

It is unlikely that the bargaining process will be fair if one party has substantially more power than the other. Parties rarely have equal power and resources available to them when they arrive at the mediation table. Amy's critique argues that one of the most important sources of power with the process is expertise. One party may have better legal expertise, or better expertise in negotiating itself. Amy points out that parties who can credibly claim to be in accord with a certain way thinking, or who are more convincing, end up being more powerful in negotiations. In the practice of environmental mediation, this advantage in expertise often goes to industry groups. They typically have the economic resources, the in-house staff and the consultants.²⁰³

Amy also believes that a power analysis of environmental mediation must also take into account the power advantages enjoyed by government. To date, most environmental mediation efforts have involved some form of representation from local, provincial/state or federal governments. By definition, governments are chartered with making policy decisions that groups in society are legally bound to obey. Governments, can for example, make mediation a mandatory part of the decision-making process.

²⁰² *Ibid.*

²⁰³ *Ibid.*, at 145.

According to Amy, the most troublesome aspect of this, is the real possibility that these efforts are, and could be, being used as a way for governments to more efficiently implement policies.²⁰⁴ At the federal level In Canada for example, the *Environmental Assessment Act* has built in legislation allowing for a Minister to send a certain issue to mediation.²⁰⁵ At first glance, government sponsored mediation efforts appear to constitute a desirable new forum of citizen and interest group participation in environmental policy making. In other words, governments look willing to sit down and negotiate over important issues, but as Amy argues, public participation is hardly the motive behind these efforts. What the government is primarily interested in, is reducing court costs and speeding compliance with its policies.²⁰⁶

iv) Distorting the Issues

A second face of governmental power is more subtle but equally important - the ability to prevent certain issues from ever making it onto the political agenda in the first place. Amy argues that this approach is a common political tactic used by the established economic powers. Various states in the past have explicitly excluded from consideration

²⁰⁴ *Ibid.*, at 152.

²⁰⁵ *Environmental Assessment Act*, *supra* note 175 at ss. 25, 28 section 29 deals with the appointment of a mediator.

²⁰⁶ Douglas Amy uses Jeffrey Miller's (former chief of the EPA's enforcement branch) arguments and a report done by Peter Clark and Wendy Emrich for the US Interior Department to support his claim, *supra* note 190 at 151.

in the mediation certain issues that they find threatening - such as the question of whether hazardous waste facilities are even needed in some areas in the first place.²⁰⁷

This process of “narrowing” the issues is not a random one - but tends to selectively filter out the more basic and systemic issues involved in a dispute. For example, instead of understanding some disputes as manifestations of problems in gender, racial or class conflict in our society, mediators portray them as isolated issues involving individual wives and husbands, landlords and tenants, merchants and customers. Consequently, larger societal issues drop out of sight as mediators focus on the details of specific incidents and particular personalities. In addition, this narrow approach to social problems can mean that even if the specific incident is solved, the more fundamental problem may remain unsolved.

Amy points out that often mediation encourages us to see environmental problems as unique, isolated, local phenomena, because these kind of problems are easiest to mediate. But local environmental problems such as toxic waste are often only symptoms of larger and more systemic environmental problems.²⁰⁸ He has accused environmental mediation processes of reinforcing a political ideological bias towards maintaining the status quo. This critique stems from the fact that some of the strongest supporters of environmental mediation include the business community and the most conservative groups in the environmental community.²⁰⁹

²⁰⁷ *Ibid.*, at 150, 153.

²⁰⁸ *Ibid.*, at 193.

²⁰⁹ *Ibid.*, at 12.

The problem is seen to rest with the way that the “illusion of voluntariness”, and of meaningful participation, will tend to grant an “air of reasonableness and legitimacy to mediated agreements.”²¹⁰ Such agreements, however, if the result of co-optation or participation without power, are thus substantively unjust. Mediation becomes a deceptive process, which tends to enhance the power of the strong over the weak and thereby furthers oppression. As Douglas Amy exhorts, social critics sensitive to political problems “should not waste time avoiding or condemning mediation. Instead they should turn to the much more difficult task of changing the larger political landscape.”²¹¹

The longest on-going debate in mediation has come from feminist scholars in the area of family law. It is believed that whatever the limitations of adversarial legalism, an abused spouse with a lawyer standing beside them in a courtroom is more of an equal contest than face-to-face mediation. As a result, important questions for environmental mediation remain. Does a meeting of disputants where concerned citizens, large corporations and government agencies are surrounded by supporters involve more or less the same imbalance of power and is a model of mediation informed by an ethic of care capable of addressing these issues?

The second part of this chapter draws upon feminist literature, mainly from the area of family law. The most substantial critique of mediation has stemmed from feminist concerns around the appropriateness of ADR methods for resolving issues of

²¹⁰ D. Amy, “The Politics of Environmental Mediation”, (1983) 11 *Ecology Law Quarterly* 1 at 10, 13.

²¹¹ *Ibid.*, at 19.

inequality of bargaining power. Critiques of this nature have mostly focused on the domestic types of dispute resolution, however I contend that their concerns are relevant and often analogous to groups with similar disadvantage in society.

The Feminist Critiques of Mediation

Although the feminist critique of law has had different emphases during its various stages of development, its basic premise has remained constant: that the legal system subordinates women. Feminists who have criticized alternative dispute resolution have often expressed concerns for not only women, but other marginalized groups as well, such as, the poor, minority groups, and the disabled.²¹² Clearly, this has implications for disadvantaged groups participating in mediation processes and will be elaborated in a separate section later in the chapter. If a party's perceptions and views are not accepted as worthy or legitimate, the final agreement runs the risk of not only being contested, but of containing conditions that are unfair and unjust to parties' affected by the dispute. This section outlines the thoughts of these commentators, in particular objections that informality in the mediation process disadvantages the "weaker" parties and serves only to maintain and reinforce the powerful authoritarian forces in society. The basis of the argument is that informalism inhibits social change by persuading

²¹² For a feminist critique (although this statement is not limited to feminism) see Grillo, *supra* note 65; P.E. Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power," (1992) 40 *Buffalo Law Review* 441.

disputants with legitimate grievances to sacrifice their grievances in the interests of peace and cooperation.

Although some feminists were initially optimistic about the promise of mediation for women,²¹³ more recently there has been a great deal of work suggesting that mediation and other alternative dispute resolution mechanisms may present problems for women and other disadvantaged groups. In particular, it has been argued that, in practice, many women going to mediation will be disempowered compared to the men with whom they are negotiating. The following is a summary of some of the additional arguments not found in Amy's work that also have implications for marginalized groups seeking dispute settlement through mediation processes.

Mediation has often been praised for its accessibility and lack of formality in comparison to our court system. It is said to be less alienating than litigation and to give the parties greater control over their dispute.²¹⁴ However, it is a process which makes

²¹³ See for example C. Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process" (1985) 1 *Berkeley Women's Law Journal* 39; Rifkin, *supra* note 84.

²¹⁴ See for example P. Lovenheim. *Mediate, Don't Litigate: How to Resolve Disputes Without Going to Court* (New York, NY: McGraw-Hill, 1989). Mediation was used to successfully address a historically silenced group in Rochester New York. A gay rights group effectively mediated with other groups to gain the right to march in a civic parade. They declined to engage in a full fledged legal fight even with the help of the ACLU, because they wanted a customized solution to their own specific problem; or L.R. Singer. *Settling Disputes: Conflict Resolution in Business, Families and the Legal System* (Boulder, CO: Westview Press, 1990) argues that in cases where there is a pre-existing relationship between the parties in conflict (sexual harassment is cited), the parties often value their relationship or are otherwise motivated to resolve their differences. In such cases, mediation would provide an option that falls between the polar alternatives of doing nothing or of escalating conflict further ; B.H. Herrnstein, "Women and Mediation:

demands on the participants - requiring them to meet with the person with whom they are in dispute and to assert their needs in relation to that person. It requires them to explain matters in the dispute and to find ways of resolving them. The demands which mediation makes are likely to fall unevenly where there is a power imbalance between parties.

i) Privatizing the Dispute

The issue of privatization of disputes in the confidential forum of mediation has been examined by feminists writing about specific areas of law. Margaret Thornton considers the detriments associated with the secrecy that surrounds the conciliation of discrimination disputes.²¹⁵ Since discrimination is dealt with in private and the outcomes of disputes are not known, it is suggested that other members of oppressed groups cannot be empowered by successful cases. Discrimination then becomes a private individualized issue, not a matter of public scrutiny and public responsibility.

Anne Bottomley has examined the problems of privatization in relation to family law.²¹⁶ She argues that women have struggled hard for substantive rights embodied in legal rules in family matters. Such substantive rights are fragile and easily taken away, but the struggle to create and maintain legal gains for women has educated the public

A Chance to Speak and Be Heard", (1996) 13:3 *Mediation Quarterly* 229.

²¹⁵ M. Thornton, "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia", (1989) 52 *Modern Law Review* 733.

²¹⁶ A. Bottomley, "What is Happening to Family Law?" in J. Brophy and C. Smart (eds), *Women in Law: Explorations in Law, Family and Sexuality* (London, UK: Routledge, , 1985).

about issues of importance to women. The need for protection from violence is one example. If family disputes are to be dealt with in the private and confidential arena of mediation, the risk is that women's interests will fade from the public agenda, and decisions that are important to women will be made according to norms which are unarticulated and thus unable to be challenged.

This is an important critique for environmental mediation and the environmental justice movement as well. Some argue that the private settlement of disputes "results in the disaggregation and privatization of class and public interest problems" - helping the strong to "divide and conquer" and to "neutralize social justice gains" achieved by the women's movement and other civil rights initiatives.²¹⁷ It is argued that collective political action has often been necessary to achieve basic rights and entitlements for marginalized groups. Later in my analysis of the implications of these critiques I will discuss whether there are currently significant limitations to the protections and remedies offered marginalized groups by our legal system. The current protective laws and remedial measures, as well as the potential for mediation to improve these protections and remedies will be examined and evaluated.

Martha Fineman has developed a different, but related point about mediation.²¹⁸ She has suggested that it is possible for mediation to effect a change in the rules or principles we apply to decision making in particular areas - a change that takes place

²¹⁷ Bush and Folger, *supra* note 3 at 23.

²¹⁸ M. Fineman, "Dominant Discourse, Professional Language and Legal Change in Child Custody Decision-making", (1988) 101 *Harvard Law Review* 727.

without public debate or sanction. Fineman studied the effect of courts' compulsory referral to mediation of disputes about custody and access to children after divorce. Referral of all such disputes, together with a strong ideological commitment of the mediators dealing with the disputes to shared parenting, had the consequence that shared parenting became an effective presumption in custody disputes, despite the fact that no change in the law had been made. She argued that a presumption of shared parenting can neglect interests of women and does not necessarily benefit children. Even in the absence of mandated mediation, Fineman pointed to the potential of mediation to influence decision-making in ways which may be difficult to identify and thus difficult to challenge.

Other feminists take this argument one step further by contending that because family mediation is generally represented and promoted as a process whereby a mediator helps the parties to reach an agreement superior to litigation, the assistance provided by a mediator is often manipulative and more obviously coercive than litigation. As a result, this ultimately calls into question the meaning and effect of both the mediation process and the settlement contract signed at its conclusion.²¹⁹ If mediators are committed to the specific outcome of shared parenting, their focus on these aspects can result in a coalition between mediators and fathers against mothers. This commitment ignores a feminist critique which places greater importance on the adversarial system as presently the only

²¹⁹ See for example Bailey, *supra* note 48; Schaffer, *supra* note 192; D. Majury, "Unconscionability in an Equality Context", (1991) 7 *Canadian Family Law Quarterly* 123.

means by which formal attention is given to gender, race, class and other forms of discrimination.

This is not to say that the adversarial system does give adequate attention to discrimination factors. Equality rights are constitutionally entrenched in the *Canadian Charter of Rights and Freedoms*²²⁰. However, it is often pointed out that rights intending to remedy the effects of systemic inequality, are often interpreted by the judiciary to construct “yet another version of the ideology of equality.”²²¹ Feminist critiques of law, have for many years argued that possessing formal equality rights and being allowed to exercise those rights, are two very different things. However, mediators who dismiss feminist critique on the basis that it completely supports a flawed adversarial system miss the point of much of the critique.²²²

Feminist critique of mediation in support of the adversarial system is selective of what it considers favourable in the traditional legal system. The ultimate goal of the their critique is to expand the arena within which to challenge the historically defined boundaries that have dictated what issues are considered appropriate for public or private

²²⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c.11.

²²¹ K. A. Lahey, “Feminist Theories of (In)Equality” in S. Marting and K. Mahoney (eds.) *Equality and Judicial Neutrality* (Toronto, ON: Carswell, 1987) 71 at 82.

²²² See for example L. Marlow and S. R. Sauber, *The Handbook of Divorce Mediation* (New York, NY: Plenum, 1990) at 104-19, 154. They devote much of their text to pointing out the inconsistencies, false consciousness and general wrong-headedness of (especially feminist) critics of mediation. They advance the thesis that divorce problems should be viewed within the value system of a mental health professional and demonstrate a sense of dismay that anyone could regard family disputes as in any sense political.

debate. The fear is that vital family and workplace issues of justice will be depoliticized and (re)privatized. The effect will be to effectively silence those who suffer most as a consequence of privatization.

ii) Credibility Differential

According to Kathy Mack, one of the most powerful barriers to access to justice for women is the failure to accord women the same credibility men automatically receive.²²³ In society generally, as well as in law, it is suggested that women are consistently treated as less worthy of belief than men, specifically because they are women. This refusal to take women seriously is seen as often unintended and is hard to understand or identify. Examples of this credibility gap between parties can have significant implications for parties more concerned with preserving and maintaining ongoing relationships in ADR. Mack discusses a number of language features that have been associated with powerlessness. Examples include: fillers (“um”, “you know”), qualifiers (“maybe”, “perhaps”), and questions with rising intonation. It appears that these features are used more often by women, than men, though class, age, education and the particular power relationship between the speakers may be significant factors as well.²²⁴

²²³ K. Mack, “Alternative Dispute Resolution and Access to Justice for Women,” (1995) 17 *Adelaide Law Review* 123 at 130.

²²⁴ *Ibid.*, at 131.

Other significant differences are the patterns and expectations about who speaks and who is silent. It is well established that, in mixed male/female groups, men talk more than women, men interrupt women much more often, and men control the conversational topic. Though frequent interruptions of women, by men, are often not regarded as rude by men or women, women tended not to speak after being interrupted. Studies also found that discussion groups are more likely to accept proposals from men than identical suggestions made by women. Listeners also remember more of what a man says, even when presenting the same material in the same way. The cumulative effect of these patterns makes it harder for a women to be perceived as a credible, effective speaker even when she is accurate and honest. However, it has been observed that when a women uses a more authoritative speech pattern, she may be penalized by listeners for deviating from the appropriate gender stereotype.²²⁵

This credibility gap is seen by some feminists as a major factor in making mediation inappropriate for women.²²⁶ In mediation, people have to identify and assert their own needs and interests. Being denied credibility, women may expect fewer entitlements or the more assertive speaker may pressure her to settle.

²²⁵ *Ibid.*, at 132.

²²⁶ See for example H. M. Lips, *Women, Men and the Psychology of Power* (Englewood Cliff, NJ: Prentice-Hall, 1982) 100-101; J. A Kelly, H.E. Wildman and J.R. Urey, "Gender and Sex Role Differences in Group Decision-Making Social Interactions: A Behavioural Analysis", (1982) 12 *Journal of Applied Social Psychology* 112; J.H. Scanzoni, *Sexual Bargaining: Power Politics in the American Marriage* (2d ed.) (Chicago, IL: University of Chicago Press, 1982); P. Kollock and P. Schwartz, "Sex and Power in Interaction: Conversational Privileges and Duties", (1985) 50 *American Soc. Review* 34.

In addition to gender, I contend that there exist other aspects of a person's identity that would potentially impact on the capacity to mediate effectively as well. Women are not the only group effected by the credibility gap. There exist gendered patterns of speech as well as culture. People of different heritage may have accents or speech patterns that are not easily understood or perceived as credible.²²⁷ Certainly education would play a significant role - environmental groups could potentially be made up of many different backgrounds in the community - concerned parents, community business owners, religious leaders, farmers, native aboriginals etc. - all with varying levels and abilities to communicate. The importance of advocating a mediation technique that will allow all these views to be heard and accepted as legitimate is paramount and raises issues as to the overall legitimacy and subsequent transformative potential of the process.

Some feminists also point out that the conflict between the language of experts and local knowledge plays an important role in environmental public hearings and mediations. Often the connections that residents draw between problems in the household and air pollution for example, are minimized by experts or government officials.²²⁸ For example, when activist Cathy Hinds, one of the first to suspect well-water contamination in her rural community in Maine, expressed concern about the water

²²⁷ For an example of language barrier issues arising in Quebec communities see M. Lang, "For the Sake of Children: Preventing Reckless New Laws," (1999) 16 *Canadian Journal of Family Law* 229.

²²⁸ R.R.M. Verchick, "In a Greener Voice: Feminist Theory and Environmental Justice," (1996) 19 *Harvard Women's Law Journal* 23 at 48.

to her doctor, he first “dismissed the idea and prescribed tranquilizers.”²²⁹ Environmental policy is an area where technical data - especially concerning the exact environmental effects of certain pollutants and activities - currently plays a particularly large part. However, critics have pointed out that there is definitely a gray area between conventional science and politics in which the two are inseparable.²³⁰ Scientists often cannot answer policy maker’s questions about risks to certain substances. Faced with the possibility of lives at risk, however, policy makers seldom wait for scientific consensus. Not only are decisions being based on incomplete evidence, the idea that scientific data is not somehow value neutral has also been brought to the fore by such feminist scholars as Sandra Harding.²³¹

Trina Grillo's Critique of Mediation From a Feminist Perspective

In addition, to the critiques of mediation raised above there is an important contribution made by feminist scholar and mediator, Trina Grillo, that cannot go unmentioned. In a short time, Grillo’s 1991 article, *Mediation - Process Dangers for Women*,²³² became the canonical text of a feminist critique of ADR that focuses primarily on what happens in situations where people of unequal bargaining power directly confront each other, with either no or little formal legal protection. In Grillo’s analysis,

²²⁹ *Ibid.* Such treatment may not only evidence distrust of non-scientific observation, but also sexism.

²³⁰ K. Harrison. *Risk, Science and Politics: Regulation of Toxic Substances in Canada and the United States* (Montreal: McGill-Queen’s University Press, 1994) at 8.

²³¹ Harding, *supra* note 53.

the social control of mediation observed in most practices creates a world which is not “neutral”, as promised in mediation ideology, but full of normative constructions in which mediators subtly manipulate the process to produce the substantive results they prefer (such as joint custody). According to her critique, courts have not been friendly or welcoming places for women and mediation, especially mandatory mediation, may be no better.

i) Principles and Fault in Mediation

Grillo’s major criticism stems from her suggestion that women going through divorce are often seeking to be told by a higher authority that they are right and that their husbands are wrong. In other words, they desire moral vindication from an outside third party. However, the informal law of the mediation setting requires that discussion of principles, blame and rights be de-emphasized or avoided. Unlike the court system, mediators may attempt to orient the parties towards reasonableness and compromise, thereby denying women affirmation.²³³ Grillo points out that this value-free perspective taken by most mediators can “deprive a divorcing spouse of the opportunity to appear virtuous in society’s eyes and her own.”²³⁴ It may be important from both a societal and individual standpoint, to have an agreement that reflects cultural notions of justice and not merely one to which there has been mutual assent.

²³² Grillo, *supra* note 65.

²³³ *Ibid.*, at 1560.

²³⁴ *Ibid.*, at 1562.

Grillo observes that many mediators do their best to ultimately help parties focus on planning for the future rather than on assigning blame for past failures. She contends that this focus prevents women from standing up for themselves and along the way, devalues and betrays them.²³⁵ The chief means by which mediators eliminate the discussion of principles and fault is by making types of discussion “off-limits” in the mediation. She cites mediation experts Jay Folberg’s and Alison Taylor’s “Proposition 5” as the point upon which nearly all mediators agree: “In mediation the past history of the participants is only important in relation to the present or as a basis for predicting future needs, intentions, abilities and reactions to decisions.”²³⁶ She argues that it is typical for mediators to insist that parties waste no time complaining about past conduct. Thus, while one of the justifications for introducing mediation into the divorce process is that context will be substituted for abstract principles, in fact, by eliminating discussion of the past, context - in the sense of the relationship’s history - is removed. According to Grillo, we are left with neither principles nor context as a basis for decision-making.²³⁷

An additional consequence of de-emphasizing discussion of principle and fault is that some persons may be discouraged from asserting their rights when they have been injured. Grillo suggests that rights assertion cannot take place in a context in which discussion of fault and the past are not permitted, for recognition and assertion of rights are ordinarily based on some perceived grievance, as well as on some notion of right and

²³⁵ *Ibid.*, at 1559-66.

²³⁶ *Ibid.*, at 1563.

²³⁷ *Ibid.*, at 1564.

wrong.²³⁸ This has obvious implications for environmental justice in disputes, for example, where parties are attempting to address the past conduct of a government's or a business owner's (or both) failure to provide proper clean-up measures to a known contaminated waste site.

ii) Lack of Mediator Neutrality

Grillo, like Douglas Amy at times, asserts that mediators exert a great deal of power and when parties are in conflict, having a third, purportedly neutral person take the viewpoint of one or the other results in a shift of power to the party with whom the mediator agrees.²³⁹ This power is said to be not always openly acknowledged but is hidden beneath protestations that the process belongs to the parties. In other words, there is much room, but little acknowledgement, of the possibility of the mediator imposing a hidden agenda on the parties.

Grillo argues that the mediator can be biased in two different ways: (1) with respect to issues; and (2) with respect to the individuals. She uses the example of family mediators' bias towards joint custody as issue-related unfairness and the possibility of prejudice in favour of or against a person because of race, gender, sexual orientation, disability etc. as examples of individual bias. She realizes that no one can be completely neutral. Mediators, like all human beings, have their own viewpoints and values that may

²³⁸ *Ibid.*, at 1567.

²³⁹ *Ibid.*, at 1585.

differ from an “objective reality”. As Grillo acknowledges, the most salient feature of a good mediation process is that the failures of neutrality are not denied, but recognized and addressed.²⁴⁰

Partiality comes in many forms. In its most extreme form it results from prejudice in favour of or against a person or group because of race, gender, sexual orientation, religion or class. Critics contend, that it is no surprise that mediators are not completely impartial, for in a very fundamental way, impartiality is a myth.²⁴¹ As Martha Minow has pointed out, the concept of impartiality is based on the notion of the observer without a perspective. But any observer inevitably sees from a particular perspective, whether that perspective is acknowledged or not.²⁴²

In what follows, I discuss the implications of these critiques for both mediation and the environmental justice movement. Amy does not directly engage with a discussion over environmental justice issues, however his argument that groups with fewer economic resources often experience problems of gaining equal access to mediation processes remains valid. Sustaining an environmental coalition based on racial, gender and class differences is a formidable task; limited resources impede organizing and lack of information can block mobilization efforts.²⁴³

²⁴⁰ *Ibid.*, at 1588.

²⁴¹ *Ibid.*

²⁴² M. Minow, “Foreword: Justice Engendered”, (1987) 10:101 *Harvard Law Review* at 45-50.

²⁴³ D. E. Camacho, “Environmental Justice Movement” in *Environmental Injustices*, *supra* note 71 at 13.

By articulating the environmental justice perspective in terms of racial discrimination and social justice, the movement originally built on the legacy of civil rights - which emphasized such values as individual rights, equal opportunities, full citizenship, social justice etc.. As the feminist critique above warns, taking these discussions out of the traditional adjudication forum could lead to the effect of privatizing these issues to the detriment of larger societal goals involving justice and equality rights for everyone. The language of rights has had a successful impact on the mobilizing abilities of the environmental justice movement and any alternative model of dispute resolution that will be embraced by the movement must incorporate a theory of justice that will allow for the larger issues of discrimination, human health and community empowerment to be dealt with more effectively.

I contend that the answer lies in the emphasis and importance that both feminism and environmental justice gives to people speaking for themselves.²⁴⁴ I argue that citizen deliberation is essential if there is to be a collective effort addressing environmental problems and solutions. It is important to analyze these substantial critiques in the area and address their implications for both mediation and environmental justice before being able to propose a model of mediation that has the potential of confronting some of these challenges in the final chapter. I argue that there is a danger in using the traditional adjudicatory models to the extent that legal strategies shift movement struggles out of the control of local activists and into the hands of lawyers and national legal organizations.

²⁴⁴ Verchick, *supra* note 228 at 27.

As a result, laws and litigation are seen as a solution to the problem of environmental injustices, as opposed to community empowerment and transformation.

The critiques raise many important concerns surrounding the often subtle influences and dynamics of power in mediation. Douglas Amy has expressed concern over the impacts of informal and private dispute resolution on the traditionally and historically disadvantaged and feminists, such as Grillo, Bryan and Mack are particularly troubled by situations in which the parties are of unequal bargaining power. It is now important to discuss the implications of these critiques for mediation and environmental justice. Environmental issues often involve some facet of “public rights” or “public interest” and the idea of decision-makers possibly being free from public scrutiny and public record needs to be addressed.

Implications of Critiques for Mediation and the Environmental Justice Movement

This chapter, so far, has explored a number of the problems associated with mediation in general and environmental mediation more specifically, involving such aspects as power imbalances and co-optation. In these perspectives the problems discussed are not random, but systematic biases that tend to work in favour of some interests over others. As a result, various feminist scholars and Douglas Amy advocate the minimal use of mediation. Amy in the conclusion of his book wrote, “that given its

drawbacks and limitations, the most appropriate role for environmental mediation is a relatively minor one.”²⁴⁵

I contend that if environmental mediation is to be advocated as a more effective means of dispute resolution, it is important to acknowledge the dangers and to start thinking about the kinds of reforms and principles that would meet these challenges in the Canadian context. It appears that beyond family dispute mediation, ADR issues of race, gender, class etc. still remain largely unaddressed.²⁴⁶ I argue that the feminist critique is more relevant to environmental mediation in that the critique is grounded in fundamental questions of power, difference and conflict as viewed from the perspective of those who are disadvantaged. It is this perspective which ultimately speaks to the environmental justice movement. I contend that power is not limited to only economic influence, other dimensions, such as experiential knowledge, held by less advantaged community organizations is also an important source of power in environmental dispute resolution. The following section attempts to address some of the issues of power by examining the important role of the mediator and their ability to assist in advancing environmental justice goals.

²⁴⁵ Amy, *supra* note 190 at 200.

²⁴⁶ Yamamoto, *supra* note 66 at 1067.

i) Redressing Power Imbalances

There are a number of similarities in both of the above critiques that need to be addressed within the context of environmental mediation and the environmental justice movement, as well as an ethic of care. Feminists, such as Grillo and Mack, as well as Amy, point out that mediation is not simply about communication, it is also about power struggles. Clearly, then, despite the assurances of some proponents of mediation, serious questions can be raised about whether there is equality between parties in specific disputes. In family law, we saw differences between the perceived power of wives and husbands and in environmental conflicts we saw pro and anti-environmental forces. Both critiques examine the various ways in which these imbalances can undermine the fairness and legitimacy of mediation efforts. Amy discusses how environmental groups argue that the legislative, administrative and judicial processes are biased in favour of those with the most economic power²⁴⁷ and the feminist critique refers to similar informational differential that by-in-large affords husbands the advantage of greater financial resources to seek the advice of experts familiar with previous disputes.

Identifying and recognizing the importance of power relations between the parties in mediation is a first step in the development of a mediation model that attempts to address these disparities. Feminists critiquing mediation have made it difficult to ignore the role of clear rules in mitigating power imbalances and their more general influence on

²⁴⁷ *Ibid.*, at 133.

society. For example, a rule such as the right to equality, sends a clear signal that society does not accept racism.²⁴⁸

As outlined in the previous chapter, I argue that a model of mediation informed by an ethic of care, with its emphasis on interdependence and connection, would view the options provided by mediation as expanding disputants' rights rather than seeing the process as a reduction of rights. Primarily, the environmental justice movement relies on rights to aid in their struggles. However, it has been pointed out that this view is premised on a universal understanding of rights that fails to recognize the inherent liberal bias in a western legal framework of rights. As a result, a model of dispute resolution that privileges only rights as a preferred method of social change, runs the risk of continuing to legitimize the status quo.²⁴⁹ It is certainly the case, as Andrew Altman acknowledges, that: "Liberal thinkers have often exaggerated the ability of law to constrain power and thereby protect people, and they have similarly underestimated the degree of assistance that the law needs from other cultural practices and institutions."²⁵⁰ Liberal theorists have revised considerably their estimations of the prospects for using law alone to remedy social injustice.

More recently, however, some feminists have begun to question the wisdom of using traditional litigation as the only alternative for social reform. Some suggest that an

²⁴⁸ Shaffer, *supra* note 192.

²⁴⁹ A. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) at 172-175.

²⁵⁰ A. Altman, *Critical Legal Studies: A Liberal Critique* (Princeton, NJ: Princeton University Press, 1990) at 6.

emphasis on rights may tend to “overemphasize the separation of the individual from the group, and thereby inhibits an individual’s awareness of her to connection to mutual dependence on others.”²⁵¹ Elizabeth Schneider has argued that a singular focus on enforcing legal rights may divert energy and attention away from ways of bringing about more fundamental change in human relationships and social institutions - changes that would allow true equality for women and other disadvantaged groups.²⁵² In other words, some feminists are beginning to see that mediation may give parties a chance to resolve their problems on their own terms. In a 1996 article entitled, *Women and Mediation: A Chance to Speak and Be Heard*, evidence showed that many women do not care about winning big court verdicts. They want a chance, “to air their grievances, to be treated fairly and to get on with their lives with the least disruption possible.”²⁵³

I contend that there is currently significant limitations to the protection and remedies offered to disadvantaged groups by our legal system. Advocates for women and others need to recognize that while women in all parts of society suffer from many of the same problems, such as domestic violence and sexual harassment, the solutions to these problems must respect women’s individual circumstances. When a one-size-fits-all solution is applied to a diverse population, that solution is going to fit all imperfectly. This is perhaps the biggest flaw of traditional proceedings initiated to protect women’s

²⁵¹ E. Schneider, “The Dialectic of Rights and Politics: Perspectives from the Women’s Movement,” in D. K. Weisberg (ed.) *Feminist Legal Theory Foundations* (Philadelphia: Temple University Press, 1993) at 508.

²⁵² *Ibid.*

²⁵³ Hermstein, *supra* note 214 at 230.

rights. Today many women from various cultural backgrounds believe that even feminist agendas often ignore their experiences. I contend that contextualized processes like mediation avoid such marginalization by allowing aggrieved parties to speak for themselves.

Similarly, there is evidence to suggest that the issue of unequal bargaining power may be diminishing for environmental justice groups. Political protests have proved fairly successful for the environmental justice movement and several environmentalist activists, over the past two decades, have become extremely adept at creating blockages and costly delays for project developers in conventional adjudicatory proceedings.²⁵⁴ This runs contrary to Amy's belief that citizen environmental groups by-and-large have no formal sources of power from which to negotiate. This new evidence supports the possibility that mediation can be used as a process to produce better decisions that satisfy more interests and actually help to resolve conflicts. With a leveling of parties bargaining power, issues of co-optation and exploitation of parties are no longer emphasized. The civil rights movement has contributed significantly to the environmental justice movement's mobilizing potential. Local citizens opposed to a new and unwelcome development have seized upon minor procedural flaws as a basis for delay. The short-

²⁵⁴ S. Capek, "The Environmental Justice Frame: A Conceptual Discussion and an Application", (1993) 40:1 *Social Problems* 5 at 19.

term objective has been to create a legal, political or administrative "logjam", in the hopes of improving the parties bargaining position.²⁵⁵

Environmental justice activists have also been able to draw on the organizational resources and institutional networks established previously for the struggle against racial equality. Churches, neighbourhood organizations, community associations etc. have all lead to a substantial growth in the movement over the past fifteen years.²⁵⁶ This predominantly grassroots movement is not without its allies in Washington, DC as well. President Clinton during his first term in the early 1990's signed an Executive order, directing federal agencies to develop policies to address environmental justice.²⁵⁷ Although the ability to mobilize is often not translated into bargaining power, Amy's belief that environmental mediation serves to legitimize inequitable agreements in favour of only corporations and governmental agencies appears to be changing in the years since his book was first published in 1987. Arguably, the need for a better, more co-operative resolution process to prevent parties from "deadlocking" has become even more imperative.

If questions about how mediation responds to the issues of power go to the heart of the debate about the quality of justice provided by mediation, then it is important in

²⁵⁵ J. Harrison, "Environmental Mediation: The Ethical and Constitutional Dimension" (1997) 9:1 *Journal of Environmental Law* 79 at 84.

²⁵⁶ Sandweiss, in *Environmental Injustices*, *supra* note 71 at 39.

²⁵⁷ *Exec. Order No. 12,898* 59 Reg. 7629 (US) 1994. "Each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of programs, policies and activities on minority populations and low-income

considering the duties of the mediator to understand how power dynamics may affect the mediation process. Can anything be done to reduce the effects that imbalances of power can have on mediation efforts? The next section will examine some of the possibilities for overcoming these problems.

ii) The Role of the Mediator

One possibility is for mediators to try and intervene in the negotiations to create more of a balance of power between the parties. Lawrence Susskind, who is sensitive to this problem of power inequities, has argued that there are times when mediators may be able to increase the bargaining skills of a weak negotiator.²⁵⁸ In order to address social injustice in general and environmental justice specifically, be it racism, sexism, economic exploitation or another type of discrimination or oppression, it is the position of this thesis that mediators be compelled to recognize and empower the parties to eliminate unjust behaviour. It is the responsibility of the mediator to name the problem and devise a fair and durable resolution. In other words, mediators must redefine their commitment to impartiality. Certainly impartiality is central to conducting a dispute resolution process that allows the disputants to define their own terms of agreement, but as the critiques above have noted, singular reliance on the principle of impartiality too often leaves existing power imbalances unchallenged and thus provides nothing better than second-

populations.”

²⁵⁸ L. Susskind, “Environmental Mediation and the Accountability Problem,” (1981) 6:1 *Vermont Law Review* 1 at 15.

class justice for the less powerful. In order to foster just and therefore more durable resolutions, mechanisms must aim to transform the disputants and their relationship. It must empower all disputants to explore the context of their conflict and acknowledge the power dynamics within it.

The term impartial does not mean a mediator must be passive. Mediators can and should take active roles to facilitate agreements and their training and personal value systems will clearly affect the mediation process. Intervention, while appropriate for restructuring or opening the lines of communication, must stop short of taking the decision making authority away from the parties.

Mediation can be an empowering process insofar as it fosters respect and cooperation, but a successful outcome depends on the active participation of the parties and their relatively balanced capacity to negotiate. True equality in the balance of power may be impossible to achieve, but the mediator must prevent an abuse of power by the disputants. Mediators can use a variety of techniques to redress an imbalance of power between the parties. For example, if inequality of bargaining power stems from lack of knowledge, information can be provided. Unequal negotiating skills can sometimes be balanced by insightful intervention and restructuring by the mediator. Intimidating negotiation patterns can be interrupted and re-framed in order to provide support to the disadvantaged party.

iii) Mediator training

In applying an ethic of care approach to mediation, the mediator seeks to recognize power disparities in terms of care and justice among the participants and to the help identify issues to be resolved that spring from these disparities. Helping participants learn to communicate about their differences and to relate to one another is essential in reaching a resolution.

Mediator training should include theoretical learning about a feminist ethic of care in order to develop awareness within each mediator of her or his own moral context. With this awareness, mediators can better facilitate ethics of both care and justice, through their responses and feedback with parties. I contend that familiarity with an ethic of care and with communication techniques that enable the mediator to assist those parties to express their voices could go a long way to resolving environmental conflicts in communities.

iv) Local Knowledge versus Privileged Science

Both critiques also contain a certain simplistic view of power. Amy's entire argument is based on the idea that parties with unequal bargaining power should not mediate. However, his notion of what constitutes power is limited, in that economic influence appears to be the only criteria for generating greater power and control. Even

political power for Amy is based on the financial backing of certain environmental issues over others.²⁵⁹

Other theories of power, recognize that economic factors are not the only aspects that determine power relations. Some feminist critiques recognize that non-economic factors play an important role as well. For example, mediation, is a dialogue in which information is conveyed through language. Feminist authors, in particular, have noted that excluded experience includes the sensory, emotional, relational and intuitive dimensions of experience - all of which contribute to the development of knowledge and morality. For example, Alison Jaggar argues that:

Philosophical attention to people's actual moral experienceseeks to broaden the Enlightenment tradition's perceived focus on individuality, impartiality and reason as to include an appreciation of the moral significance of community, particularity, and emotion.²⁶⁰

In relation to mediation, it was argued above, that associated with language, is a credibility issue and the idea that the argument is not always as important as the arguer's identity. Knowledge is power. People who are able to present issues in an seemingly authoritative fashion are usually viewed as more convincing and thus more powerful. As some feminists have pointed out, those who credibly claim to be in accord with current scientific thinking fall into this category.²⁶¹ Others who offer local community

²⁵⁹ See for example Amy, *supra* note 190 at 133, 142, 144, 151 etc.

²⁶⁰ A.M. Jaggar "Feminist Ethics: Projects, Problems, Prospects. in *Feminist Ethics* *supra* note 142, 78 at 83.

²⁶¹ See for example Harding or Haraway, *supra* note 53.

knowledge or every day experience are viewed as somehow outside the realm of credible expertise. I have suggested that a model of mediation informed by an ethic of care would allow for the inclusion of this type of knowledge and therefore power. By incorporating and validating traditionally excluded voices, parties are made aware of the effects of their actions and of alternative ways they can act. By including all forms of knowledge, mediation becomes a forum for challenging and redefining perspectives. Mediation informed by an ethic of care, with its commitment to context and interdependence allows for the sharing of stories. This type of dialogue between parties is not based on a notion of equality of power but instead involves a recognition of ourselves as embedded in a community of relationships. This also has implications for the environmental justice movement in that the movement is generally unified by a strong emphasis on citizenship rights, democratic process and respect for grassroots knowledge. For example, the experiential reality of those most directly affected by the problems.

Feminism requires an understanding of personal experiences and values.²⁶² Feminist theory is, at its core, an exploration of the actual. Whatever the appeal of broad principles or abstract rules, such tools cannot lead to justice unless they are understood and applied in ways that acknowledge the real-life experiences of those most affected.²⁶³ This appears to hold particular promise for environmental justice, which grounds itself in

²⁶² See for example K. T. Bartlett, "Feminist Legal Methods", (1990) 103 *Harvard Law Review* 829 at 837.

²⁶³ M. J. Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice", (1986) 16 *New Mexico Law Review* 613 at 619.

the voices and values of local communities.²⁶⁴ It has been argued, that the inequality in exposure to environmental harm flows directly from a failure to consider the experiences and values of marginalized groups, such as the poor, women and people of colour. Environmental justice advocates do not believe that such insensitivity occurs spontaneously. Rather, they identify environmental injustice, similarly to some feminists, as a product of an American legal system rooted in the values and interests of an elite society.²⁶⁵ Power is conceptualized within this model as the ability of A to prevail over B in formal decision-making. Elite theory argues that there are essentially two major groups in society, a small group of powerful elites and the powerful masses.²⁶⁶

As a result, according to this critique the environmental regulatory structure that has emerged perpetuates values and interests of those historically in power (mainly white men). Environmental justice advocates argue, that US federal environmental law is notorious for its elevation of data crunching and technical jargon over local and community knowledge.²⁶⁷ Like the issue of credibility raised by feminists in divorce mediation proceedings, it appears that the government's subsequent faith in science to define and solve complex social problems reveals a certain bias. At the very least, the

²⁶⁴ See for example L. W. Cole, "The Struggle of Kettleman City: Lessons for the Movement", (1993) 5 *Maryland Journal of Contemporary Legal Issues* 67 at 74 -77. Where a group of Latino farm workers struggled to comment on impact studies in their native language.

²⁶⁵ See Bullard, *Dumping in Dixie*, *supra* note 78 at 9 -11 and Cole, *supra* note 72 at 634-35.

²⁶⁶ Camacho, "Introduction," *supra* note 71 at 16.

²⁶⁷ See Cole, *supra* note 72 at 636; or W.A. Shutkin and C.P. Lord, "Essays on Environmental Justice: Environmental Law, Environmental Justice and Democracy"

complex administrative processes created under the law work to exclude people who lack formal training in the scientific field.

This type of local knowledge, advocated by both feminists and environmental justice advocates, could possibly lead to communities having their concerns recognized and legitimated when they first appear. Scientific experts and government bureaucrats, far removed from a community's contamination, are sometimes slow to link problems or property damage to environmental contamination.²⁶⁸ This is not to say that technical information and scientific data are unimportant. I argue that an ethic of care approach to mediation simply would not allow for one type of knowledge to be privileged over another. It could also potentially include the sharing of scientific data amongst the parties. Those parties who could afford the expensive testing and gathering of information could make the findings available to all the disputants involved. The valuation of information as relevant/irrelevant, educated/uneducated, knowledgeable/ignorant has all too often led to the exclusion of women, minorities or indigenous peoples when they have been given a place at the negotiation table.²⁶⁹ An

(1994) 96 *West Virginia Law Review* 1117 at 1118, 1126-27.

²⁶⁸ C. Hamilton, "Concerned Citizens in South Central Los Angeles", in R.D. Bullard (ed.) *Unequal Protection: Environmental Justice and Communities of Color*. (San Francisco, CA: Sierra Club Books, 1994) 207 at 208. Arguing that residents of polluted communities, who every day tend the gardens, do the laundry, and care for the children, are much more likely to notice clues of an environmental threat.

²⁶⁹ For a discussion of local knowledge and the importance of redefining knowledge see S.J. Heckman, *Gender and Knowledge: Elements of a Postmodern Feminism*. (Boston, MA: Northeastern University Press, 1992); V. Shiva, *Women, Ecology and Development*. (London, UK: Zed Books, 1992).

ethic of care approach to environmental mediation would address the root assumptions on which decision-making rests. It questions the centrality of reason and instead moves linkages and relationships to the centre. Care would require an expanded perception of how humans interrelate with each other and with the environment, and how environmental systems interrelate. This does not exclude the usefulness of reason or scientific data, it simply recognizes that reason must be defined by the connections and links between the systems. For example, what may seem reasonable for one group of disputants over a waste facility siting at one time, in one region of the country, may not be the same at another point in time for another area. The larger outside society may value the environment differently, parties may value health and safety differently or economic gain. An ethic of care would allow for these expanded possibilities.

An ethic of care affirms a stand of morality measured by intuitive responses to concrete situations, rather than the ability to stand outside a situation and justify one's actions in terms of universal moral principles.²⁷⁰ The particular value of such an approach in affirming local knowledge in environmental mediation is the experience of empathy. The naming of the experience of human and non-human caring. Decisions would be made not only in terms of equality and other rights, but in terms of the pain or harm they may cause or perpetuate for other people. In environmental mediation, this

²⁷⁰ See H.L. Dreyfus and S.E. Dreyfus. "What is Morality? A Phenomenological Account of the Development of Ethical Expertise." in D. Rasmussen (ed.) *Universalism vs. Communitarianism: Contemporary Debates in Ethics*. (Cambridge, MA: The MIT Press, 1990).

would mean evaluating the current and future harmful effects that place particular human and non-human communities at risk. Scientific and experiential knowledge would both be used to determine the potential harm. Recognizing that science is no more objective or accurate than concerned parents noticing changing health effects in their children, backyard gardens and nearby parks.

Nevertheless power disparities are real. Large corporations are powerful. Ranged against a group of community activists or an overstretched and under-resourced environmental organization, the advantages can have a real impact on the substance of agreements. As a result, these critiques appear to also have a number of implications for the community underpinnings of the environmental justice movement.

Environmental Justice and the Possibilities for an Ethic of Care

Environmental justice advocates have already employed contextual based reasoning to combine personal stories and empirical data to convince others of the connection between pollution and discrimination.²⁷¹ The above section implies that the use of contextual reasoning located in local knowledge would link an ethic of care approach to the central goals of environmental justice. Mediation, as a more open, informal process, could arguably be used to promote a more effective method of resolution that allows for these voices to be heard and taken into account.

²⁷¹ See Cole, *supra* note 264, telling the story of community's legal and political battles while including empirical evidence to corroborate claims.

In addition, sharing stories has the positive effect of creating solidarity among community members, by assuring participants that they are not misguided or alone in their observations. A traditional adjudicatory model with its mechanical rules and questioning would not allow for the uninterrupted telling of a story. The examination style of the courtroom lawyer does not always reveal the entire story let alone allow for the building of a possible shared identity among participants. The lawyer is trained to ask only those questions best suited to prove a point and may leave out important details that do not fit easily into an "yes" or "no" response format. Mediation on the other hand, would allow for more opportunities for deliberative discussion in which personal perspectives could be shared. Transformative forms of mediation share the main principles of inclusion, openness, listening, understanding and third party facilitation of dialogue and communication.²⁷² In a model of mediation informed by an ethic of care, dialogue focuses not only on discovering the interests of opponents, and creating ways of satisfying those interests, but in understanding each others' values, wants, concerns and fears and how they are shaped by the process. The mediator has no coercive power or authority to decide for the parties, or even to require them to reach an agreement. Instead, the mediator works to improve communication and understanding between the parties and help them to move towards an agreement of their own making.²⁷³

²⁷² E. F. Dukes, "Why Conflict Transformation Matters: Three Cases" August 1996 George Mason University School of Law <<http://www.gmu.edu/academic/pes/Dukes61PCS.html>> (12 February 2001).

²⁷³ J. D. Rosenberg, "In Defense of Mediation," (1991) 33 *Arizona Law Review* 467 at 471.

An ethic of care perspective could also be useful for proponents of environmental mediation because of its potential for widening the scope of our traditional definitions of community and as a result, expanding the number of parties affected by a dispute. To borrow Carol Gilligan's words, the values of care are in "networks created and sustained by attention and response."²⁷⁴ Therefore, obligations arise out of relations with others. Usually these networks and subsequent obligations are assumed to be between people, but arguably there appears to be no reason why they could not be understood in terms of the relationships between humans, future generations yet un-born and non-humans (including species of plants and animals). This widening of our conception of community through an ethic of care would have several implications for the environmental justice movement. The environmental justice movement has been often criticized for its emphasis on human communities over the natural environment. "Questions of who pays and who benefits from policies of economic growth, industrial development and environmental protection have been at the heart of the environmental justice agenda."²⁷⁵ However, some writers are beginning to suggest that environmental justice activists are as interested in changing the prevailing power relations as they are in reducing pollution or preserving biodiversity.

²⁷⁴ C. Gilligan, "Remapping the Moral Domain: New Images of the Self in Relationship," in T.C. Heller, M. Sosna and D.E. Wellbery (eds.) *Reconstruction Individualism: Autonomy, Individuality, and the Self in Western Thought*. (Stanford, CA: Stanford University Press, 1986) 240 at 242.

²⁷⁵ Environmentalist Bob Edwards as quoted by Dobson in *Justice and the Environment*, *supra* note 182 at 20.

Laura Pulido has pointed out that,

Given the conditions in which marginalized communities find themselves, their point of entry into environmental concerns is usually framed by inequality and often related to access, population and distribution issues in intimate ways. Because they encounter environmental problems through inequality, their resolutions may be contingent upon an alteration of local power relations, cultural practices, systems of meanings and economic structures.²⁷⁶

I contend that there are two characteristics of the environmental justice movement that suggest the possibility of broadening its horizons beyond just concern for human populations; its grassroots composition and its politicizing effect. From the grassroots point of view, there is the chance that activists will make connections between not only poverty and environmental discrimination but other forms of injustice as well. From the politicizing point of view, some writers have noticed that organizing campaigns have widened to include not only the traditional focus of hazardous waste issues, but issues that contribute to habitat destruction, species extinction and loss of wetlands. These broader environmental concerns are captured by the first and third of the Principles of Environmental Justice:

- I. Environmental justice affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction.
- II. Environmental justice mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.²⁷⁷

²⁷⁶ Environmental activist Laura Pulido as quoted by Dobson, *Ibid.*, at 22.

²⁷⁷ "Principles of Environmental Justice" in W. Cronon (ed). *Uncommon Ground: Toward Reinventing Nature* (New York, NY: W.W. Norton & Company Inc, 1995) at 307 [Hereinafter *Uncommon Ground*].

Although the central concern of the movement is still human health, it would appear that a model of mediation informed by an ethic of care has the potential of providing the environmental justice movement with an additional avenue for seeking justice and political action for a broader range of affected parties who would normally go unrepresented and unheard in traditional adjudication proceedings. This idea of justice comes from conceiving of what we owe to others with whom we have a relationship of care.

What an ethic of care brings to light, is a broader realization that justice, as well as environmental justice, is the more than the sum of individual rights or claims. Environmental injustices can often have an aggregate affect on the community that far outweighs a series of individual claims. For example, environmental hazards that tend to be distributed on the basis of income level and result in mass injury to a threatened population takes on a profound moral character involving larger societal issues such as power, status and trust. In short, injustice can mean more than the number of expected fatalities. There are a number of non-economic factors that would affect a community emotionally and psychologically as well. Localized environmental hazards do not simply hurt individuals, they can erode family ties, community relationships and future generations of both human and non-human species. Arguably, a model of mediation informed by an ethic of care affirms the feminist goal that public policy must consider both larger societal issues and local experience in addressing a problem.

Ensuring that important interests are included is a main advantage to a model of mediation informed by an ethic of care. The proposed reconstruction of the ethic of care includes the responsibility to ensure that all affected parties have an opportunity to participate. Public interests can be addressed, even though literature suggests that a good mediated agreement is nearly always defined as one that satisfies the parties in the mediation.²⁷⁸ The problem, as outlined by Amy, is that equating the parties' interests with the public interest is questionable - especially when significant parts of the public are left out of the process. An ethic of care would allow for greater representation and participation, including future generations and non-human species affected. The proposed model would allow for a minimal standard of justice to be determined and upheld in the interest of the larger community, while at the same time recognizing the parties' interests in being able to determine the terms of the final agreement.

In summary, an ethic of care can propel environmental justice advocates and policy-makers in the right direction by always challenging the hidden biases behind environmental law, by bringing personal and local knowledge to the fore and by remaining committed to a transformative model of mediation that promotes a process of open dialogue in the community. If we reframe the issue as a concern for the broader public interest (which could encompass a balancing of environmental and development interests), the problem is overcome. A condition of the ethic of care approach is to have

²⁷⁸ G. Cormick, "Intervention and Self-Determination in Environmental Disputes: A Mediator's Perspective", (Winter 1982) *Resolve* 1 at 3-6.

the parties realize that they have a common problem that must be solved collectively and not that one party must “win” at the expense of the other. An ethic of care informed model of mediation will show that the goal is to shift the negotiation away from “us versus them” to “us versus the problem”. In focusing both parties on solving the problem, a co-operative enabling approach is created.

The following chapter will examine a proposal for an approach to mediation informed by an ethic of care and apply it to the specific example of mediating conflicts that arise when negotiating the location of waste facilities within a community. I will also propose that the elements of an ethic of care based approach to mediation align with the goals of the environmental justice movement to provide a more positive experience for groups seeking greater social justice for their communities.

**CHAPTER IV: TOWARDS A REFORMED MODEL OF MEDIATION FOR
PURSUING THE GOALS OF ENVIRONMENTAL JUSTICE
A CASE STUDY: KIRKLAND LAKE AND THE ADAMS
MINE WASTE FACILITY PROPOSAL**

With the introduction of the *Environmental Protection Act* and the *Environmental Assessment Act*, landfills were not generally approved without a substantial public hearing in Ontario. However, since the Progressive Conservative government came into power, the situation has changed. A clear example of this occurred in July 1996, when, despite the fact that the Hamilton Region Conservation Authority and 3 000 members of Stoney Creek Residents Against Pollution (SCRAP) requested a hearing, the Ministry approved a landfill site in a quarry in Stoney Creek without a hearing. Similarly, a municipal landfill in Dufferin County near Orangeville was approved in December 1997 without a hearing.²⁷⁹

The Kirkland Lake waste facility, the case study to be analyzed in this chapter, was a major proposal for locating 20 million tonnes of the City of Toronto's waste. In 1998, it was approved after what could only be called a pre-emptory hearing process – a

²⁷⁹ Canadian Institute of Environmental Law and Policy Information Centre, "Research - Provincial Change", June 2000 <<http://www.cielap.org/infocent/>

quick, very limited hearing where the topics discussed were decided by the project's proponent. Indeed, the only issue examined at the hearing was the technical soundness of using a "hydraulic containment system".²⁸⁰

Uncertain access to the judicial process and inability to effectively participate in environmental decisions prevails despite the proliferation of environmental legislation in the past twenty years. The perceived need to define and articulate environmental rights and duties stems from the public's continuing disillusionment with government's lack of accountability.²⁸¹ A remedy proposed has been that a useful step would be for the government to explicitly recognize that citizens have a right to a healthy environment.²⁸² The question this raised however is, if environmental rights are made legally enforceable, how can this best be done?

In an attempt to overcome some of the important criticisms raised in Chapter Three, the following chapter explores how a model of mediation, as both a technique of dispute settlement and a method of participation in decision-making, could be incorporated into existing legislation to promote greater environmental justice for traditionally excluded or marginalized groups. I combine the concept of ethic of care with the ethic of justice to extend both and thereby create a more complete model of

research/swaste4.html > (13 May 2001) at 1.

²⁸⁰ *Ibid.*

²⁸¹ "Environmental Bills of Rights" in Estrin and Swaigen (eds.) *supra* note 33, c. 25 at 794.

²⁸² See E. Hughes and D. Iyalomhe, "Substantive Environmental Rights in Canada," (1998) 30 *Ottawa Law Review*, 229 at 230.

dispute resolution that captures more adequately the principles of environmental justice and attempts to ensure that all citizens are given the opportunity to enjoy their environmental rights. The aim is to illustrate how a reformed model of mediation with an emphasis on including previously silenced and disadvantaged groups could assist parties in developing better and more workable solutions to environmental disputes. I emphasize the importance of developing the concept of environmental justice in a democratic society and analyze the possibility of incorporating human and non-human caring relations into Canadian legislative reforms of dispute resolution processes.

The first section defines and describes the essential characteristics of an ethic of care to be incorporated into the proposed model of dispute resolution. After a discussion of the implications of these dimensions for mediation I conclude that an ethic of care approach, involving responsibility, attentiveness and interdependence, could potentially assist a mediator to find appropriate, context-based solutions to the disputes involving issues of environmental justice. The inadequacies associated with current federal and provincial provisions governing public participation and dispute settlement in environmental conflicts are then examined. I then propose several recommendations for legal reform in light of the proposed model of mediation in which emphasis is placed on the need for changes to existing legislation to allow, in certain circumstances, the promotion of such environmental justice principles including rights to participation, accurate information and funding for disadvantaged parties. The chapter concludes by reframing the issues and illustrating how the proposed approach might be applied by

examining the recent debate over the siting of a Toronto waste facility in the northern Ontario community of Kirkland Lake.

A Model of Mediation Informed by an Ethic of Care - A Proposal

The past fifteen years have seen a proliferation of model mediation standards by associations of practitioners, particularly in the United States. In 1994, the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution jointly adopted model standards (the Joint Standards) intended to serve as a general framework for the practice of mediation.²⁸³ A number of provincial associations of mediators have also adopted model codes of conduct and associations of mediators in particular fields such as family disputes have also followed suit.²⁸⁴ The model standards are important references not only for insights they might provide the individual mediator, but also because they may be relevant to the expectations that the parties might reasonably be expected to bring to mediation. The approach or model a mediator uses will place a different emphasis on the values that a mediation can provide.

²⁸³ American Arbitration Association, American Bar Association and Society of Professionals in Dispute Resolution, *Model Standards of Conduct for Mediators* (Washington, DC: ABA, AAA, SPIDR, 1995) [Hereinafter Joint Standards].

²⁸⁴ The Canadian Bar Association-Ontario has approved a set of guidelines for lawyer mediators: See Canadian Bar Association-Ontario, *Model Code of Conduct for Mediation* (Toronto: CBAO-ADR Section, 1998); See also Law Society of Upper Canada, *Professional Conduct Handbook* (Toronto: LSUC, 1997) Rule 25, briefly addresses the duty of a lawyer acting as mediator to ensure the parties understand that the lawyer is not acting as counsel for either party; See Family Mediation Canada, *Code of Professional Conduct* (Guelph: FMC, 1996).

As discussed in Chapter Two, I suggest a more broad-based ethic of care model of mediation is needed in order to break out of the dilemma posed by the predetermined standards of a dispute resolution process based solely on a universal set of rights. Fisher and Tronto offer such a definition of the ethic of care. They write:

On the most general level, we suggest that caring be viewed as a species activity that includes everything that we do to maintain, contain and repair our “world” so that we can live in it as well as possible. That world includes, our bodies, ourselves, and our environment, all of which we seek to interweave in a complex, life-sustaining web.²⁸⁵

Care thus defined, makes this traditionally devalued perspective visible and re-evaluates it. Functions characterized by reciprocity, mutuality and relationality are at the centre of a care-based ethic. Following Tronto’s definition, the ethic of care is characterized by four dimensions of the care process:

- 1) caring about, that is recognizing the need for care not as a helplessness and the stamp of inferiority but as necessity and fact of life;
- 2) taking care of, that is assuming responsibility for care and establishing a “flexible notion of responsibility” as central moral category instead of assuming an obligation-based notion of responsibility;²⁸⁶
- 3) care-giving, that is the actual work of care needs to be based on competence and a sense of worth which views a less than competent taking-care-of as morally unacceptable; and

²⁸⁵ B. Fisher and J. Tronto, “Toward a Feminist Theory of Care,” in E. Abel and M. Nelson (eds.), *Circles of Care: Work and Identity in Women's Lives* (Albany: SUNY Press, 1991) at 40.

²⁸⁶ According to Tronto, flexible responsibility requires that responsibility become a matter of political public debate, rather than being based on implicit assumptions and socio-culturally accepted practices of what has been called altruism.

- 4) care-receiving, that is a notion of care which recognizes the condition of vulnerability and inequality of the care-receiver, and views the care-receiver's responsiveness as moral precept for the valuation of care.²⁸⁷

The ethic of care defines conflict as affecting people existing in a network of relationships, and stresses that all people depend on the continuation of relationships. In an ethic of care orientation, communication and the emphasis of connection(s) and context are seen as the best ways to prevent moral injustices. This means that while a certain agreement may be appropriate for a particular group, it may not be appropriate for the next group. Each group will come to an agreement which is acceptable for them, rather than being constrained by a preconception of a universally right outcome. However, this does not mean that in the proposed model of mediation anything goes.

Environmental disputes are often unique in that they involve conflicts over diverse societal values. An ethic of justice is still needed in order to maintain a minimum content of socially-acceptable standards. An ethic of justice sees conflict in terms of contrasting and competing claims to rights. It uses rules to prevent the moral wrong or unfairness and to provide a system of co-operation for autonomous individuals living in society.²⁸⁸ However, this fairness influenced by an ethic of care, would largely be determined by the participants, rather than by pre-established rules made by people who have no connection to the dispute or any of the participants. Therefore, in a different sense, at a more general level, universality is still maintained.

²⁸⁷ See Fisher and Tronto, *supra* note 285; also elaborated on in Tronto, *Moral Boundaries*, *supra* note 151.

The proposed model cannot promise the resolution of value-laden conflicts. But, opportunities for improving dialogue and subsequent learning between groups becomes possible once the emphasis is shifted from resolving the conflict to understanding the conflict. The proposed model also has a unique opportunity to apply some of the principles of environmental justice to seek improved mutual understanding between parties in a mediation.

These dimensions have significant implications for mediation in general and the proposed model of environmental mediation. Each places a different emphasis on the preservation and maintenance of both human and non-human relationships and provides the potential for co-operative based solutions to environmental disputes.

i) Recognizing a Need for Care

First, the ethic of care rejects an independent and autonomous concept of the individual actor. Instead, it recognizes human dependence on the life giving web of relationships offered by the human parties to the dispute as well as nature. This interdependence of the mediating parties on one another would not be something to be looked down upon as inferior or weak, but accepted as a fact of everyday living within a given society. An ethic of care would not see the community and the environment as

²⁸⁸ Gilligan, *IDV*, *supra* note 11 at 30-31.

separate abstract entities, as some traditional land planning models do for example,²⁸⁹ but as integral parts of a whole.

Within this first tenet, the proposed model would also reject an independent and autonomous concept of the role of the mediator. Instead, the mediator would be viewed as an active participant involved in the process not simply a third-party observer. In fact, it can be argued that regardless of the mediator's approach, the mediator is for all purposes an integral part of the process, not a spectator. The mediator's responsibilities in facilitating the parties' communications at the very least make the mediator a part of the process. The question for an ethic of care then becomes how the mediator should respond to abuse by stronger or manipulative parties.

The current Joint Standards guidelines instruct the mediator to: respect the principle of self-determination;²⁹⁰ and to remain impartial and even-handed.²⁹¹ Other standards, including the Canadian Bar Association-Ontario (CBAO) Model Code tend to cite the same primary duties.²⁹² The model standards appear to offer only limited guidance on the specific issue of the mediator's obligations in relation to fairness and deceptive behaviour. Fairness in the Joint Standards is presented only in the context of procedural fairness as follows: "A mediator shall work to ensure a quality process and to

²⁸⁹ J. Birkeland, "Community participation in urban project assessment," in B. Martin (ed.) *Technology and Public Participation* (Wollongong, Australia: Science and Technology Studies, University of Wollongong, 1999) 113 at 126.

²⁹⁰ *Joint Standards*, *supra* note 283 at Article I.

²⁹¹ *Ibid.*, Article II.

²⁹² See *CBAO Model Code*, *supra* note 284 at Articles 3- 7.

encourage mutual respect among parties. A quality process requires a commitment by the mediator to diligence and procedural fairness.²⁹³ The CBAO Model Code is even less specific about mediator duties to assure fairness. Article VII of the Code entitled “Quality of the Process” requires mediators to ensure that the process “encourages respect among other parties”.²⁹⁴

In general, however, particularly outside the area of family law, the standards of professional conduct reviewed offer little guidance on the ongoing obligations of mediators in relation to fairness and power imbalances. Most imposed no obligation on the mediator to ensure the substantive fairness of the settlement options. More importantly, model standards of conduct offer little or no guidance as to the appropriate course for mediators where a duty in relation to fairness appears to conflict with the duty to respect party autonomy, impartiality or confidentiality.

It is difficult to determine what the ethics of a mediation should be until it is clear what the role of the mediator is. If the role of mediators is to be defined by an ethic of care then empowerment and relationship building would be the basis for a model of ethical conduct. If, on the other hand, the role of the mediator is defined as providing more efficient justice, then the basis for an ethical model would be the cost and time that

²⁹³ *Joint Standards*, *supra* note 283 at Article VI.

²⁹⁴ CBAO, *supra* note 284 at Article VII.

certain actions would entail. My proposed model attempts to incorporate both definitions. In other words, when an ethical dilemma arises in the context of an environmental dispute, (as when an action could possibly cause harm to a party) the most important point for discussion is the fact of human interdependence and it is important to recognize that the whole community shares in this interdependence. This relies on the notion of three principles, mutual respect, caring and procedural fairness. An ethic of care in mediation will depend on parties asking what mediator and process qualities engender trust and demonstrate respect, caring and fairness in context.

An ethic of care practice would include a third party role of responsibility which would embrace such values as inclusion, engagement, shared knowledge and openness, rather than an impossible neutrality which would only serve to reinforce the status quo.

ii) Taking responsibility

Second, to “take care of” means to take responsibility. This notion of responsibility would challenge commonly assumed role assignments of the parties involved in a dispute. For example, for governments and businesses to “take care of” the environment is not simply to displace care through monetary economic means, but to acknowledge that additional care is required in order to transform efforts into satisfying both human and ecosystem needs. To be responsible in a negotiating process would not mean to act out of personal or even social obligation, but out of a recognition of “mutuality and reciprocity”. Responsibility therefore becomes part of an acknowledged

public process which brings care to the centre and does not simply rely on long-standing or assigned senses of obligation. Instead, taking care requires attention and focus and questions rigid role expectations. Responsible contributions of care would become flexible and re-negotiable. Not previously defined rules, but recognition of interdependence would shape the contributions and connections between the parties and their environment.

iii) Care-giving

Third, an ethic of care approach to mediation also speaks to the possible solutions of the conflict. To take care of people, the environment or things in a substandard fashion is not enough. For example, to simply agree to use some kind of emission reducing measure is not enough if better alternatives are known. If the displacement of pollution from one area to another could be avoided by redesigning the production process then standard solutions are inadequate.

“Competence” in care would seem to suggest that technical knowledge and relational knowledge, the experience of experts and the local, indigenous people whose practices have been excluded or devalued be considered in creating a variety of solutions to the dispute.²⁹⁵ Knowledge, within an ethic of care, is grounded in emotion, experience

²⁹⁵ For a discussion of local knowledge and importance of redefining knowledge see S.J. Hekman. *Gender and Knowledge. Elements of a Postmodern Feminism*. (Boston, MA: Northeastern University Press, 1992); V. Shiva, “Staying Alive,” *Women, Ecology and Development*. (London, UK: Zed Books, 1992).

and values. An ethic of care model of participatory mediation would involve learning by immersion within a community rather than by eliciting information through empirical questions and surveys as in traditional environmental assessment review. It would also mean that since expert knowledge and technologies are not superior by virtue of being objective, rational and detached, the expert must become accountable for outcomes. Adherence to a certain methodology would no longer constitute responsible behaviour.

iv) Care-receiving

Lastly, “care receiving” addresses the most challenging redefinition required by an ethic of care. It demands a fundamental re-evaluation of the hierarchies within a given mediation process. It would involve the recognition that, not only the strong and powerful, not only the government agencies and businesses, not only the verbal and vocal, but all would have valuable contributions to make which demand responsiveness. Since, arguably, every part of the ecosystem is important, importance may well be assigned by the mediator by vulnerability, not by strength, by receiving, not by contributing. This is not simply an abstract recognition, but rather a practical recognition of the need to consider others. The care we give would matter, even the care we would give to the most vulnerable part of the whole.

In general, the ethic of care in mediation would broaden the conception of what constitutes better human and non-human welfare, health and safety from a functional or objective oriented conception, to an interdependent one. An ethic of care in mediation

requires an expanded perception of how parties interrelate with each other and with the environment, and how environmental systems interrelate. Ethical relationships of care are defined by attentiveness, flexible relationships which question accepted hierarchies, competence and dependence. This requires a fundamental rethinking of values as diverse rather than universal. However, this proposed model does not imply that rights are unimportant. Instead, it places them in a larger context which recognizes that justice and rights are part of interdependent links and form connections with such other conceptions as economic activity, human activity and environmental activity.

Inadequacies of Current Federal and Provincial Approaches to Environmental Dispute Resolution

It is now important to briefly examine the current models of public participation and mediation open to disputing parties before showing how the proposed model could potentially be used to overcome some of their inadequacies and limitations. In Canada, attempts have been made to formalize dispute resolution techniques and bring them within existing judicial and legislative systems. The first attempt at incorporating dispute resolution techniques into environmental mediation was passed in 1992. The federal *Canadian Environmental Assessment Act* (CEAA) illustrates the incorporation of ADR provisions in a statute dealing with the specific issue of environmental assessment.²⁹⁶

²⁹⁶ CEAA, *supra* note 175, c. 37.

Now most provinces include legislative references to mediation in their respective environmental assessment statutes and environmental bills of rights.²⁹⁷

Most existing Canadian decision-making and standard-setting on environmental standards is a discretionary matter for legislative and executive bodies. Apart from limited “public participation” consultation during decision-making processes there is no role for affected citizens.²⁹⁸ At first glance, a number of these provisions appear to allow for broad participation, however, in reality, mandates have been interpreted much more narrowly.²⁹⁹ For example, affected parties in land-use disputes sometimes include residents of the municipality, but often exclude neighbouring interest groups, such as native and outlying rural communities.³⁰⁰ In addition, neither mediators nor panels have any decision-making authority. It is the minister of the environment or an independent board who ultimately makes the final decision as to whether or not to proceed with a project.³⁰¹

In addition, the quality of the public participation under current provisions is unclear. Robert Gibson, an authority on environmental assessment, has identified several weaknesses in Canada’s environmental assessment processes. His main criticisms

²⁹⁷ For example see S.N.S. 1994-95, c.1; S.M. 1987-88, c.26; R.S.N.W.T. 1988 c. E-7; S.O. 1993, c. 28, ss. 24(1), 34.

²⁹⁸ Estrin and Swaigen, *supra* note 33 at 219-221.

²⁹⁹ See E. Swanson, “Alternative Dispute Resolution and Environmental Conflict: The Case for Law Reform” (1995) 34:1 *Alberta Law Review* 267.

³⁰⁰ J. Girard, “Dispute Resolution in Environmental Conflicts: Panacea or Placebo?” 1999 <<http://www.law.ualberta.ca/centres/civilj/full-text/girard.htm>> (07 February 2001) 1 at 13.

³⁰¹ Estrin and Swaigen, *supra* note 33 at 219.

include: lack of adequate assessment of the need for a project and its possible alternatives; and the lack of adequate consideration of socio-economic and cultural effects of projects.³⁰²

Thus, legal reforms are needed to address the inadequacy of the current provisions for mediation and participation. However, not just any model of dispute resolution would be sufficient. The following sections demonstrate how the proposed model of mediation, as both a technique of dispute settlement and a method of participation in decision-making, could be incorporated into existing legislation to promote greater environmental justice goals for traditionally excluded or marginalized groups.

Limitations of Current Approaches to Environmental Mediation

Even if additional opportunities were created for the use of mediation, the currently advocated models would be limited in their capacity to resolve environmental disputes. In one of the most popular and influential works for practitioners in the conflict resolution field, *Getting to Yes*,³⁰³ the authors suggest that there are basically three ways of dealing with disputes: determining who has more power; determining who is right; and moving beyond rigid positions to reconciling the underlying interests, or needs, of the disputing parties.

³⁰² Canadian Institute for Environmental Law and Policy. *Environmental Assessment in Ontario* by R.B. Gibson and B. Savan (Toronto, ON: CIELAP, 1986).

³⁰³ R. Fisher and W. Ury. *Getting to Yes, Negotiating Agreement Without Giving In*. (New York, NY: Penguin Books, 1991).

The last of these ways, interest-based negotiation, has become enormously popular as an approach to dispute resolution.³⁰⁴ In interest-based negotiating, parties examine each others interests, avoid taking positions and generate solutions which embody the parties' interests. Proponents of this model argue that people through careful communication and creative problem-solving, could find ways in which their own interests could be satisfied without denying the needs of others. But even if this improvement was incorporated into current legislative mediation models, it is clear that the presence of fairness is still not enough. An ethic of care, with its emphasis on relatedness and connection has the potential to transcend self-interest, seeking not just common ground among parties based on interests, but also common good. In other words, an ethic of care informed model of environmental mediation would aspire to something more that extends outside the community to take into account larger public policy issues because of this emphasis on relatedness and connection. Interest-based negotiation is in many ways too limiting in environmental conflicts where disputes over values and ethical dilemmas play an important role. Interest-based negotiation only speaks to the actual parties involved in a specific dispute. Although the ethic of care emphasizes the importance of context, the proposed model also recognizes that often environmental disputes speak to larger issues of societal rights and justice.

³⁰⁴ See for example E.F. Dukes, "Reaching for Higher Ground", in E. F. Dukes, M.A. Pischolish and J.B. Stephens (eds.). *Reaching for Higher Ground in Conflict Resolution: How to Build Shared Expectations and Commitments* (San Francisco, CA: Jossey-Bass Publishers, 2000) at c. 1 claiming that it took the dispute resolution field by storm and is being applied in the workplace and other settings.

Few approaches to dispute resolution appear to recognize that groups need to define the terms on which members “care” about and relate to one another. This development of shared expectations about ways of anticipating and resolving conflict in interest-based negotiation is typically reduced to the development of ground rules for how a group will work.³⁰⁵ As such, the initial mediation contract could be a vital tool for ensuring that the parties understand and agree in advance on how the mediator will deal (or not deal) with particular issues relating to both the ethic of care and justice. The mediation contract and the “ground rules” agreed to by the parties at the outset of the mediation can and should reflect expectations of the parties with respect to the fairness and the mediator’s role in ensuring that these expectations prevail. It appears that these grounds rules rarely bring about relatedness or a sense of interdependence amongst parties. As more and more people are exposed to the typical uses of ground rules, it appears they are growing more cynical about the value of such rules.³⁰⁶

No effective alternative to ordinary ground rules seems to have emerged, however, if used more effectively, ground rules remain the first line of defence against unproductive or destructive group experiences. Consistent with the proposed model, a mediator would insist that the ground rules include a set of general principles as to how the parties will conduct themselves throughout the process. Principles could include general statements contained within the above definition of an ethic of care about the need to take responsibility for healthy communities as well as specific statements,

³⁰⁵

Ibid.

including the support from government ministries for a continued waste reduction and recycling program.

If the desire of the federal or provincial governments is to resolve environmental disputes by providing better public participation in mediations, legislation should be enacted to incorporate an ethic of care informed model of mediation that establishes minimum standards for practitioners. I contend that guaranteed and consistent participation and decision-making by the affected groups would go a long way to legitimating the process. With a model of mediation informed by an ethic of care emphasis is placed on honouring cultural contexts and knowledge. As a result, project decisions become decisions made by the affected community. An ethic of care, would emphasize that participants are more likely to respect their own decisions as compared to the decisions imposed by others.

Legislative Reforms - Some Recommendations

Formalizing procedure through the enactment of legislation would, at a minimum, ensure consistency between mediation processes. From the standpoint of an ethic of justice, having a set of standard rules and procedures would provide some level of fairness to participants. This might be achieved, for example, by establishing rights of participation including: (a) the right to funding to facilitate participation for those groups

who are more economically disadvantaged and could not otherwise participate; and (b) the right to access accurate information.

A review of the existing legislation in Canada and the United States suggests that there are two ways these provisions could be implemented.³⁰⁷ Firstly, legislation dealing with ADR processes in general, across all subject matters, could be newly created. Secondly, legislative reforms could be incorporated into existing environmental statutes. For example, reforms to the various sections dealing with mediation in the *Canadian Environmental Assessment Act (CEAA)*.

General legislative changes could take the form of establishing an Office of Dispute Resolution under the administration of a director. The state of Colorado, for example, has established an office under a separate piece of legislation entitled the *Dispute Resolution Act*. The director is mandated to ensure that dispute resolution services are made available through the various state judicial systems.³⁰⁸

In Canada this would mean, citizens, corporations and government agencies would all have the right to access either a federal or provincial system of mediation. In certain circumstances issues could then be referred to mediation by not only the discretion of the Minister of the Environment, but also affected citizens of the local communities, broader public interest groups and private corporations. The circumstances by which a right to mediation would be recognized would vary. In environmental disputes, the

³⁰⁷ Swanson, *supra* note 299 at 274.

³⁰⁸ See reference in Swanson, *Ibid.*, at 276.

anticipated impact on human and non-human communities would have to be significant and serious environmental justice issues would also have to be raised.

Also, of common concern to all dispute resolution processes are issues associated with mediator qualifications. Minimum qualification criteria or standards for mediators could be established whereby mediators are empowered to ensure that parties are given the opportunity to preserve pre-existing legal rights; and gain access to accurate information.

Other matters, such as participant selection and implementation of agreements reached could be addressed in their specific context. In this case, through reforms to the *Canadian Environmental Assessment Act (CEAA)*. Of particular interest to this thesis is the need to establish clear guidelines for a landfill site selection process. This involves determining criteria for what constitutes a “willing host”. Currently, no workable criterion have been established or agreed upon. Evidence suggests that a “willing host” site is where the owner of the land is willing to sell their property for the purpose of landfill development and the host municipality’s council is supportive.³⁰⁹ It appears that host selection is currently based solely on economic considerations. An ethic of care with its emphasis on taking responsibility in social relations would allow for other considerations to be included, such as, the potential impact on health for both the human

³⁰⁹ According to the *Draft Environmental Assessment Proposal for Public Section Waste Management Planning* as quoted in B. Griffin, “The Adams Mine Landfill Proposal: A Community Perspective,” 1995 <http://www.greviousangels.com/highgrader/articles/adams_review.html> (12 June 2001) at c. 4.

and non-human communities and the cultural and social implications of agreeing to host a waste facility.

In light of governmental refusal to include potential environment interests, the CEAA should be reformed to include a non-governmental representative for the environment in every mediation. The representative could be called from public interest environmental advocates to fit the context of the situation. The proposed model implies that all affected parties should be included in the process and should have the right to influence any decisions made that will potentially impact on their communities' well-being and quality of life. This would include both government publicly-driven and private projects. An ethic of care, with its emphasis on interdependence and connection, recognizes that the environment is also affected by development and the ultimate decision. As such, it should also be allowed to participate. At the very least, non-human interests should be represented and considered.

Mediation techniques may only ever be applicable to a subset of environmental justice issues. Where those affected, for example by land use developments, such as contaminated waste sites or a forest logging areas, are willing to participate in discussions with other involved parties, then mediation is possible. This requires having legislation that allows groups to be involved in the process as early as possible. Waiting until citizens feel they have been alienated or left out of the discussions will only cause escalation of the conflict. When people become angered and disillusioned the hope of reaching any type of dispute settlement or agreement becomes virtually impossible. It is

also in the best interests of the proponent that they agree to participate willingly. Proponents often invest substantial amounts of time and money before a project is approved. If some opposition is present, the proponent can not be assured that a community will not change its mind and attempt to delay the project through any means necessary. Boycotts, road blockades, protests are just a few of the more extreme techniques. Legal delay and stalling tactics in the courts system are also possible.

I argue that an ethic of justice, with its reliance on fairness and equality, would assert that everyone is entitled to a certain minimum standard of environmental quality regardless of where they live. It would then be the ethic of care with its emphasis on sustaining social relations through connection and interdependence that would speak to the level of that environmental quality. Accordingly, an ethic of care would extend our concept of environmental rights to ensure that a level of quality could sustain human and non-human cultures beyond mere health or physical survival. Thus, complainants should be empowered through legislative reform to bring a claim to mediation for any act or omission (including failure by government to fulfil its obligation) which: degrades or will potentially degrade the level of environmental quality for both human and non-human communities; undermines human health; denies fair access to information; and undermines the ability of the environment to support human cultures and ecosystems.

The process of incorporating mediation into legislation has already begun, however much more remains to be done in order to include an approach to mediation that will address the integration of both an ethic of justice and an ethic of care. A right to

mediation through the enactment of legislation would, from a justice perspective, encourage consistency between processes and could be used to provide some level of fairness to the participants. In addition, an ethic of care perspective would provide previously excluded groups (including the environment) with not only a right to participate, but a right to be part of the decision-making process leading up to agreement that will eventually govern their on-going relationship.

As interest in applying mediation to regional, provincial and national-scale disputes is growing understanding the justice implications of environmental dispute resolution mechanisms is essential.³¹⁰ Of great importance to environmental justice are rights to accurate information; prompt respectful and unbiased hearings; and democratic participation in decision-making.³¹¹ The next section will turn to the issue of environmental justice and the potential for a mediation model informed by an ethic of care to address some of the key principles and concerns of the movement. Siting efforts, for example, often generate serious conflicts. Such development can potentially lead to a concentration of environmental hazards, which raises issues of justice. Some cash-strapped rural areas believe it makes sense to take waste/refuse from other cities. Would Kirkland Lake's City Council have ever thought the landfill deal attractive were it not for the fact that it is and has been an economically depressed area? Would they have been so

³¹⁰ Swanson, *supra* note 299 at 268.

³¹¹ See Capek, *supra* note 254.

willing to jeopardize their future generations if this were not the case? Would a wealthier community have tolerated such an intrusion?

Furthering Environmental Justice Goals

Environmental justice activists in general define the environment as “the place you work, the place you live, the place you play.”³¹² As mainly grassroots activists working in direct response to the threats of pollution, resource exploitation and land-use decisions in their communities, they contend that the decision-making process is itself a primary issue in the debate over environmental problems. As a result, they are committed to developing a more democratic, locally and regionally based, decentralized organizational culture.³¹³

The recent Kirkland Lake case study that follows appears to have raised many of the same justice issues to which the US environmental justice movement is currently attempting to draw attention to. Environmental justice activists maintain that some humans, especially the poor, are also victims of environmental destruction and pollution. Numerous studies have demonstrated that it is primarily low-income communities and in some cases, communities of colour, that are often targeted for industrial waste disposal sites.³¹⁴ Studies have also confirmed that low-income communities breathe air up to five

³¹² G. Di Chiro, “The Nature as Community: The Convergence of Environment and Social Justice”, in *Uncommon Ground*, *supra* note 277, 298 at 300.

³¹³ *Ibid.*, at 306.

³¹⁴ *Ibid.*, at 302.

times dirtier,³¹⁵ drink water of lower quality, experience more wastewater and solid waste problems and are exposed to more heavy metals.³¹⁶

October 1991, in Washington DC, marked the signifying moment in the history of the environmental justice movement. According to conference participants (many of whom were of delegates from Canada), the event fore-grounded the importance of environmental groups' insistence on self-representation and speaking for themselves.³¹⁷ From these discussions there appears to be a common thread between the principles of the movement for environmental justice and an ethic of care. Working by consensus, the leadership summit drew up a set of organizational principles that would guide the emergent political process. These "Principles of Environmental Justice" profile a broad and deep political project to pursue environmental justice and contain much of the same language and values proposed in an ethic of care informed model of mediation. Such terms include; "interdependence", "mutual respect", "responsibility", "self-determination" and a "right to participate as equal partners" etc.. The solutions incorporated into the environmental justice movement frame demand both procedural changes in access to information, fair hearings, meaningful participation in decision-making and substantive ones in reduction to toxic threats to all communities, increased

³¹⁵ See for example M. Lavelle & M. Coyle, "Unequal Protection: The Racial Divide in Environmental Law," *National Law Journal* (Sept 1992) S2 at S2; Bullard, *supra* note 78; McWilliams, *supra* note 18 at 758.

³¹⁶ D. Bullard, *Ibid.*

³¹⁷ Di Chiro, *supra* note 312 at 305.

employment opportunities, improved health care. For example:

Principle One affirms, “the sacredness of Mother Earth, ecological unity and interdependence of all species, and the right to be free from ecological destruction.

Principle Two demands that public policy be based on mutual respect and justice, for all peoples, free from any form of discrimination or bias.

Principle Five affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.

Principle Seven demands the right to participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement and evaluation.

Principle Sixteen calls for the education of present and future generations which emphasizes social and environmental issues based on our experience and an appreciation of our diverse cultural perspectives.³¹⁸

Like the proposed ethic of care with its emphasis on relatedness, environmental justice groups, while strongly criticizing mainstream conceptions of nature, produce a distinct theoretical and material connection between human/nature, human/environment relations through their notions of community. Community becomes the place, and the relations and practices, that generate what these activists consider more socially just and ecologically sound human/environment configurations.³¹⁹

As one activist put it: “The goal is equal justice and equal protection from pollution.”³²⁰ However, within the environmental justice movement, differences exist

³¹⁸ Taken from *UnCommon Ground*, *supra* note 277 at 307.

³¹⁹ Di Chiro, *supra* note 312 at 310.

³²⁰ Bullard, *supra* note 268 at 316.

concerning which strategies for achieving these rights should be used. Environmental justice activists have successfully borrowed many of the tactics associated with the civil rights movement to call attention to their demands, such as protests, boycotts, as well as lobbying and litigation. As Richard Samp explains, one of the reasons for the tremendous success in recent times has been the movement's ability to use the language of rights, liberty and equality.³²¹ However, some argue that the primary focus should be at the grassroots level, with community empowerment as the key to remedying environmental injustice.³²² They believe that there is a danger to the extent that legal strategies shift movement struggles out of the control of local activists and concerned citizens into the hands of lawyers and national legal organizations. As a result, laws and litigation are seen as the solution to the problem of environmental injustices, as opposed to community empowerment.³²³ Adopting a legal strategy, such as litigation, requires talking about the problem in complex legal terms. Further, legal and technical solutions can disempower a community by removing the struggle to an arena dominated by experts.³²⁴

An ethic of care informed model of environmental mediation could be used to better validate and recognize environmental justice activists' own experiences. As seen in our definition of an ethic of care at the start of the chapter, "competence" in care seems

³²¹ R. Samp, "Fairness for Sale in the Marketplace", (1994) 9 *St. John's Journal of Legal Commentary* 503.

³²² See Bullard, *supra* note 76.

³²³ S. Sandweiss, "Social Construction of Environmental Justice," in *Environmental Injustices*, *supra* note 71 at 50.

³²⁴ Cole, *supra* note 72 at 638.

to suggest that technical knowledge and relational knowledge, the experience of experts and the local, indigenous people whose practices have been excluded or devalued be considered in creating a variety of solutions to the dispute. Many community activists describe in great detail the profusion of respiratory illnesses and skin disorders that they and their neighbours suffer. They speak of plants that will not grow, bad-smelling air and foul-tasting water.³²⁵ Traditionally such environmental issues get limited to technical discussions in litigation about acceptable risk and scientific uncertainty.³²⁶ In contrast, such direct knowledge about changes in the environment, obtained through experience, would also be validated from the point of view of an ethic of care.

The environmental justice movement also argues that an effective movement, must integrate, not dichotomize, the histories and relationships of people and their natural environments. Most environmental justice activists' discussions of nature are balanced with an analysis of the impossibility of separating it from "life", from cultural histories, and from socially and ecologically destructive experiences. They offer a framework that insists on making linkages among multiple aspects of the ecosystem, including the social environment.³²⁷ Ideas of nature, for environmental justice groups, are therefore tied closely to ideas of community, history, ethnic identity and cultural survival, which include relationships to the land that express their particular ways of life. This ideas of

³²⁵ Di Chiro, *supra* note 312 at 314.

³²⁶ R. Hofrichter, "Cultural Activism and Environmental Justice," in *Toxic Struggles*, *supra* note 73, 85 at 87.

³²⁷ Di Chiro, *supra* note 312 at 317.

community presupposes an ethic of care's commitment to connection to and interconnectedness with other groups, other species and the natural environment through everyday experiences with family, friends and work.

In addition, the proposed model of environmental mediation would expand the avenues in which environmental justice groups seek to more effectively incorporate democratically developed forms of expression. The model's greatest strength lies in its flexibility and ability to incorporate everyday life experiences. As communities and activists participate in the process and draw out alternative visions of a healthy, safe environment based on an ethic of care, they can potentially influence how the other parties traditionally view their interests. The objective is to create a forum that allows for the free flow of ideas that questions traditional notions of corporate cultural images and stories. An ethic of care informed model of mediation represents a way of giving voice to people in their own language and images that for many years has gone unacknowledged and undervalued in traditional public comment arenas or courtrooms. Such expressions are usually opposed to and counter the themes presented by corporations about markets, economic growth and values, but mediation would allow for these discussions to at least take place in a non-adversarial, non-threatening atmosphere.

As a first step, the proposed model of mediation would force the parties in determining the ground rules to examine their own assumptions around the issues of environment, human and non-human health, public interest etc.. As the parties become more involved, they would potentially see the contradictions in their actual policies and

actions and develop solutions that will be more democratic and responsive to the communities needs. The proposed model of mediation forces parties to take account of the needs and interests of others and may also provide them with information that changes their perception of the problem.

It is proposed that if any conflict resolution process aims at restoring justice, citizens are reluctant to use mediation because they believe that formal justice better fits their framing of the dispute in terms of fairness. It is recognized that the environmental justice movement is not about to give up pursuing some of their concerns in the traditional forum of litigation. However, mediation and especially a process informed by an ethic of care, does meet the movement's demands for recognition and empowerment. To date, environmental justice initiatives may rightfully resist mediation endeavours on the basis of a suspect quality in the process. However, success runs the risk of being limited in traditional litigation settings as well. The proposed model provides a workable alternative to conventional approaches and is a process that the movement should consider adopting.

We can only care for the environment if we have a particular relationship with it. The proposed model demands that parties discuss this relationship openly and honestly. If mediation develops more consistent standards of practice and an interactive relationship between parties and their representatives, it is argued that disputants, especially those pursuing environmental justice goals, would be eager to try mediation. As a result, mediators must develop a set of skills that will help to gently focus the

discussion on main issues. In addition, Carpenter and Kennedy have suggested that before initiating meetings, mediators must familiarize themselves with the what the environmental issues are.³²⁸ An ethic of care adds to this in that mediators should also be aware of who the people are that are involved. They need to understand the forces motivating each group and the role that past grievances may play in the conflict.

Within the context of environmental mediation more specifically, community participation within the traditional approach to waste facility siting has been characterized as technocratic and top-down. Despite references to multiple publics or a multiplicity of values, the "community" has been conceived as a monolith whose best interests can be translated by experts.³²⁹ Critics have maintained that participation has meant consultation or "input", while experts determined what is best for the community. Hence, the optimal result for the community is believed to be objectively determined, through such decision aids as risk analysis, environmental assessment. All of which are highly technical and arguably exclude regular people from genuine involvement.³³⁰

As mentioned, increasingly more open procedures enable the public to oversee the administrative process (i.e. impact statements, "transparent processes", plain language laws, written decisions etc.), however, while public hearings allow the general public to express its views, these need not be acted upon. Objectors are then compelled to find

³²⁸ S. Carpenter and W. Kennedy, "Environmental Conflict Management." in R.W. Lake (ed.) *Resolving Environmental Conflict* (Rutgers, NJ: Center for Urban Policy Research, The University of Rutgers, 1985) 288.

³²⁹ Birkeland, *supra* note 289 at 116.

³³⁰ See Estrin and Swaigen, *supra* note 33.

errors in the technical procedures employed by experts which can be legally challenged, at least for negotiation purposes. This, as we will see in the following example, can lead to an escalation of the conflict, as each side prepares to “dig-in” and “win” by any means necessary.

Application of the Proposed Model - A Case Study

i) Background to the Adam’s Mine - Kirkland Lake Dispute

The city of Toronto generates one million tonnes of residential solid waste annually, of which 250,000 tonnes (25 percent) is diverted from disposal through recycling and composting. Toronto’s Agencies, Boards and Commissions and Departments produce and additional 150,000 tonnes per year. As well, Toronto receives 300,000 tonnes of waste for disposal from York and Durham regions and 600,000 tonnes per year from private businesses, for a total disposal volume of 1.8 million tonnes a year.³³¹

Toronto currently disposes its solid waste at the Keele Valley Landfill Site, located in the City of Vaughan. The City supposedly requires a new waste disposal capacity because the Keele Valley Site is scheduled to close in 2002, under provincial direction.³³²

³³¹ Taken from the City of Toronto’s web site, “Toronto City Council Approves Disposal Contracts,” 13 October 2000 <<http://www.toronto.ca/involved/swm/swmmep/htm>> (22 June 2001) 1 at 2.

³³² *Ibid.*

For the depressed mining town of Kirkland Lake, almost seven hours north of Toronto, this garbage means jobs. While Southern Ontario's urban centres boom, Kirkland Lake is bust and has been for quite some time since the market price of precious metals started to drop. Under these circumstances, Toronto's disposables can look almost good to a community dotted with boarded-up houses and closed shops. And so, local business owners in Kirkland Lake, like Todd Morgan, aimed to take Toronto's trash for 20 years, ship it by train and bury it in an abandoned mine on the outskirts of town.³³³

The contentious scheme split the community of 10,500 (and caused heated debate in Toronto) with those eager for desperately needed money and jobs set firmly against those worried that the mine might leak -contaminating the town's water supply and possibly causing another "Walkerton" disaster. Battle lines were drawn - with death threats exchanged and protest groups blocking rail lines and trying to threaten Toronto's 2008 Olympic Games bid.³³⁴

Once the waste reached Kirkland Lake, it was to be dumped into the Adams Mine, an abandoned iron ore facility. While modern blueprints usually call for landfills to be lined with layers of clay and rubber before trash is added, this project was going ahead without anyone actually trying to stop incoming water from coming into contact with the garbage. Instead, gravel was to be used to create a buffer between the water and the

³³³ See V. Smith, "The Politics of Garbage," *Eyenet* 21 September 2000 <<http://www.eyenet/eye/issue/issue-09.21.00>> (22 June 2001) 1 at 1.

³³⁴ *Ibid.*

garbage, and contaminated waste would be pumped out through pipes before it was purified and then released back into the environment.³³⁵

Even if the process never mechanically broke down, rainwater was going to always be contaminated before it was cleaned. As a result, critics were fearful that the pit could potentially leak contaminated groundwater into nearby rivers and lakes. Todd Morgan (the main business developer), was quoted as saying the possibility of bad run-off was unlikely, but that he could not guarantee anything. "There's never a project in the world that you can say, absolutely guaranteed, 100 percent - never, never - you can never say that a plane won't fall out of the sky."³³⁶

Although at no time was any type of mediation or facilitative process used, I contend that a mediation process informed by an ethic of care could have gone a long way to alleviate community concerns and tensions and could have also offered opportunities for better solutions. The vehement public opposition, not only in Northern Ontario, but also across Canada, called for intervention (or at least participation) at the federal levels of government. The project was to affect not only Kirkland Lake residents, but also First Nations citizens and impacted inter-provincially, with the natural watercourse flowing directly through both Ontario and Quebec.³³⁷ Newspapers reported that a number of protesters were looking at violent means of stopping the garbage. There had even been

³³⁵ *Ibid.*

³³⁶ *Ibid.*

³³⁷ Adams Mine Info Site, [webpage] October 2000 <http://www.Adams_mine.com> (12 June 2001) 1 at 1.

threats of boycotting businesses that supported the project.³³⁸ In what follows, I argue how a commitment to mediate from an ethic of care perspective could have transformed this conflict into a co-operative, relationship-building experience.

This example was chosen for a number of reasons. The most obvious was that it raised several recent environmental justice issues in a Canadian context. Not only would the facility have potentially placed local and surrounding residents at risk, but it would have permanently altered the terrain of this small rural town. “Why should these risk and inconveniences be forced on us?”, they asked, “while the rest of the province suffers nearly nothing and in many cases benefits from the removal of waste from their areas?”³³⁹

Final acceptance of the facility was not contingent on the outcome of any kind of citizen participation in a local referendum. Justice issues were also raised as to whether the Adam’s mine was technologically sound and Kirkland Lake’s residents persistently questioned the justice of decision-making that imposed risks on them without asking for their participation.³⁴⁰

ii) Participation of Affected Parties

The first controversy to erupt in the public consultation process was the City of Toronto’s decision to not recognize a number of community representatives who sought a place on the Public Liaison Committee (PLC). The individuals represented communities

³³⁸ Smith, *supra* note 333 at 1.

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

who were interested and believed they could be affected by the landfill proposal. Most were from farming communities to the south of the site. Other representatives represented environmental groups with a proven history with the landfill issue. Don Wright, a representative from a neighbouring township, commented when he was told to leave the PLC table, “My people are not represented. The only people represented here are the people of Toronto.”³⁴¹

Initial support from residents for further work on the Adams Mine proposal came from a carefully worded referendum in the community of Kirkland Lake where residents were not asked to vote on whether they wanted the waste facility, but whether they wanted an environmental assessment done. Temiskaming District MPP David Ramsay has pointed out that many voted “yes” did so because they believed that after the environmental assessment they would still be in a position to vote on whether they wanted the landfill. It soon became clear that such a vote was not going to take place.³⁴²

A model of mediation informed by an ethic of care would not allow for the deciding of someone else’s future without having heard from the residents most affected by the decision. An ethic of care calls for inclusiveness: the integration of voices of local citizens, children, classes, indigenous cultures and other species often marginalized in traditional forms of mediation or public participation. If legislation for a “right to participation” by way of mediation was to be enacted, citizens would have been able to

³⁴¹ Griffin, *supra* note 309 at c. 5.

³⁴² *Ibid.*, at c. 4

claim a right to information. The proposed model sees humans as interdependent with community and nature. This would validate concerns that are largely disregarded in mainstream dispute resolution, such as, a sense of well being, contact with nature and a healthy safe environment.

Linked to greater inclusion of parties in mediation is the issue of the quality of participation to be expected by the parties. There were many criticisms around the consultation process regarding the flow of information, the amount of time for review and the accuracy of the information provided by the Public Liaison Committee.³⁴³ Again, as part of the legislative reforms, a right to accurate information in mediation proceedings would have given the mediator the power to ensure that information was being readily exchanged in a timely fashion as agreed at the outset by the parties in their ground rule statements. If the mediator had doubts as to the accuracy of the information, steps could have been taken in the interest of fairness to halt the proceedings until the appropriate party agreed to be more forthcoming and honest.

There is evidence to support the idea that citizens care deeply about public life and their communities. Studies show that people will become involved when they have a sense of belonging and they see that their voices make a difference.³⁴⁴ This implies that people need accessible places to engage one another productively and safely, to learn the concerns of their neighbours and to speak their own concerns.

³⁴³ *Ibid.*

³⁴⁴ See The Harwood Group, *Citizens and Politics: A View from Main Street America* (Dayton, OH: The Kettering Foundation Press, 1991).

An ethic of care seeks to nurture a stronger democracy by helping to constitute and support communities on local, provincial and national levels. It seeks to establish relationships that empower people to articulate their needs freely and explore differences. It moderates powerlessness and alienation by insisting on inclusion and participation. It opposes the “us” versus “them” mentality which too often accompanies environmental conflicts by offering recognition of a shared humanity and purpose.

iii) Privileging Local Knowledge

An ethic of care approach offers more than just gaining access to participating in a mediation. A model of mediation informed by an ethic of care would have not only allowed for the citizens of Kirkland Lake to participate, but would have also recognized the community residents as experts and validated their experiences and knowledge. For example, on an official visit to the Adam’s Mine site - the main business developer was quoted as saying to the various business interests and local government officials present that the “site was for so long dormant its lush vegetation has grown back in. Some argue that it is now a lake.”³⁴⁵ In response to what was clearly an over estimation, a worker named Harry, the mine’s only employee for the past 11 years, replied, “It may be hundreds of feet of trapped rainwater now, but I’ll never be able to fish in there on my lunch hour.”³⁴⁶ It may not have been a scientific form of expertise, but Harry more than

³⁴⁵ Smith, *supra* note 333 at 6.

³⁴⁶ *Ibid.*

anyone, knows what the site is and will always be. This type of local knowledge would normally be dismissed in any negotiations over the potential plan for the land. A model of mediation informed with an ethic of care would have recognized that an employee on-site for that length of time - who is familiar with the history of the mine - may have had some other valuable knowledge to impart regarding the safety and health of the site. An ethic of care values all forms of knowledge and stresses that it is vital for citizens to make sure that traditional and community wisdom is part of the process. Harry may have known about how wildlife and other former employees had already been adversely affected previously. He may have offered a perspective that highlighted how the community has already suffered enough in the name of progress and development.

In addition, local farmers also found it difficult to accept that their high water demands created by their agricultural activities in the "clay belt" area could be supplied by the filtration technology being recommended. They had spoken with old mine employees in the community and were aware that large fractures in the rock were present long before the geological experts discovered the cracks.³⁴⁷

Traditional frameworks for decision-making that are based on wisdom residing in either professionals or citizens are inherently divisive.³⁴⁸ On the one hand, the characteristics of "care-giving" and of "taking care" in environmental mediation would recognize the intrinsic worth of all parties, including diverse forms of knowledge in

³⁴⁷ Griffin, *supra* note 309 at c. 2.

³⁴⁸ Birkeland, *supra* note 289 at 113.

decision-making that may contribute significantly to greater environmental justice. This process could benefit all parties, as well as improve ecological efficiencies and reduce conflict by giving the community a sense of ownership of the planning and design process. Mediators approaching the process from the proposed model would emphasize “competence” in care by encouraging citizens to stand by what they know to be true and not feel compelled to demonstrate that truth in terms that the process considers as traditionally being “legitimate” or superior. Mutual obligations, such as listening to each other and respecting each others’ association with the landfill would be encouraged by the mediator. As a result, (re)building trust is possible, especially where initial mistrust is directed towards a faceless government department or corporation which subsequently acquires a personal face through interactions with the community over time.

On the other hand, Mayor Lastman of Toronto decided unilaterally to reject assertions that the mine disposal plan posed a threat to the environment. Even though the technology was untested and had not been up and running before³⁴⁹, he believed that Council needed to move ahead for the sake of “time constraints.” He conceded that he did not know where the city could find fifty million dollars a year to pay for the development of new methods of disposal.³⁵⁰

In some sense, this call for an ethic of care is also a call for a certain kind of community. In the case of Kirkland Lake, it could lead to the extension of surrounding

³⁴⁹ Smith, *supra* note 333 at 6.

³⁵⁰ Z. Ruryk, “Toronto Trash Northbound to Kirkland Lake”, 3 August 2000
 <http://www.canoe.ca/AllAboutCanoesNewsAug00/03_trash.html> (10 May 2001).

areas that could potentially be affected by the transport of waste, such as the aboriginals living in nearby Temiskaming. Sources indicated that native people felt “short-changed of their rights and justice”.³⁵¹

Carol McBride, the Chief of Temiskaming First Nation, near Kirkland Lake, warned at an unofficial public gathering at City Hall, that to go ahead with this plan would be to ignite a “firestorm”. What was noteworthy here is that it appeared that she was not simply speaking for her own Anishnabe people but for many concerned non-native residents of the area. She was quoted as saying, “You will not bring garbage into our traditional territories. This country has taken too much from the Aboriginal people. We have very little. You are planning to take away our culture, our tradition and our future generations.”³⁵² McBride and a group of protesters scuffled with guards and police and on at least three occasions were dragged from the city hall chamber during the protest.

People in the proposed model of mediation would discover how to move beyond intimidation, coercion and litigation to get their needs met. Even with current models available that improve on legislative processes (an interest-based approach, for example), it is clear that the absence of aggression is not enough, nor is the presence of fairness. The quest for relatedness-connecting with others in ways that affirm both oneself and the other is the next step in dispute resolution.

³⁵¹ R. Montour, “Down in the Dumps”, *Eastern Door* 9:37 October 2000 <<http://www.easterndoor.com/Archivesx/9-37/9-37-editorial.htm>> (12 May 2001).

³⁵² *Ibid.*

iv) Broadening the Scope of Discussion and Possible Solutions

A model of mediation informed by an ethic of care aims to enable citizens to question existing assumptions about the traditional decision-making authority by making no topic “off limits” for open informed discussion. The process attempts to broaden the focus of facility siting to include issues other than narrowly technical considerations of efficiency. Studies of mediation have shown that once the issue has been defined, usually by the more powerful party, it was difficult for a contesting or different perspective to get a fair hearing.³⁵³ Narrowing the scope of the mediation offers no opportunity to re-formulate or re-define the conflict. In theory, the odds are against the least advantaged parties.

The Kirkland Lake decision came after more than ten years of former Metro and provincial governments attempting to find a long-term solution. An ethic of care informed model of mediation with its legislative reform recommendations would have had parties involved years ago. It is quite possible in that time that alternatives, such as reducing waste, composting and recycling could have been developed and implemented. Many argue that Torontonians are in the habit of making too much trash and that they need to look at diversion programs.³⁵⁴

³⁵³ See Harrison, *supra* note 255.

³⁵⁴ Smith, *supra* note 333 at 7. Halifax, for example is leading the way with an 80 per cent reduction. Edmonton is at 70 percent, but Toronto is only at 25 per cent as of October 2000. Even though Toronto is doing things in terms of composting, many believed that the Kirkland Land project gave no initiative to recycle.

This initial site selection process would have also be included in the mediation discussions. The Adam's mine was selected as a preferred site because it was supposedly a "willing host". However, given the degree of local opposition to the proposed landfill it is reasonable to conclude that a true willing host community did not exist. Besides their being no clear understanding or definition of the notion of "willingness" at no time were the local opposing residents given the opportunity to raise questions around the determination of their region as a "willing host" in the first place.³⁵⁵ In the interest of environmental justice, the question of who speaks for the Township needed to be addressed. Perhaps a local service board, or a taxpayers association made up of concerned citizens could have been allowed to represent the Township and thus speak to whether the township was willing or not. Again, there needs to be clear guidelines established under these circumstances. Serious environmental justice issues are raised when willingness is based on agreement by only a municipal council and a landowner who is willing to sell land. The proposed model would ensure that issues of social equity and social fairness were given the opportunity to be voiced in mediation discussions. Mediators, as part of their role in facilitating discussion, would allow for the concerns of previously excluded parties to be heard and taken into account.

Another concern was that Kirkland Lake had initially been promised much more than a dump - namely a recycling facility and twice the number of jobs.³⁵⁶ The facility's

³⁵⁵ Griffin, *supra* note 309 at c. 4.

³⁵⁶ Smith, *supra* note 333 at 1.

size, purpose, safety standards and so on should have been made part of the discussions. Mediators would have pointed to developers need to recognize their “responsibility to take care” in the project and would have had to tailor their proposal to specifications determined by the host community, thus avoiding last-minute changes of facilities proposed by developers based on such ethic of justice criteria as efficiency and profitability.

Based on the definition of an ethic of care proposed at the beginning of the chapter, they would have also needed to address issues of “competency” in care-giving. This would have allowed parties to openly discuss concerns around possible contamination to the ground water. Citizens fear of risk could have potentially been abated by having the final agreement include clauses that dealt with safety mechanisms and even future clean-up procedures, if necessary. In other words, recognizing that the relationship of developer and citizen, human and non-human would be inextricably connected for many years to come.

There were also details of transporting the garbage that were of issue to many people that were never discussed formally. The waste was to travel through lands cover by the Robinson-Huron Treaty. While a 150-year-old agreement protects native hunting and fishing rights along the way, First Nations representatives feared that waters near the rail line could be affected.³⁵⁷ Their concerns were never addressed by any level of government and felt their traditional land claims over Adams mine were being ignored.

³⁵⁷ *Ibid.*, at 6.

Even if this dispute had been directed to mediation by the Minister of the Environment, current legislation does not stipulate that the Minister is obligated to take into consideration their claims and concerns. A mediation informed by an ethic of care would have allowed for a discussion to take place by permitting the parties to decide the topics of priority at the outset.

v) Development of Greater Corporate Social Responsibility

According to the definition of an ethic of care described above, parts two and three dealing with responsibility and competency in care-giving could lead to corporations and other business entities conducting themselves in a fashion that makes them accountable to society as a whole for their choices, underpinned by the premise that corporations have responsibilities to the wider community, not just their owners and shareholders. Slowly companies are in some ways already coming to realize that financial responsibility to shareholders is dependent, at least in the long term, on responsible environmental management, safety and responsiveness to societal needs and demands.³⁵⁸

As public and private waste corporations are experiencing difficulties in finding landfills, it appears as though some have adopted a strategy of identifying powerless,

³⁵⁸ Despite the dominance of “economic rationalism” in developed countries, with its connotation of remorseless pursuit of profit, the idea that corporations are responsible for more than just shareholders began to gain ground in the 1990's R. Tomasic, “Corporate Crime and its Regulation: Issues and Prospects,” in D. Chappel and P. Wilson (eds.). *Crime and the Criminal Justice System in Australia: 2000 and Beyond*. (Chatswood:

economically depressed communities. There needs to be a legislative examination around the issue of exporting garbage beyond a municipality's jurisdiction. The export of garbage raises not only technical concerns, but environmental justice and moral concerns as well. The implications of allowing communities to site landfills far from the source where the waste is generated could potentially lead to an out-of-sight, out-of-mind attitude. With an ethic of care's notion of taking responsibility in care-giving and receiving, waste management should promote the 3R's (reduce, reuse, recycle), not undermine them. If garbage is to be exported, then clearly the idea of a "willing host" is critical to a fair siting process and therefore open to discussion in a mediation process.

In Ontario, the overwhelming responsibility for dealing with used materials and their associated wastes rests with municipalities.³⁵⁹ Again, the proposed model would see responsibility lying in the producer of the product to develop disposal and recycling programs for consumer packaging. A key component of producer responsibility is the requirement for industry to take back what it produces after the consumer is finished using it - in other words accept responsibility.³⁶⁰

Unfortunately, we do not live in an ideal environment. We live in a world inherited from past generations and we also live in an industrialized society. Mediation of such issues, informed by an ethic of care, would have the mediator emphasize how all humans and especially industrial corporations and the military branches of national

Butterworths, 2000) 259.

³⁵⁹ CIELAP, *supra* note 279 at 2.

³⁶⁰ *Ibid.*

governments play a part in producing waste and that everyone must share the burden of our society's waste, not just the poor and minorities.

This is not to say that the proposed model would allow any environmental issue to be considered. With the recognition that an ethic of rights is also important for maintaining standards of fairness - not all grievances would be created equal. The terms of the relative risk and cost of such environmental hazard would have to be weighed in a preliminary discussion with all the relevant parties involved.

vi) Implications of Proposed Model for Power Imbalances

The ethic of care would allow for a break down of the traditional binary structures of "us versus them" - allowing everyone to see that the local community is not only local, the local is not necessarily powerless or even less powerful. The ethic of care does not assume that because something is framed as local and unique problem that it does not carry farther reaching national or possibly even global consequences. Peta Bowden argues that true caring is about extending our interests beyond local concerns, and breaking the boundaries between public and private. Thus, success in understanding the practice of being a citizen depends on the recognition that we are strengthened and supported by "caring" values.³⁶¹

³⁶¹ P. Bowden. *Caring: Gender-Sensitive Ethics*. (New York, NY: Routledge, 1997) at 150.

In addition, the proposed model, by incorporating an ethic of justice, attempts to maintain an awareness of the critical role of power in environmental disputes. The answer to power imbalances is mediator action. Having the mediator acknowledge interdependence and the value of each participating member is important, but an ethic of justice speaks to the nature of the specific relationships. As a result, the mediator keeps a critical, open stance and assists the parties in developing ground rules for how to deal with manipulative behaviour. Information deficiencies can be counteracted by mediator action such as including rules regarding open sharing of information between groups, allowing use of technical expertise from government agencies or allowing experienced environmental groups to offer consultation.³⁶² Sharing of information is likely to increase as trust is built in the process. Proponents of a project have an incentive to share because disseminating information can clarify misunderstandings about the proposal and potential environmental impacts.

Environmental disputes often pit powerful economic entities interested in exploiting the wealth of the environment against individuals and organizations with less economic resources. This economic imbalance does not mean the stronger interests always prevail in environmental disputes or that there is necessarily an overall power imbalance. It does mean however, that strategies such as protests, civil disobedience and media campaigns designed to discredit corporate practices or activities and calls for

³⁶² E. Smith, "Danger - Inequality of Resources Present: Can the Environmental Mediation Process Provide the Answer," (1996) 2 *Journal of Dispute Resolution* 379 at 392.

boycotts, as seen in Kirkland Lake, often are employed to counter one party's superior economic strength. These strategies can exacerbate strained relations and contribute further to the intense adversarial, win-lose nature of environmental disputes. In Kirkland Lake, people were:

...afraid of arguments and fights. There have been screaming matches. It's just easier not to talk about it sometimes, so a lot of people are afraid to say what they think. Some will respect that you're on a different side. At the same time, somebody will come in and say, 'You'll never see my face again.' Those kinds of things can hurt businesses in a town like this.³⁶³

The Kirkland Lake proposed waste facility deal eventually fell apart in October 2000, following furious debate over the environmental impact the garbage would have on area drinking water. While the official stance was that the deal actually collapsed over liability issues, no vote was taken by council to formally kill the plan until January 2001. The "official position" of the City Council was that new information had come forward and that the terms of the contract (that had never been released to the public) could not be agreed upon. It does appear that public pressure did have a direct influence on the final decision, however a mediation process informed with an ethic of care would have at least provided the opportunity to improve participation and develop shared understandings that could have potentially enhanced environmental justice. Participation as a principle of environmental justice in an model of mediation informed by an ethic of care relies on genuine involvement where the affected human and non-human communities have a

³⁶³ Smith, *supra* note 333 at 4.

voice, are heard and engage in ongoing, open deliberations. Achieving this principle often relies on incorporating forms of knowledge apart from technical science in decision-making.³⁶⁴

In the case of Kirkland Lake, it could be argued that everyone lost. The community received none of the employment opportunities they desperately needed and Toronto was left trying to find yet another host community at increased time and expense to taxpayers. Traditionally, monetary incentives, are offered to attract host communities.³⁶⁵ Under this approach individuals incur moral costs by showing that their approval can be bought. The proposed model of mediation with its emphasis on fairness and communal sharing could have possibly generated some discussion of non-monetary compensation that would have appeared less self-interested.

This section has attempted to outline how a model of mediation informed by an ethic of care could have enabled the citizens, business owners, government officials of both Kirkland Lake and Toronto to see the problem of land-use planning as a collective responsibility. While there is a long history of public participation in waste facility siting, and progress in the area of improving participation methods, the translation of those processes into government level decision-making has been limited. It is recognized that the participatory processes discussed in this chapter are not exclusive to the domain of an

³⁶⁴ See W.A. Shutkin, "The Concept of Environmental Justice and a Reconciliation of Democracy," (1995) 14 *Virginia Environmental Law Review* 579; J.A. Perrolle, "Comments from the Special Issue Editor: The Emerging Dialogue on Environmental Justice," (1993) 40 *Social Problems* 1.

³⁶⁵ *Ibid.*

ethic of care. For example authors like John Dryzek,³⁶⁶ Frank Fischer³⁶⁷ have been influenced by Habermasian theories of critical theory and communication. These authors seek practical ways to create community participation fora in which citizens can come together to discuss issues of concern, in a situation where discussion is influenced by the force of the better argument, and not by power or wealth.

In addition, there is a second school of thought which shares many of the same aspirations of an ethic of care in communicative land planning. Authors like Iris Marion Young³⁶⁸ argue that many approaches to public participation, including the discursive school outlined above, simply end up privileging those people who feel most comfortable with the western rational adversarial model of argument. Instead, she advocates achieving a more inclusive public discussion by ensuring that voices coloured by emotion and story-telling are recognized as valid and authoritative.

However, I would argue that the proposed re-defined model of mediation informed by an ethic of care does take dispute resolution one step further. It not only challenges the dualistic nature of positioning an ethic of rights in contrast to an ethic of care, but it attempts to elevate and incorporate a way of knowing and resolving disputes that has been traditionally devalued as a result of being labelled feminine and therefore

³⁶⁶ J.S. Dryzek. *Discursive Democracy: Politics, Policy and Political Science* (Cambridge: Cambridge University Press, 1990).

³⁶⁷ F. Fischer, "Citizen Participation and the Democratisation of Policy Expertise", (1993) 26 *Policy Sciences* 165.

³⁶⁸ I.M. Young, "Communication and the Other: beyond deliberative democracy", in M. Wilson and A Yeatman (eds.) *Justice and Identity* (Wellington: Bridget Williams Books, 1995).

inferior. Environmental mediation is in need of both ethics: the ethic of justice to maintain a minimum degree of fairness, enshrined in process rules and rights and an ethic of care to enhance the quality of life and humanity to a position where right and wrong are understood more out of compassion than legalism.

This new approach challenges mediators to consider the justice of decision-making procedures in environmental disputes (how decisions are made, who gets heard and with what authority). It also serves to remind us that if we want to achieve effective institutional reform in environmental issues it is not enough to introduce more opportunities for public participation, we need to ensure that the outcomes are equitable and that the participatory procedures are more inclusive and just. To the extent that business developers currently consider community interests, advocates in the legislature, the business community and city planning official, generally assume that any economic development will benefit the residents.³⁶⁹ This assessment leads to the assumption that public participation in land-use planning is unnecessary since community interests are adequately represented by well intentioned advocates in the local government.

Conclusion

In this chapter, I have attempted to show that a model of mediation informed by an ethic of care can go a long way towards the resolution of environmental disputes. Environmental mediation has tremendous potential for enhancing environmental justness

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See for example Smith article quoting businesses and Town Councillors in

in decision-making. In its broadest sense, the ethic of care asks parties to look at what they can do to better care for the environment. While legislative reforms may formalize an otherwise flexible process to some extent, it allows greater opportunities for previously marginalized or excluded groups to challenge the assumptions and terms of reference embedded within traditional approaches to public participation.

CONCLUSION

The proposed model of environmental mediation informed by an ethic of care offers a bridge between physical realities like ecosystems, human physiology, and chemicals on the one hand, and deeply held values, such as human beings' place in the natural world, relations to future generations, and democratic decision-making, on the other. This thesis has attempted to show that to participate effectively in the interpretation and development of environmental conflict, the mediator must understand both the physical realities, the values, and the legal structures that connect and influence the parties. There is always a new challenge for the environmental mediator -- a new combination of science, technology, culture, law, economics and politics.

Chapter One outlines that there is a growing awareness that adversarial legal processes may worsen rather than help environmental conflicts. As society becomes more diverse, Canadians are increasingly seeing themselves not just as individuals, but as members of groups and communities. Yet much of the law continues to be based on the assumption that only individuals matter.

Traditionally, judicial procedures have presumed that the goal of litigation is to

discern facts that relate to a particular situation or conflict and then to identify the law that applies to these facts. Many of our most important societal issues can only imperfectly be forced into this model. In most environmental disputes there are multiple parties to a conflict. The issues that divide parties are often not two-sided, but are multi-sided.

Chapter Two sets out a theoretical framework for environmental mediation informed by a unique awareness of both the perspectives of an ethic of care and an ethic of justice. Carol Gilligan's work and the subsequent work of many feminist scholars has been significant in critical legal thinking because it presents an approach to solving moral conflicts that emphasizes the problem of the formalistic judicial approach to North American legal systems. A great deal of debate has focused on the apparent claim that the use of the ethics of care and justice are correlated with gender. But an arguably more important part of Gilligan's contribution is the finding that there exists a mode of reasoning - not intuition or a gut feeling, but a form of genuine reasoning - that is significantly different from the dominant rights-based approach.

The third chapter examines the influential critiques of mediation generally and environmental mediation more specifically. Environmental mediation is seen as inescapably political based on power imbalances that can never be denied or fully eradicated. However, this insight should not be taken as an indication that the goal of making environmental conflicts more humane and more caring is irrelevant or insignificant.

By examining the recent dispute over the siting of a waste facility in Kirkland Lake, Ontario, the final chapter proposes a new understanding of how we can potentially change the processes by which environmental conflicts are resolved. It attempts to show that embracing diversity among participants opens up the possibility of finding or forging a commonality that is not premised on hierarchy or exclusion. This can only occur if the participants include those groups traditionally left out of the negotiating process and who are not considered just observers, but rather producers and contributors of knowledge. This model of mediation proposes that as more views are taken into account, the less likely we are to be locked into one perspective. In addition, the model attempts to capture within its meaning the fundamental values of fairness, equality, interdependence and community.

The model offers a framework for thinking about and responding to environmental conflict, rather than a unified theory or philosophy. Justice, as it is defined within a model of mediation informed by care, means achieving a situation in which the resolution to the problem is considered to be fair, right and appropriately based on the given context or circumstances. Justice is therefore seen as flowing from experience or as flowing within care. It involves a search for conflict resolution in the eyes of those most immediately involved in the conflict. As argued previously, much of traditional adjudication rests on objective facts and abstract principles. By searching for truth within a care model, with an emphasis on connection and interdependence, parties are better able to comprehend each others' interests.

It has often been argued that there is a role for the community in the resolution of environmental disputes. This approach is designed to accommodate such cases where communities desire to use mediation to prevent a potential harm, such as in the siting of waste facilities. A conflict over where to locate a landfill may involve relationships between members of different industries, labour organizations, environmental organizations, aboriginal peoples, different levels of government, citizen's organizations and other concerned individuals or groups. Often competing values are at stake and may clash as parties attempt to shape the definition of and response to the conflict.

The proposed model brings together all those individuals and groups affected by the conflict, including those with the power to make the decisions. As much as possible, the participants must be provided with the freedom to control the process, to establish the boundaries of the conflict and to establish rules about how the process should unfold.

The future of mediation will largely depend on its receptivity by its potential users - professional groups and communities. Information is required to dispel the myths of mediation. Professional groups, such as the legal community, who view their vested interests as being threatened by the emerging process of mediation, have to be reassured. The legal system is not undermined by mediation. Indeed, the legal system and mediation are complementary, rather than competing or contradictory, processes. Both seek to provide a solution to disputes and each has its place. Further documentation and comparative analysis of the Canadian experience is needed to support the role of an ethic of care in environmental mediation. While case studies and conceptual thinking are

important, the next step would be to test the proposed theoretical framework on actual environmental mediation cases involving the public interest. Survey results could then be used to predict the impact of the model on future environmental mediation processes.

Participating meaningfully in environmental mediation requires a lot of time and energy. This thesis makes a particular point of emphasizing that all forms of knowledge should be valued and recognized. It is vital for citizens to ensure that traditional and community wisdom is part of the process. Although, having a mediator and parties committed to the proposed framework will not always guarantee that all concerns are taken into account, it represents a significant step in the right direction.

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