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**A NORMATIVE FRAMEWORK FOR ENVIRONMENTAL POLICY:
STEWARDSHIP AND THE ETHIC OF CARE**

by
PATRICIA ANNE MITCHELL

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Arts

Department of Law

**Carleton University
Ottawa, Ontario
March 26, 1999**

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**A Normative framework for Environmental Policy:
Stewardship and the Ethic of Care**

Submitted by Patricia Anne Mitchell, B.A. (Hons)

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

Thesis Supervisor

Chair, Department of Law

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March 26, 1999

ABSTRACT

Scientific research on the state of the global environment is providing evidence that business as usual behaviour is no longer satisfactory for ensuring a sustainable future. A new ethical framework to guide human behaviour is needed. This thesis argues that incorporating an ecofeminist ethic of care into our traditional justice-based models will be necessary for humans to move beyond dominion over thinking about the natural world to become responsible stewards. Promoting a care-justice based legal stewardship in Canadian society by incorporating the public trust doctrine into our environmental protection regime will help us to become more responsible for the natural world that we depend on for our sustained existence and the existence of our children, grandchildren and great-grandchildren. We have come to a point where engaging with an ethic of care at every level of our societal structures is no longer an option but a necessity.

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TABLE OF CONTENTS

ACCEPTANCE FORM	ii
ABSTRACT	iii
ACKNOWLEDGEMENTS	iv
TABLE OF CONTENTS	v
INTRODUCTION	1
1.0 ECOFEMINIST CARE AND ENVIRONMENTAL DECISION-MAKING	11
1.1 Introduction	11
1.2 An Ecofeminist Ethic of Care	16
1.21 What is Ecofeminism?	16
1.22 Links Between Women and Nature	20
1.23 Ecofeminist Care	25
1.3 Care and Justice for Nature	33
1.31 Challenges Faced by Ecofeminist Care	33
1.32 Justice – Drawbacks and Benefits	39
1.33 Ecofeminist Care-Justice for Nature	48
1.4 Conclusion	53
2.0 TRADITIONAL MODELS OF STEWARDSHIP	55
2.1 Introduction	55
2.2 Indigenous Stewardship	58
2.3 Religious Stewardship (The Judeo-Christian Model)	63
2.4 Legal Stewardship	70
2.5 Conclusion	83
3.0 STEWARDSHIP IN A COMPLEX WORLD	86
3.1 Introduction	86

3.2 Traditional Stewardship Models Revisited	87
3.2.1 Nature and Indigenous Connection	88
3.2.2 Keepers of the Garden	90
3.2.3 The Public Trust in Secular Society	93
3.2.4 Care-Justice and Stewardship	99
3.3 Conclusion	102
4.0 CEPA AND THE PUBLIC TRUST DOCTRINE	103
4.1 Introduction	103
4.2 Environmental Statutes and the Public Trust	104
4.2.1 Environmental Law in Canada	104
4.2.2 The Public Trust Doctrine, Its Language and Environmental Statutes	108
4.2.3 Incorporating the Public Trust at the Federal Level	116
4.3 Stewardship Through a New CEPA (Bill C-32)	117
4.3.1 CEPA and its Review	117
4.3.2 BillC-32 and the Public Trust	123
4.3.3 Care-Justice in Canada: Stewardship Today and Tomorrow	127
4.4 Conclusion	131
CONCLUSION	133
WORKS CITED	137
STATUTORY INDEX	147
CASES REFERRED TO	149

INTRODUCTION

As a new environmental student, one may be struck by the very slow pace of earth transformation caused by ice ages, volcanic eruptions, tectonic movement, soil erosion and other physical processes that occur over geologic time. The next realisation may be the absolute frantic pace with which the earth is being transformed at the hands of humans, particularly since the industrial revolution. As the human population continues its exponential growth, natural resources become more rapidly depleted, particularly non-renewable ones, and natural mechanisms that deal with the waste products of development projects are being stretched to their limits. As scientific knowledge progresses, humans are gradually awakening to these limits. The current state of the environment is demanding that humans assess the way they live on the earth and take appropriate action to ensure that those coming in the future will have a quality place to live.

The particular view taken of the human-nature relationship, that is the environmental ethic that one adheres to, determines everyday socio-economic choices that humans face and whether or not they take appropriate action. Environmental ethics are intimately intertwined in many social structures, especially those intended to guide human actions in a less than perfect and very complex world. Environmental ethics are, or should be, part of the legal structure that controls human activities and guides choices about the natural resources that sustain human existence and progress. Various forms of environmental ethics have guided human behaviour since humans inhabited the earth. In

more recent times, new, and in some cases, radical ethics have emerged to deal with the serious choices that humans must make to ensure a sustainable planet. It is important to realise that “sustainability has become the ultimate challenge to the energy and creativity of the human race”.¹

Sustainability must come in many forms and in many places. Some people argue that sustainability will come from technological innovation. Technology has been acclaimed as the saviour for everything from feeding the world’s population, to making processes more efficient, to reducing stress on the natural sinks of industrial waste products. It appears, however, that technology has not solved environmental problems, at least in recent times. Lakes, rivers and oceans continue to be polluted by the toxic wastes from industrial sources, fertilisers and pesticides. Trees continue to be cut at rates much faster than regrowth can occur. The climate is growing warmer because of the choices that humans have made since the industrial revolution, with serious implications for coastal areas and certain ecosystems. Scientific research is beginning to confirm that environmental problems and ecological systems are more complex and interconnected with socio-economic systems than was originally thought and that there is much more that needs to be discovered in these areas. In 1992, two of the world’s leading scientific organisations reported that science and technology would probably not be able to prevent “either irreversible degradation of the environment or continued poverty for much of the

¹ Donella H. Meadows, Denis L. Meadows and Jorgen Randers, Beyond the Limits: Global Collapse or a Sustainable Future (London: Earthscan Publications Limited, 1992), xvii

world.”² This abandonment of the technological optimism that dominated most of the twentieth century seems to suggest that a sustainable future may be in jeopardy unless population growth slows dramatically and economic restructuring occurs.³ Other scientists take the warning a step further by arguing that “[a] great change in our stewardship of the earth and the life on it is required, if vast human misery is to be avoided and our global home on this planet is not to be irretrievably mutilated.”⁴ It appears then that human beings must make some alterations to their norms of behaviour related to the natural environment, or in other words, adjust their environmental ethic.

An environmental ethic is a system of values and beliefs used by humans in a more or less systematic way to guide how they make decisions concerning other humans and the natural environment.⁵ An environmental ethic is a guide to who or what has moral standing and also a guide for how to adjudicate when conflicts occur. An environmental ethic has legal and political implications for every-day decision-making. Environmental ethics have appeared in history in many sizes, shapes and flavours. Environmental ethics range from anthropocentrism, which in today’s world is often referred to as shallow ecology, to those related to more radical ecophilosophies such as

² Royal Society of London and the U.S. National Academy of Sciences, Population Growth, Resource Consumption, and a Sustainable World, (London and Washington: 1992) quoted in Lester R. Brown and Hal Kane, Full House: Reassessing the Earth’s Population Carrying Capacity (New York: W.W. Norton & Company, 1994), 30.

³ Lester R. Brown and Hal Kane, Full House: Reassessing the Earth’s Population Carrying Capacity (New York: W.W. Norton & Company, 1994), 30.

⁴ Union of Concerned Scientists, “World’s Leading Scientists Issue Urgent Warning To Humanity,” Washington D.C., press release, November 18, 1992 quoted in Lester R. Brown and Hal Kane, Full House: Reassessing the Earth’s Population Carrying Capacity (New York: W.W. Norton & Company, 1994), 30.

⁵ Donald VanDeVeer and Christine Pierce, eds., People, Penguins, and Plastic Trees: Basic Issues in Environmental Ethics, (Belmont: Wadsworth Publishing Inc., 1986).

deep and social ecology and ecofeminism. Ethics cross many boundaries of interaction and complex social and natural systems and come into play any time economic, political, legal, and social decisions are made. These decisions ultimately have consequences for both natural and social systems. An ethic that appears to hold a great deal of promise for social and environmental problems is the ethic based on care, respect and responsibility as expressed by ecofeminist theorists and activists.⁶ An ecofeminist ethic of care seems to have the potential to breakdown nature/culture, male/female and other dualisms that perpetuate the domination of certain humans and the natural environment by other humans.

Ecofeminist theories have evolved from pressing political and practical concerns about women and the environment.⁷ Many ecofeminists have adopted the ethic of care as an alternative model of normative decision-making to the more traditional justice-based models that have dominated Western social thought for most of recent centuries. Justice models are based on autonomy and separation where rules and rights are applied in a uniform way regardless of the circumstances of a problem. Care models are based on connection, relationships with distinct but interdependent others and responsibilities to take appropriate action, determined by taking into consideration the circumstances of the

⁶ A partial list of ecofeminist writings would include: Carolyn Merchant, "The Death of Nature," in Environmental Philosophy: From Animal Rights to Radical Ecology, eds. Zimmerman, Michael E., J. Baird Callicott, George Sessions, Karen Warren and John Clark. (New Jersey: Prentice-Hall Inc, 1993); Maria Mies and Vandana Shiva. Ecofeminism. (Halifax, Nova Scotia: Fernwood Publications, 1993); Judith Plant, Healing the Wounds: The Promise of Ecofeminism, (Philadelphia: New Society Publishers, 1989); Val Plumwood, "Nature, Self and Gender: Feminism, Environmental Philosophy, and the Critique of Rationalism," in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996); Karen Warren, Ecological Feminist Philosophies (Bloomington: Indiana University Press, 1996).

⁷ Karen Warren, Ecological Feminist Philosophies (Bloomington: Indiana University Press, 1996), xvi.

problem. The care “orientation requires us to examine human structure, institutions, and actions to determine our obligations in light of sustainability”.⁸

Historical connections between the domination of women and the domination of nature require that environmentalism address feminist issues and feminism consider environmental concerns if appropriate solutions are to be found for socio-economic problems in modern, complex societies. This thesis argues that engaging with ecofeminist theory informed by an ethic of care is necessary, but not sufficient, for achieving a sustainable future. This is because ecofeminism explicitly attempts to address the problems and concerns of both women and nature and the connections between them. Moreover, based on readily available evidence that environmental deterioration continues at an alarming pace in the face of traditional justice-based decision-making, ethical deliberations based on care and connection must also be incorporated to provide a more complete model for handling the interconnected and often global problems that challenge society in the late twentieth century. Care must move more into mainstream thinking, away from the softer, more private function of a nice to have, more utopian goal that does not seem particularly applicable to the rights-bearing, justice-based community. While care considerations must not be left out of moral deliberation, care cannot be expected to solve all the problems. Current feminist arguments are moving in the direction of integrating care and justice rather than framing them as opposing sides of a value dualism. The proponents of this view argue that the

⁸ Reed, MG and O Slaymaker. “Ethics and Sustainability.” Environment and Planning A 25 (1993): 727.

two concepts are not mutually exclusive, that they may complement each other in a single process of judgement, or that differences can be bridged by a third concept such as trust.⁹

When informed by modern ecofeminist theory and promoted within society at large, environmental stewardship may provide the desired care-justice framework for making daily complex social, environmental and economic decisions. Legal stewardship,¹⁰ in the form of the public trust doctrine, shows promise as an appropriate care-justice model for modern, complex and secular society. Including the public trust doctrine in Canadian legal statutes, such as the proposed new environmental protection act, Bill C-32,¹¹ would allow the courts to act in an anticipatory fashion to encourage broader acceptance of environmental stewardship in Canadian society. Until an ethic of care is integrated with justice into all levels of society for environmental decision-making, stewardship will remain little more than a warm, fuzzy, feel good model and remain ultimately ineffective at the higher levels of business and government and minimally effective at lower levels of government and the private realm.

This thesis will explore the ecofeminist ethic of care in an attempt to remodel the ancient ethic of stewardship to fit our modern times. It is hoped that this new

⁹ Kathryn Tanner, "The Care that Does Justice, Recent Writings in Feminist Ethics and Theology." Journal of Religious Ethics 24 (Spring 1996): 172.

¹⁰ Legal stewardship, in the form of the public trust doctrine has origins in ancient Roman law, where air, sea and seashore were allocated for public use, were not subject to private ownership and were subject to the guardianship of the Roman people. These public rights carried over into English Common Law. Refer to Constance D Hunt "The Public Trust Doctrine in Canada." In Environmental Rights in Canada ed. John Swaigen. 151-194. Toronto: The Butterworth Group of Companies, 1981 for a valuable discussion of the public trust doctrine. Through the public trust doctrine and trustee statutes governments have accepted certain responsibilities in respect of the trust, including the duty to consider the impact of use decisions and the duty to protect people's common heritage. See Thomas A. Campbell, "The Public Trust, What's it worth?" Natural Resources Journal 35 (Winter 1994): 77-8. Although the public trust doctrine and trustee statutes have experienced a degree of success in the United States, Canadian courts have been reluctant to embrace these stewardship-based principles.

¹¹ The House of Commons of Canada, 1st Session, 36th Parliament, 46-47 Elizabeth II, 1997-98, Bill C-32.

stewardship will assist those who must make the difficult choices facing humans if they are to continue to live a good and comfortable life on a sustainable planet earth.

Although much has been written about ecofeminism and the ethic of care, there is relatively little information on stewardship and virtually none that attempts to connect it with ecofeminist theory. This is the gap that this thesis seeks to fill by critically examining indigenous, Judeo-Christian religious and legal stewardship models using an ecofeminist ethic of care-justice framework and suggesting a new model for environmental decision-making. This new stewardship, in particular in the legal form of the public trust doctrine, is further explored for the implications of applying it to environmental regulation. This work will hopefully add to the overall body of knowledge concerning the relationship between environmental ethics and environmental policy and law.

Chapter one examines ecofeminist care and environmental decision-making. This chapter begins by looking at the origins of ecofeminist thinking, in particular related to links between women and nature. These socially constructed links need to be recognised and made visible because they have been inappropriately used to legitimise and perpetuate the domination of women and nature by men. They also must be recognised because they affect appropriate responses to women's circumstances that are particularly related to their closer social connections to the natural environment, particularly in the developing world. The main argument presented is that it is necessary, although not sufficient, to engage with an ecofeminist ethic of care in order for appropriate solutions to

environmental problems to be found. The second part of the chapter demonstrates how the care and justice models can be integrated to provide a more complete model of ethical decision-making than if each one is adhered to separately. Finally, an ethic of care–justice framework for nature is developed that includes strong human connection with, rather than separation from, non-human nature. This care-justice framework includes recognition of the unique responsibilities and positive duties of caring that human's hold in relationship toward other humans and non-human nature to ensure a sustainable future for many generations.

Chapter two proceeds to outline three representative models of stewardship that have traditionally been more narrowly focused on caring for natural resources such as forests and coastal ecosystems than what may be necessary for more complex societies of today. Indigenous, Judeo-Christian religious and legal stewardship are examined to reveal the various elements that are common to all models, as well as those that are unique to only one. It will be shown that the various models of stewardship have necessary and relevant elements that fit a care-justice framework for guiding environmental regulation, policy and decision-making. These elements must be institutionalised in secular society and not just in religious circles or native cultures in order to be effective in today's modern complex world. This chapter reveals that legal stewardship, in the form of the public trust doctrine, has grown in the United States from a narrow water-based legal instrument to encompass much broader forms of environmental protection. Unfortunately, this is not reflected in Canadian experience

with the doctrine where it remains underdeveloped and the subject of much controversy in secular society.

Chapter three critically examines the various models of stewardship against the care-justice framework to see how they could be adapted into a more promising ethical model for modern, complex societies. This chapter isolates various elements of the three models that fit ecofeminist care-justice thinking and action and brings them together in a new model of stewardship that can and should be applied in modern society in an attempt to find better solutions to environmental problems. The public trust doctrine, informed by the care-justice framework, is shown to be promising as an anticipatory tool to promote the adoption of more care-based decision-making into traditional justice models. The courts are seen as potential promoters of the care-justice framework in secular society, in particular as judges become more comfortable with the use of the public trust doctrine for the protection of natural resources. It is argued that this anticipatory role could become more prominent in Canada if a home for the public trust could be found in Canadian statutory law.

Chapter four follows from these arguments to examine public trust language from various jurisdictions where it is more developed and show how it could be incorporated into Bill C-32. This is the new act to revise the Canadian Environmental Protection Act¹² (CEPA) that is currently undergoing clause by clause discussion by the Standing

¹² Canadian Environmental Protection Act, RSC 1985, c.16 (4th Supp.), first enacted as SC 1988, c.22, as amended.

Committee on the Environment and Economy. Bill C-32 is shown to be a good place to include strong public trust notions even though at present it only minimally captures more weak ideas of public scrutiny of government actions and rights of participation for Canadian citizens in protecting their natural heritage. The chapter concludes by showing how the door has been opened a crack to provide the possibility of finding a place for the public trust doctrine in Canada. However, much more needs to be done before Canadians can claim to have adopted a care-justice ethic by which to live and upon which to base the normative decisions that will ensure a sustainable planet.

1.0 ECOFEMINST CARE AND ENVIRONMENTAL DECISION-MAKING

1.1 Introduction

As the new millennium rapidly approaches, humanity faces environmental and other social problems that are more extreme and are proceeding at a faster pace than ever before in human history.¹ While there is much discussion among academics, politicians and other stakeholders on these problems and their solutions, environmental policies and decision-making still produce poor or undesired results in many cases. For example, global carbon emissions from the burning of fossil fuel continue to increase significantly on an annual basis while approximately 50,000 species per year become extinct globally. Moreover, world population growth continues at an exponential rate, despite commitments to improve or alleviate these situations that were made at the 1992 United Nations Conference on Environment and Development (UNCED) held in RIO.² Some people have proposed that human development is both the cause of and the solution for environmental and social problems.³ While it is widely recognised that the solutions for

¹B.L. Turner II and others, eds., The Earth as Transformed by Human Action :Global and Regional Changes in the Biosphere over the Past 300 Years (Cambridge: Cambridge University Press, 1990). This book brings together many examples of transformations of the earth that have occurred at the hands of human societies since the industrial revolution. It provides an analysis of the state of the environment and its many connections to social systems. It lends credibility to the belief that business as usual is no longer acceptable and that humans must embrace a new environmental ethic.

² Lester Brown, Christopher Flavin and Hilary French, State of the World 1997 (New York: W.W. Norton & Company, 1997). This annual publication examines progress towards sustainable development and documents these and other trends that adversely affect the global environment. It includes many statistical charts and tables on problems such as the prospect of food scarcity, reductions in cropland, chronic disease in developing countries, and poverty.

³ World Commission on Environment and Development, Our Common Future (Oxford: Oxford University Press, 1987). This is also known as the Brundtland Report. This report focussed on the notion that, even though human development has been seriously implicated in contributing to global environmental problems and serious social problems such as widespread poverty in the developing world, further development would be necessary before these problems could be eliminated. The key would be to make development sustainable for all people over many generations. Humans need to make hard choices about how development unfolds so that long-term solutions for environmental and social problems can be determined.

environmental problems need to be sustainable long-term, the popular, yet often ill-defined concept of sustainable development,⁴ is criticised by radical ecologists⁵ for being a continuation of Western Enlightenment anthropocentric and instrumental views of nonhuman nature.⁶ For these critics, any hope of finding a solution to environmental problems will require new social values and structures that recognise nonhuman nature as a full member, or at least an effected partner, in the negotiations.

In the 1960s and 70s, radical ecophilosophy, including deep ecology, social ecology and ecofeminism, developed out of the realisation that anthropocentric and Enlightenment views about the natural environment, especially the human drive for endless material progress, no longer provided adequate norms for preventing pollution and destructive action. Moreover, it appeared to these radical ecologists that norms, such as the need to control nature and other members of society as a means of alleviating material deprivation and the hierarchical and authoritarian structure of society,⁷ were incapable of alleviating pressing social problems related to poverty, food scarcity, and

⁴ Sustainable development is defined in Our Common Future on page 43 as development that “meets the needs of the present without compromising the ability of future generations to meet their own needs.”

⁵ This group, who have cast a critical eye on the human/nature relationship and social structures that are implicated in environmental problems, typically includes proponents of either deep ecology, social ecology or ecofeminism. Radical ecologists differentiate themselves from “reform environmentalists” who address environmental problems but not modernity’s instrumental view of nature and the authoritarian-type political and social structures that tend to accompany this view. Michael E. Zimmerman, Contesting Earth’s Future: Radical Ecology and Postmodernity (Berkeley: University of California Press, 1994), 3.

⁶ Michael E. Zimmerman, Contesting Earth’s Future: Radical Ecology and Postmodernity (Berkeley: University of California Press, 1994), 7. In this critical examination of radical ecology and its ability to propose solutions to environmental problems, Zimmerman argues that radical ecologists have correctly pointed out that the ecological crisis grows from proponents of Enlightenment modernity that have assumed human freedom to be the result of “mastering” the natural world.

⁷ Michael E. Zimmerman, Contesting Earth’s Future: Radical Ecology and Postmodernity (Berkeley: University of California Press, 1994), 2.

human rights. Each of these radical ecophilosophies proposes a different cause and solution for environmental and social problems.

Deep ecologists closely identify themselves with nature and argue that anthropocentric instrumentalism is the direct cause of environmental destruction. For deep ecologists, the appropriate solution for environmental destruction is to set aside large tracts of land to be kept free of human development.⁸ Social ecologists argue that social hierarchy and domination cause the ecological crisis and the solution can be found in local or bioregionally⁹ governed communities rather than large central governments.¹⁰ Ecofeminists blame patriarchy for environmental and social problems. Patriarchy, they argue, is an oppressive social structure that justifies the domination of women and other marginalised groups, as well as nature. Most ecofeminist theorists and practitioners seek to eliminate domination and oppression through non-hierarchical decision-making based on care, respect and responsibility for a self-in-relation with others.¹¹

This wide range of proposed causes of and solutions for environmental problems emphasises how pollution and waste are becoming more and more interconnected with

⁸ George Sessions, "Introduction to Part Two Deep Ecology," in Environmental Philosophy: From Animal Rights to Radical Ecology, eds. Michael E. Zimmerman and others (New Jersey: Prentice-Hall Inc., 1993), 161-170.

⁹ Bioregionalism is a political theory that proposes that human societies should be more closely related to nature and more conscious of their locale or regions. It is a proposal to ground human cultures within natural systems so that human communities can resist distorting the earth. One of the strategies of bioregionalism is to focus on home and community. This focus on home, however, creates a note of caution for women where home has not always been a source of liberation. Karen J. Warren, ed., "Taking Empirical Data Seriously: An Ecofeminist Philosophical Perspective" in Ecofeminism: Women, Culture, Nature, ed. Karen J. Warren (Bloomington: Indiana University Press, 1997), 131-3.

¹⁰ John Clark, "Introduction to Part Four Social Ecology," in Environmental Philosophy: From Animal Rights to Radical Ecology, eds. Michael E. Zimmerman and others, (New Jersey: Prentice-Hall Inc., 1993), 345-353.

¹¹ Karen J. Warren. "Introduction to Part Three - Ecofeminism," in Environmental Philosophy: From Animal Rights to Radical Ecology, eds. Michael E. Zimmerman and others (New Jersey: Prentice-Hall Inc., 1993), 253-267.

social structures in perplexing and complex ways. There is also a general feeling among environmentalists in particular that it is becoming highly questionable whether science, through increased technological efficiency, will be able to provide all the necessary answers to environmental problems in time to avert ecological crisis.¹² If technological change will not provide a total answer, then some other solution to environmental problems is urgently needed. This must be a solution that crosses the many boundaries of complex and interacting economic, social, political and environmental systems, one that is based on an appropriate environmental ethic and interpretation of the human-human and human-nature relationship, and one that translates into appropriate action. This is what ecofeminists seek to provide through theory and action that is based on an ethic of care. While there is considerable debate in feminist circles on the value of an ethic of care, ecofeminists tend to agree that any complete normative framework will need to take account of or include this ethic for solutions to environmental and social problems to be found.

This chapter will show that engaging with an ecofeminist care ethic will be necessary, although not sufficient, for addressing the current ecological crisis. It will argue that in addition to caring principles an appropriate normative framework for environmental policy and decision-making must include justice principles if humans hope

¹² There is much ongoing debate over whether new technological development can keep up with the current pace of human transformation of the environment so that ecological crisis can be averted. In addition, even if the right technology existed, certain transformations of social and economic structures in society would be necessary to ensure that the technology was adopted on a widespread basis. This may be harder than ever to accomplish in our globally competitive world.

to move toward sustainability. Care-based decision-making refers to the idea that connection, responsibility and consideration of the particular others that one comes into contact with are important for making normative choices. Justice-based principles, which are based on autonomy and separation, imply that universally applicable rules and rights, exclusive of the particular situation or people involved, are the appropriate basis for moral deliberation.¹³ The first section of this chapter will examine ecofeminism as a feminist and environmental philosophy and movement. The ecofeminist construction of the self in a web of relationships that includes nonhuman nature and the associated ethic of care will be shown to be critical to finding solutions to the ecological crisis. The next section will examine possible shortcomings of the ecofeminist care model and opportunities provided by the alternative justice model of moral deliberation. An integrated ecofeminist care-justice normative framework will be presented as a positive and workable alternative model for environmental decision-making. The inclusion of both care and justice in decision-making models is considered necessary to adequately address environmental and social problems. Concepts of self and other and the accommodation of difference within a community that includes non-human nature will be discussed along with the public/private distinction and how relationship and

¹³ Refer to Eve Browning Cole and Susan Coultrap McQuin, eds., Explorations in Feminist Ethics: Theory and Practice (Bloomington: Indiana University Press, 1992) for discussions on both care and justice and the integration of the two models. Roger J. Rigterink, Rita Manning, Robin S. Dillon, and Elizabeth Ann Bartlett, whose essays are included in this work, examine connections between and integration of care and justice frameworks. Mary Ellen Waithe, Annette Baier, Mary Brabeck, and Owen Flanagan and Kathryn Jackson in Mary Jeanne Larrabee, ed., An Ethic of Care: Feminist and Interdisciplinary Perspectives, (New York: Routledge, 1993) also discuss the relationship between care- and justice-normative models. Seyla Benhabib, in her book Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics, (New York: Routledge, 1992) addresses this topic by arguing for inclusion of the perspective of both the “generalised” and “concrete” other within an interactive form of universalism.

responsibility compare to rules and rights. This ecofeminist care-justice framework for nature will then be used in chapter 3 to evaluate the three models of environmental stewardship that are introduced in chapter 2.

1.2 An Ecofeminist Ethic of Care

1.21 What is Ecofeminism?

Ecofeminism represents the joining of feminist and ecological theory and practice in an attempt to develop solutions for the complex social and environmental problems of the late twentieth century. The term “ecofeminisme” was first used in 1974 by the French writer Françoise d’Eaubonne, who “called upon women to lead an ecological revolution to save the planet.”¹⁴ While feminism began as a movement to end sexist oppression, more recent feminist arguments address multiple forms of oppression that structure gendered identities.¹⁵ For these later feminists, women must be liberated from racism, classism, heterosexism, ageism, anti-Semitism, ethnocentrism, ableism and naturism¹⁶ as well as sexism. According to Karen Warren, “[s]omething is a feminist issue if an understanding of it helps one understand the oppression or subordination of

¹⁴ Carolyn Merchant, *Earthcare: Women and the Environment* (New York: Routledge, 1995), 5.

¹⁵ Multiple oppression of gendered identities refers to the idea that the development of a sense of self is influenced and structured by race, class, age ability/disability, sexual orientation and culture, as well gender. Moreover, many of these structures place a certain race, class or gender higher than another and therefore legitimise domination. For example, patriarchy places male above female, which has often resulted in women being oppressed by men.

¹⁶ Naturism refers to the idea that humans have traditionally dominated nature. This domination of nature has been traditionally male-based due to the role men assumed within society. The domination of women by men has often been legitimated by connecting women in unique and concrete ways to nature, for example by equating of the cyclical nature of women’s hormonal structure to the biological cycles of nature.

women. . . . According to ecofeminists, trees, water, animals, toxics and nature language are feminist issues because understanding them helps one understand the status and plight of women cross-culturally.”¹⁷ Ecofeminism is both a critical social theory and a grassroots activist movement where ecology and feminism come together to challenge “gender relations, social institutions, economic systems, sciences and our views of our place as humans in the biosphere.”¹⁸ Unlike some philosophies that lend themselves to contemplation and inaction, such as postmodernist deconstruction,¹⁹ or to inward mysticism, such as the metaphysical philosophy of Heidegger and the deep ecology of Arne Ness, ecofeminism lends itself to “action, the expression of will and political participation.”²⁰ While deep ecologists ask us to think like a mountain and post-modernists deconstruct ideas to a point where they can no longer provide a basis for social change or, alternatively, where proposals for change become hopelessly utopian, ecofeminism requires that responsible action accompany its critical social theory.

Ecofeminism is based not only on a deconstructive process through the critical aspect of its social theory but also a reconstructive potential that requires its criticisms to

¹⁷ Karen J. Warren, ed. Ecofeminism: Women, Culture, Nature (Bloomington: Indiana University Press, 1997), 4.

¹⁸ Stephanie Lahar, “Ecofeminist Theory and Grassroots Politics” in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 1.

¹⁹ Briefly, postmodern deconstruction refers to a general scepticism towards the grand claims and grand theory of the modern era that tend to represent privileged positions and experience. Instead, postmodernism reflects an openness and acceptance of a range of voices in social inquiry, artistic experimentation and political empowerment. Deconstruction refers to the postmodern method of critical inquiry that stresses how the multiple positioning of an author or reader related to culture, class and gender has influenced interpretation of text. This means that there can be an infinite range of meanings possible, at least as many as there are interpreters, and some people argue that there is very little substance left upon which to base actions to accomplish change. Refer to The Dictionary of Human Geography, edited by R.J. Johnson and David M. Smith (Oxford: Blackwell Publishers, 1994) for more information on this subject.

²⁰ Stephanie Lahar, “Ecofeminist Theory and Grassroots Politics” in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 7.

be addressed through action on values and policies in public arenas.²¹ Ecofeminism is well suited to environmental policy analysis because the human relationship to nature must be critically rethought in order for people to consistently avoid making environmentally poor choices. In addition, rethinking how humans relate to each other based on structures such as gender, race and class is necessary because these relationships have been historically connected to environmental problems. For example, ecofeminism explicitly recognises concrete and important connections between women and nature and at the same time attempts to change historical and conceptual mis-connections between women nature that have led to the domination of both. Ecofeminist political inquiry, grassroots organising and direct action include, among many other examples, the struggles of women of colour in the environmental justice movement in the United States²² and the strategies of Chipko women in India who were victims of Western development processes.²³

While all ecofeminists agree that women's issues and environmental problems are connected, they debate the nature of the connections and how they relate to the twin domination of women and nature. Adding to the confusion there are as many forms of

²¹ Stephanie Lahar, "Ecofeminist Theory and Grassroots Politics" in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 8. Lahar gives several examples of ecofeminist reconstructive projects such as community forums on a variety of social and public issues. Moreover, she maintains that the balance between ecofeminism's critical and creative functions is essential to the political strength necessary to address today's global issues that may ultimately bring us to the edge of ecological crisis.

²² See for example, Dorceta E. Taylor, "Women of Color, Environmental Justice, and Ecofeminism," in Ecofeminism: Women, Culture, Nature, ed., Karen J. Warren (Bloomington: Indiana University Press, 1997), 38-81. Although this article argues that the environmental justice movement exists at the intersection of many other social movements such as the civil rights, labour, feminist, environmental and ecofeminist movements, she does acknowledge that some, although not all, environmental justice activists consider themselves as belonging to the ecofeminist movement.

²³ Vandana Shiva, "The Chipko Women's Concept of Freedom" in Ecofeminism, Maria Mies and Vandana Shiva (London: Zed Books, 1993), 248-250.

ecofeminism as there are feminism itself, with similar debates between them and confusing, incoherent sets of labels attached to the various positions within the debates. While liberal, cultural, social and other feminisms have contributed to ecofeminist perspectives on the human/nature relationship,²⁴ all ecological feminisms have in common an antidualistic²⁵ theory and practice which explicitly connects feminist and environmental concerns to address women-nature connections that no previous feminism has addressed adequately.²⁶ Rather than fall into postmodernist traps of nihilism, pessimism, and the ending of reason and history, ecofeminists seek to “enter into history to reason from the ‘is’ to the ‘ought’ and to reconcile humanity with nature, within and without.”²⁷ Before ecofeminism emerged, the basic problem encountered by feminist interpretations of the human/nature relationship was dualistic thinking, or the explicit wish to separate women entirely from nature. Feminists tended to use separation as a strategy for overcoming misguided conceptual connections or mis-connections that men had traditionally used to dominate women. Instead of using separation as a strategy, it may have been better in many cases to acknowledge real, concrete and lived connections with the natural environment that have resulted in the oppression of women in a typically male designed society.²⁸ Ecofeminists surmount the dualism problem by specifically

²⁴ Carolyn Merchant, *Earthcare: Women and the Environment* (New York: Routledge, 1995), 5.

²⁵ Antidualistic refers to a theoretical position which attempts to overcome multiple forms of either/or thinking that feed single or multiple oppressions based on human/nature, male/female, rich/poor or white/black splits.

²⁶ Ynestra King, “Healing the Wounds: Feminism, Ecology and the Nature/Culture Dualism,” in *Reweaving the World: The Emergence of Ecofeminism*, ed. Irene Diamond and Gloria Feman Orenstein (San Francisco: Sierra Club Books, 1990), 116.

²⁷ Ynestra King, “Healing the Wounds: Feminism, Ecology and the Nature/Culture Dualism,” in *Reweaving the World: The Emergence of Ecofeminism*, ed. Irene Diamond and Gloria Feman Orenstein (San Francisco: Sierra Club Books, 1990), 116.

²⁸ Ynestra King, “Healing the Wounds: Feminism, Ecology and the Nature/Culture Dualism,” in *Reweaving*

uniting feminism with environmentalism, which they feel is necessary for providing an adequate version of either position and appropriate solutions to environmental and social problems.²⁹ This means that to ecofeminists it is impossible to find solutions to environmental problems without addressing other social problems and vice versa.

Rather than providing an exhaustive account of ecofeminist theory and practice, it is sufficient for the purpose of this thesis to examine key ideas in relation to an ecofeminist ethic of care. These ideas include: recognising and articulating the connections between women and nature, both those that are concrete and those that are conceptually misguided, as a way of overcoming value dualistic thinking and oppression in any of its forms; and, the ecofeminist ethic of care itself and its related conception of self and other, including the accommodation of difference and the role of connections and responsibility in normative decision-making.

1.22 Links Between Women and Nature

Historically, concrete and conceptually misguided connections between women and nature have provided the basis for the domination of both. Establishing the character of these women-nature connections and distinguishing those that are liberating for both

the World: The Emergence of Ecofeminism, ed. Irene Diamond and Gloria Feman Orenstein (San Francisco: Sierra Club Books, 1990), 111-116.

²⁹ Karen J. Warren "The Power and Promise of Ecological Feminism" in Ecological Feminist Philosophies, ed. Karen Warren (Bloomington: Indiana University Press, 1996), 19. Also refer to Petra Kelly, "Women and Power," in Ecofeminism: Women, Culture, Nature ed. Karen J. Warren (Bloomington: Indiana University Press, 1997), 114. Kelly argues that "[a]ny commitment to social justice and nonviolence that does not address the structures of male domination is incomplete." For Kelly, "playing an active part in society, on an equal footing with men, does not mean adopting the old thought patterns and strategies of the patriarchal world. It means putting our own ideas of an emancipatory society into practice."

women and nature from those that are not is a major project of ecofeminist philosophy.³⁰

Concrete connections must be recognised and acknowledged and conceptual mis-connections that typically exist in male-biased societies must be uncovered so that appropriate environment/ development policies and decisions can be taken. Yet women, who are probably best able to articulate these connections and mis-connections, tend to be excluded from active participation in policy formation and environmental decision-making processes.³¹

It is important to recognise women's concrete connections to their natural environment for policy-making to have desired results. For example, women in developing countries are responsible for running the household and consequently are more intimately connected and more directly dependent than men on forest products that are used for fuel, necessities for their animals, products for the home, and income. This means that environmental degradation and depletion of forests have a direct effect on women, forcing them to walk farther to acquire the resources they need. In addition, women face customs and taboos and legal restraints that do not apply to men. For example, prohibitions against women inheriting economic trees, trees that are owned by a family and can therefore be sold for cash, seriously impede women's income producing

³⁰ Karen J. Warren, ed., Ecofeminism: Women, Culture, Nature (Bloomington: Indiana University Press, 1997), 3.

³¹ Melody Hessig, "The Sociology of Sustainability: Feminist Eco/nomic Approaches to Survival," in Environmental Sociology Theory and Practice, eds. Michael D. Mehta and Eric Ouellette (North York: Captus University Press, 1995), 248.

possibilities. These trees will often be passed from the women's family to her spouse for disposal at his sole discretion, often for items not needed by the family unit to survive.

Connections to nature are real and important for women in developed countries as well. Just as deforestation and soil erosion affect women in the third world in their ability to feed their families, toxic releases, pesticides and other hormone disrupter chemicals adversely affect women's, as well as men's, reproductive integrity in all parts of the world.³² The forest industry provides a good example of neglect of women's connections to nature in both the developing and developed world. Key assumptions about forestry tend to be male-biased in many cases. The idea that the outsider as expert knows best, or the idea that activities falling outside commercial fibre production are of lesser importance, or the idea that large-scale production using a small number of tree species rather than small-scale community-based forestry is most beneficial in all cases, all fit this concept of western male-bias.³³ These assumptions tend to be male-biased because they are based solely on the commercial value of the trees and the effect on the bottom line rather than on the recognition that some, if not all, of the trees are necessary for women to feed and warm their families in many parts of the world. These assumptions are usually formed without the benefit of the knowledge and experience of

³² Theo Colborn, Dianne Dumanowski, and John Peterson Myers, Our Stolen Future: Are We Threatening Our Fertility, Intelligence, and Survival—A Scientific Detective Story (New York: Dutton, 1996).

³³ Karen J. Warren, ed., Ecofeminism: Women, Culture, Nature (Bloomington: Indiana University Press, 1997), 5-12. Warren presents similar arguments about male-bias in relation to water, food, farming, technologies, and toxins. One very interesting example of a so-called appropriate technology that is totally inappropriate for women is the solar stove designed for use in Africa. This stove turns out to be useless in a culture where the meals are prepared before sunrise and after dark and also completely ignores the social function of the fire in these groups. Refer to page 9.

women and indigenous people, who in many cases could easily identify the false character of these claims.³⁴

While disregarding women's concrete connections to nature is detrimental to environmental and social policy, not explicitly revealing the conceptual mis-connections that have been historically used to oppress both women and nature has equally negative consequences. Conceptual mis-connections between women and nature are many and are often expressed in language and metaphors. Women are denigrated through the use of animal terms such as pets, cows, chicks, bitches, old bats and birdbrains. Nature is feminised in terms of Mother Nature being raped and mastered, her womb existing to service the men of science, virgin timber being cut, and land being either fertile, or barren and useless as it lies fallow.³⁵ In patriarchal culture where both women and nature are seen as inferior, these mis-connections or conceptual frameworks³⁶ are oppressive.³⁷ There are three essential elements to oppressive conceptual frameworks: value-hierarchical thinking; value dualisms³⁸, and the logic of domination, a structure of argumentation that leads to justification of subordination based on some given

³⁴ Karen J. Warren and Jim Cheney, "Ecological Feminism and Ecosystem Ecology," in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 255.

³⁵ Karen J. Warren, ed., Ecofeminism: Women, Culture, Nature (Bloomington: Indiana University Press, 1997), 12.

³⁶ According to Karen Warren, "[a] *conceptual framework* is a set of *basic* beliefs, values, attitudes and assumptions which shape and reflect how one views oneself and one's world. It is a socially constructed lens through which we perceive others and ourselves. It is affected by such factors as gender, race, class, age, affectional orientation, nationality, and religious background." Karen J. Warren, "The Power and Promise of Ecological Feminism," in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 20.

³⁷ Conceptual frameworks become *oppressive* when they explain, justify or maintain domination and subordination and they are *patriarchal* when women are subordinated by men.

³⁸ A value dualism refers to the notion that concepts such as mind and body, reason and emotion, or male and female are in reality separate and distinct. Value dualisms assign more or less value on one or the other associated concept, as in mind is good and body is bad.

characteristic.³⁹ Part of the ecofeminist project is to uncover these mis-connections and consequently attempt to eliminate this logic of domination in relation to any of the “isms” (e.g., sexism, classism, ageism, naturism).

Ecofeminists demand that consideration of the natural environment should be a key part of any feminist movement to “end sexist oppression and the logic of domination which conceptually grounds it.”⁴⁰ If the logic of domination is eliminated then “a description of similarities and differences would be just that—a description of similarities and differences.”⁴¹ This means, for example, that an argument that associates women with a particular characteristic such as emotional, and then associating that with weakness, could not be used to justify their subordination by men. By the same token, it would become unacceptable to dominate nature simply because it is closely associated with women. Or similarly, the association may disappear when the domination ends because the association was created as a justification for the domination. In this way, the differences between men and women or humans and nature become simply a description of what is and not the basis for one to be dominated or oppressed by the other. The elimination of both the feminisation of nature and the naturalisation of women are central projects of ecofeminist critical social theory and support ecofeminist claims that

³⁹ Karen J. Warren, “The Power and Promise of Ecological Feminism,” in Ecological Feminist Philosophies, ed. Karen Warren. (Bloomington: Indiana University Press, 1996), 20-1.

⁴⁰ Karen J. Warren, “The Power and Promise of Ecological Feminism,” in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 24. Emphasis in original text.

⁴¹ Karen J. Warren, “The Power and Promise of Ecological Feminism,” Ecological Feminist Philosophies, ed. Karen Warren (Bloomington: Indiana University Press, 1996), 21.

environmentalism without feminism, or vice versa, would at best provide an incomplete account of either.

1.23 Ecofeminist Care

Many ecofeminists view the ethic of care and its inclusion into normative frameworks as a means to eliminate domination. Just as all ecofeminisms recognise the importance of real and conceptual mis-connections between women and nature, most also have a commitment to non male-biased ethics.⁴² Male-biased ethics tend to follow universal social contract-type theories that emphasise autonomy and separation of the self from the other as the basis for moral decisions. This disembodied and disembodied moral self in these male-biased theories tends to concentrate on aspects of male experience that are used to privatise and exclude women's experiences, defining them as morally inferior.⁴³ Because sexist language and interpretation have been pervasive in these philosophical traditions and have helped to rationalise the perceived inferiority of women,⁴⁴ feminist ethics seek to challenge sexist moral assumptions by re-interpreting

⁴² Karen J. Warren, ed., *Ecological Feminist Philosophies* (Bloomington: Indiana University Press, 1996), xvi, and in the same book Karen Warren and Jim Cheney, "Ecological Feminism and Ecosystem Ecology," 156. Many feminists maintain that "most traditional moral theories have implicitly excluded and silenced women and their moral perspectives, and thus, must be replaced with an ethic that reinterprets and validates both." Eve Browning Cole and Susan Coultrap-McQuin, eds. *Explorations in Feminist Ethics: Theory and Practice* (Bloomington: Indiana University Press, 1992), 2. In this same edition Patricia Ward Scaltas, "Do Feminist Ethics Counter Feminist Aims," 23 maintains that "[t]he project of feminist ethics is to construct a more adequate moral theory: one that informs women's actual experience of morality and their moral concerns; one that does not devalue and dismiss the role of emotions, demands, and contextual thinking in morality; one that does not lead to a distorted assessment of women as morally immature." Where "...feminists should be constantly vigilant to reject explicitly any possible implications of a restrictive view of women's position."

⁴³ Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992), 152.

⁴⁴ Male-biased traditional philosophical language either knocks down or tears and rips up arguments, or tries to beat them by nailing them to the wall. Winning arguments are compelling, binding, air-tight, knock-down, dynamite, and smashing, while bad or ineffective arguments fall flat on their face, are limp, lame, soft, fuzzy, silly and full of holes. Because words such as limp, lame soft, fuzzy etc. have historically been used in conceptual frameworks

the moral significance of women's cultural experiences and emphasising the importance of particularity, connection and context.⁴⁵ Many feminists would argue that connection and context are important because a sense of self is gained, at least in part, through the connections that have defined one's life experience, such as those found in the family or other institutions in society including church, school, or work. It was from the realisation of this male-bias in philosophy and ethics that the ethic of care emerged as an alternative way of experiencing moral deliberation.

Carol Gilligan identified a different and alternative approach to moral reasoning that was based on care and responsibility for those with whom moral agents found themselves in relationship.⁴⁶ Gilligan noticed that there are two different types of moral reasoning, care and justice, and that women seemed to favour care. While the traditional, male-biased ethics favour justice-based, autonomous thinking where the self is kept separate from the other and context and situation have no relevance in moral deliberation, a care ethic involves an immediacy of moral response that is person and situation specific. This moral response must appropriately address the needs of others while also maintaining personal relationships.⁴⁷ In care-based deliberations, the self is seen in relationship with particular others, connected and embedded, with a sense of

where women are equated to the "weaker" or "morally inferior" sex in opposition to the strong, dominating male, it seems fair to conclude that philosophical traditions perpetuate sexist notions. Karen J. Warren, "Taking Empirical Data Seriously: An Ecofeminist Philosophical Perspective," in Ecofeminism: Women, Culture, Nature, ed. Karen J. Warren (Bloomington: Indiana University Press, 1992) explores these and other ideas on the male-bias in philosophy.

⁴⁵ Eve Browning Cole and Susan Coultrap-McQuin, eds., Explorations in Feminist Ethics: Theory and Practice (Bloomington: Indiana University Press, 1992), 3.

⁴⁶ Carol Gilligan, In Different Voice (Cambridge: Harvard University Press, 1982).

⁴⁷ Kathryn Tanner, "The Care that Does Justice, Recent Writings in Feminist Ethics and Theology," Journal of Religious Ethics 24 (Spring 1996): 171.

responsibility for their well being, and within specific situational contexts. This self-in-relation is capable of viewing difference, whether it is based on class, race, age, nature or any other criteria, along non-hierarchical lines, where difference is simply difference and does not translate into inequality or oppression. When the relational self values the richness of possibility that comes with the complexity and diversity of others, structures of power, privilege and prejudice in society that have been constructed around diversity become the problem and diversity becomes the basis for a more enriched and positive experience.⁴⁸ Difference is then no longer viewed in either/or terms as it often is within justice-based frameworks. Either/or terms can be problematic when they are used as the basis for claims of being better or more deserving than someone or something else.

Gilligan argues that caring is an alternate voice only. This alternate voice used in ethical deliberations is neither biologically determined nor unique to women, even if women often favour it. This is because ethics, whether justice- or care-based, seem to develop for the most part through the experiences that construct one's world as we proceed toward maturity. Recognising this development means that tendencies to use justice- or care-based thinking come primarily from different male and female upbringing and therefore could become equally available to either males or females if the social construction of gender was adjusted. This would mean that both men and women would be capable of using care in moral deliberations.⁴⁹ Care and connection would become

⁴⁸ Charlotte Bunch, "A Global Perspective on Feminist Ethics and Diversity," in Explorations in Feminist Ethics: Theory and Practice, eds. Eve Browning Cole and Susan Coultrap McQuin (Bloomington: Indiana University Press, 1992), 181.

⁴⁹ Carol Gilligan, "Reply to Critics" in An Ethic of Care: Feminist and Interdisciplinary Perspectives, ed.

available to all stakeholders in moral decision-making, which would mean that taking responsibility for an environment that cannot represent itself in traditional justice-based models would be more broadly encouraged. A care-based alternate voice emerges with the perception that human beings constantly interact with and are affected by other human beings and their natural environment. This interaction in turn defines moral development as a shared experience with the various personal, public and natural communities of others that we interact with on a regular basis. Bonds to these others form and “constitute contexts of commitment, of reciprocal understandings and expectations, which are not readily accommodated within the model of justice-based ethics.”⁵⁰ Because consideration of the conflicting demands of individuals based solely on justice-type criteria and autonomous thinking demands detachment and universal application, connection, context and related responsibilities for others that are not exactly like the self are often left out of decision-making. This could result in important considerations being overlooked when it comes to a natural environment that cannot represent itself.

It is important to include care in moral deliberations because some situations do not always lend themselves to justice-based thinking solely. Deanne Curtin maintains that care for nonhuman animals is possible whether or not it is possible to attribute justice-based rights⁵¹ to beings that may not share many characteristics with humans. A

Mary Jeanne Larrabee (New York: Routledge, 1993), 209.

⁵⁰ Eve Browning Cole and Susan Coultrap-McQuin, eds. Explorations in Feminist Ethics: Theory and Practice (Bloomington: Indiana University Press, 1992), 5.

⁵¹ Rights are important and must not be totally eliminated from moral deliberation because many gains have

care-based approach would assist in the case of a reciprocal relationship with a pet or a non-reciprocal relationship such as working to preserve natural habitats, biodiversity, clean air or water.⁵² Ecofeminist care of the nonhuman natural world, a world that is different from and sometimes indifferent to humans, but a world where humans and nature are strongly connected, usually occurs within a moral community of humans that see themselves in relationships with rocks, trees, water and the natural environment as a whole, as well as with other humans. Important questions for ecofeminists and others relate to how nature is defined, how nature can be included in the moral community and what particular form care should take. Rather than proceeding with environmental inquiry on the basis of long-standing concepts of nature and caring as givens, public debate on the basic beliefs surrounding these concepts and how they should be defined is necessary and important for developing appropriate environmental policies. Anything less may lead to perpetuation of the status quo.⁵³

How then can nature be included in the moral community with humans? The ability to empathise and care does not demand that the community of others that one cares for be strictly human.⁵⁴ Caring for nonhuman nature, however, may be more easily accomplished if the community that includes it is not based solely on shared

been made in oppressive social situations through the assertion of rights claims. Gains made through the struggles of African Americans or women's groups can be largely attributed to rights-based arguments.

⁵² Deanne Curtin, "Toward an Ecological Ethic of Care," in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 71.

⁵³ Roger J.H. King, "Caring about Nature: Feminist Ethics and the Environment," in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 87.

⁵⁴ Lori Gruen, "Revaluing Nature," in Ecofeminism: Women, Culture, Nature, ed. Karen J. Warren (Bloomington: Indiana University Press, 1997), 362.

characteristics with humans, but is constructed instead as an inclusive community that depends on dialogue. This dialogue does not have to be actual and real, but dialogue for others that cannot speak for themselves, either because they are not capable of speech such as with nonhuman nature or because their voices are suppressed such as with marginalised people, is also included. While it is presumptive to think that one could actually know and portray the needs and desires of another, a better understanding of the needs of others can often be obtained through direct, shared experiences. Direct, shared experiences may encourage people to think more clearly about the consequences of their actions. A widely inclusive dialogic community usually provides an opportunity for better knowledge to emerge.⁵⁵

But how can nature speak in a dialogic community and make its interests known? Who has a legitimate voice to speak for nature and ensure at the same time that nature's needs are not misconstrued, as one's own needs? Ecofeminists and others can and must speak for nature that is unable to speak for itself. Ecofeminists may have a unique perspective and consequently an ability to contribute a distinctive voice when speaking for nature in a dialogic community because of the historical real and conceptual misconnections between the two that have resulted in domination of both. Through the common experience of oppressive frameworks, women "speak not instead of, or in place

⁵⁵ Lori Gruen, "Revaluing Nature," in Ecofeminism: Women, Culture, Nature, ed. Karen J. Warren (Bloomington: Indiana University Press, 1997), 363. In reference to the solar stove and developing countries discussed in an earlier footnote, including the village women in the discussion about its development would have clearly shown that their cooking time occurred before sunup and after sundown. Thus, it would be readily visible that the solar stove would be useless to them.

of, nature but as interpreters of its distress and joy.”⁵⁶ When the ecologist or ecophilosopher or ecofeminist speaks for nature, it could be compared to the speech of white antiracists or male feminists who have always been an essential part of effective liberation politics.⁵⁷ Including nature in a moral community results in a new way of thinking where humans can begin to recognise the significance of natural phenomena, such as mass extinction of natural species, birth defects in animals and humans, and global climate change, and their connection to human action, development and interpretation of progress. This recognition would then hopefully translate into better decisions being taken based on new interpretations⁵⁸ where humans acknowledge their own responsibility for transformations of nature that have resulted from social systems and human practices. In this way nature is included in a conversation in which humans self-consciously make decisions about the kind of environment in which they want to live.⁵⁹

Unfortunately, care is not always included in environmental debates. Western⁶⁰ environmental discourse tends to be framed in justice-based rights⁶¹ claims alone. In this

⁵⁶ Val Plumwood, “Androcentrism and Anthropocentrism: Parallels and Politics,” in Ecofeminism: Women, Culture, Nature, ed. Karen J. Warren (Bloomington: Indiana University Press, 1997), 351.

⁵⁷ Val Plumwood, “Androcentrism and Anthropocentrism: Parallels and Politics,” in Ecofeminism: Women, Culture, Nature, Karen J. Warren ed. (Bloomington: Indiana University Press, 1997), 350.

⁵⁸ Lori Gruen, “Revaluing Nature,” in Ecofeminism: Women, Culture, Nature, ed. Karen J. Warren (Bloomington: Indiana University Press, 1997), 369-70.

⁵⁹ Steven Vogel, “Habermas and the Ethics of Nature,” in The Ecological Community: Environmental Challenges for Philosophy, Politics and Morality, ed. Roger S. Gottlieb (New York: Routledge, 1997), 189.

⁶⁰ Western views are often very different from the views of Aboriginal peoples who usually live in a caring community. For many thousands of years, Aboriginal peoples have honoured, respected and cared for the land upon which they depended for survival. For hundreds of years these same people have tried to persuade non-native people to do the same by refraining from treating nature as if its only purpose is for human use for their own material good. Judith Plant, “Learning to live with Differences: The Challenge of Ecofeminist Community” in Ecofeminism: Women, Culture, Nature, ed. Karen J. Warren (Bloomington: Indiana University Press, 1997), 123.

⁶¹ Traditional justice-based thinking typically separates the self from the other so that claims are made about

context, environmental protection of the global climate, for example, may be opposed by energy producers' claims of providing jobs and economic prosperity within a community or nation state.⁶² Without care and connection for the natural environment, the interests of humans often preclude anything more than a utilitarian consideration of nature.

Rights-based considerations on their own may have suspect application when considering nature that typically is not considered rights-bearing because it lacks characteristics that are similar to humans to which a particular right could be attached. In addition, information problems often complicate issues and pit the interests of one set of rights-bearing individuals against another, big business against environmentalists for example.⁶³ These information problems may include scientific uncertainty about the character of the problem or technical language used to describe the problem. Scientific uncertainty has been used on more than one occasion to dispute that a problem exists in the first place and technical language can easily be manipulated to exclude various stakeholders from the decision-making process. Rights must be balanced through other dimensions of moral assessment related to care and connection and the responsibility to respond. Care

obtaining what is due to a particular individual. Formal justice is the impartial and consistent application of principles, whether or not the principles themselves are right. There is no particular recognition of the specificity of the circumstances of any given situation and the influence it may have on the correctness of the principles. Substantive justice is closely associated with the rights that individuals can legitimately demand of one another or of their government as long as the rights of the others are not impeded in the process. Distributive justice which comes into play in many environmental disputes concerns the rights of an individual to have a particular fair share of resources, natural or otherwise, over the rights of another individual. A big problem enters into the calculation when one of the individuals is the natural environment that is not considered to be rights bearing. Refer to the Cambridge Dictionary of Philosophy, sv. "Justice" for more on this topic.

⁶² According to David Suzuki, environmentalism must take a different approach to the debates are structured because it is no longer productive to "pit people against animals or environmentalists against workers." Tom Spears, "Let's end loser talk: Suzuki," *The Ottawa Citizen*, 17 November 1998, C3.

⁶³ Val Plumwood, "Androcentrism and Anthropocentrism: Parallels and Politics," in *Ecofeminism: Women, Culture, Nature*, ed. Karen J. Warren (Bloomington: Indiana University Press, 1997), 348.

for nature must be added to or integrated with justice and rights to provide a complete normative framework. Val Plumwood argues that a “[s]pecial relationship with, care for, or empathy with particular aspects of nature as experiences rather than nature as abstraction are essential to provide depth and type of concern that is not otherwise possible.”⁶⁴ The moral abstraction of universalisable principles of right is not complete without connection and care for the particular other, which may include either humans or nature or both.

1.3 Care and Justice for Nature

1.31 Challenges Faced by Ecofeminist Care

The question of the existence and/or relevance of the ethic of care and the challenge that it makes to traditional justice models of moral deliberation has been compared to the idea of paradigm shift.⁶⁵ The ethics of care and justice may be currently undergoing this type of changeover typically defined by constant questioning of the relevance of the new and old schools of thought. The ethic of care, the new school of thought, needs to be

⁶⁴ Val Plumwood, “Nature, Self and Gender: Feminism, Environmental Philosophy, and the Critique of Rationalism,” in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 159.

⁶⁵ Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (New York: Routledge, 1992), 148. Benhabib is referring to the notion found in Thomas S. Kuhn, The Structure of Scientific Revolutions (Chicago: The University of Chicago Press, 1970). A paradigm shift occurs when there is a discrepancy between data and the paradigm that it is supposed to fit. It usually comes about after some considerable period of crisis, or pronounced professional insecurity, where at some point a new paradigm comes to the fore; usually inspired by someone who is very young or very new to the field in which it occurs. According to Kuhn’s revolution model, the changeover period is marked by attempts to discredit the new paradigm, to claim that it is not really new or needed because the old paradigm is capable of handling the discrepancies, or that the two paradigms are not really considering the same thing.

subjected to as rigorous a critique as the justice model, the old school of thought. While there are many critiques to be made of the ethic of care, the focus here is not to provide an exhaustive analysis of care critiques but to identify two key areas that seem particularly relevant to this analysis. First, uncritical acceptance of care as an emancipatory strategy may be dangerous, in particular if care is based on inappropriate conceptual connections that have been used to legitimate the patriarchal domination of both women and nature. Second, care is also dangerous if it is accompanied by claims that women's voices, because of some biological or socially based difference, are better voices. This is a claim that is often used either to exclude men from caring or to restrict women to caring and thereby exclude them from the political domain.

Critics of the care model point out that claiming care as a feminist and emancipatory ethic may simply perpetuate historical trends. History shows us that males have used women's real or perceived closer connection to nature and emotion, that is women's greater role in caring, to obscure their voices, to keep them in the private sphere, or to perpetuate oppression.⁶⁶ In response to this criticism, proponents argue that an ethic of care must be politicised⁶⁷ to prevent it from being used to privatise the moral interests of women. Some critics claim that the "caring-for" model translates into the interests of the other taking precedence over one's own and that empathetic projection

⁶⁶ Eve Browning Cole and Susan Coultrap McQuin, eds. Explorations in Feminist Ethics: Theory and Practice (Bloomington: Indiana University Press, 1992), 5.

⁶⁷ Deanne Curtin, "Toward an Ecological Ethic of Care," in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 71-72. Curtin's politicisation of caring refers to the notion that care can be understood as part of a radical political agenda demanding changes in societal structures of power and inequality within which caring can be nonabusive. Also see Joan C. Tronto, Moral Boundaries: A Political Argument for an Ethic of Care, (New York: Routledge, 1993), 21.

into another's life may result in abuse when the other is placed in front of oneself.

Women who selflessly look after the needs of others who in turn only care for themselves is a phenomenon familiar to many people.⁶⁸ The solution becomes a politicised caring where the goal is "not just to make a 'private' ethic public but to help undercut the public/private distinction."⁶⁹ The public/private distinction needs to be addressed because it has so often been used to hide the interests of women in the private sphere as a means of minimising them and keeping them out of the political arena.

A useful way to move beyond the public-private dichotomy is to include considerations of both the "generalised" and the "concrete" other.⁷⁰ Confining considerations to the "generalised other" means that the standpoint of the autonomous self, whose norms are represented as rights and duties, is the only legitimate view. There is however, another aspect to the self. The standpoint of the "concrete other" becomes apparent when each self is also recognised as an individual with his or her own history and identity. This individual has needs and desires that must be understood so that differences will not be used for exclusionary purposes. Norms for this "concrete other"

⁶⁸ Deanne Curtin, "Toward an Ecological Ethic of Care," in *Ecological Feminist Philosophies*, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 71. In another example of this type of inappropriate caring, Nazi women who associated female goodness with self-sacrifice to family and community to carry out or overlook the atrocities of the regime they were living under while at the same time voicing caring values has been documented. Dianne Romain, "Care and Confusion" in *Explorations in Feminist Ethics: Theory and Practice*, eds. Eve Browning Cole and Susan Coultrap-McQuin (Bloomington: Indiana University Press, 1992), 27-30.

⁶⁹ Deanne Curtin, "Toward an Ecological Ethic of Care," in *Ecological Feminist Philosophies*, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 72.

⁷⁰ Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992).

are friendship, love and care.⁷¹ Seyla Benhabib argues that in universalistic moral theories:

the definition of the moral domain, as well as the ideal of moral autonomy, not only in Kohlberg's theory but in universalistic contractarian theories from Hobbes to Rawls, lead to *privatization* of women's experience and to the exclusion of its consideration from the moral point of view. . . .[a] universalistic moral theory restricted to the standpoint of the 'generalized other' falls into epistemic incoherencies that jeopardize its claim to adequately fulfill reversibility and universalizability.⁷²

Care and empathy for the contextualised "concrete other" within one's various relationships become necessary parts of any adequate moral theory. This "concrete other" could be either human or nonhuman nature depending on where the boundary of the moral community is drawn. Traditionally, inclusion in the moral community has depended on being a rational human being, which in turn does not open up a place for non-human nature. There does not seem to be any good reason for defining the moral community in such anthropocentric terms. Including non-rational, non-human nature would be no different than including a person with serious mental challenges, a human baby or a comatose adult.

There is also reason to be cautious about claims that a caring voice is synonymous with a woman's voice and thus better than a man's voice. Claiming that women's voices are better voices simply because they belong to women, and that they possess characteristics or properties that are therefore not available to and are superior to men, is

⁷¹ Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (New York: Routledge, 1992), 152.

⁷² Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (New York: Routledge, 1992), 152.

a form of essentialist thinking.⁷³ This type of essentialist thinking is equivalent to traditional arguments used by men to keep women barefoot, pregnant and at home.

Claims connecting an ethic of care to some characteristic of the difference that separates women from men, such as patriarchal thinking about women's biological cycling, have been criticised by some feminists as being false and dangerous. Charlotte Bunch, for example, argues that:

[t]he way societies deal with differences of race, class, culture, nation, sex, sexual preference and so on, and those between people and the rest of nature, is part of the cycle of patriarchal domination and destruction that is bringing the planet to the point of self-destruction. The question of differences in all its manifestations is quite simply a question of survival . . . of how we challenge the basic ways we've been socialized to view the question of difference.⁷⁴

For Bunch, the crucial question revolves around why difference has to mean inequality not whether difference is biologically-based, socially constructed, or related to some essence of being a woman. She cautions, however, that talk about difference and diversity can "fall into sloppy pluralism, in which everything is diverse and nothing matters."⁷⁵ If diversity is interpreted as everything goes and nothing really matters then it becomes contradictory to the feminist project by having to give up a part of women's

⁷³ Briefly, **essentialism** refers to the theory that objects have essences, or certain properties that no other object could possibly exhibit. This has been associated with the idea that there are timeless, universal truths based on these essences. The Cambridge Dictionary of Philosophy, s.v. "Essentialism." This type of argument has been used in the past to legitimate the domination of women and relegate them to the private sphere. For example, women were not allowed to vote, hold public office or rise to the top of big corporations because their overly emotional side was enough to render them incapable of such important public duties.

⁷⁴ Charlotte Bunch, "A Global Perspective on Feminist Ethics and Diversity," in Explorations in Feminist Ethics: Theory and Practice, ed. Eve Browning Cole and Susan Coultrap McQuin (Bloomington: Indiana University Press, 1992), 179.

⁷⁵ Charlotte Bunch, "A Global Perspective on Feminist Ethics and Diversity," in Explorations in Feminist Ethics: Theory and Practice, eds. Eve Browning Cole and Susan Coultrap McQuin (Bloomington: Indiana University Press, 1992), 179-80.

identity only recently claimed by feminists and used to achieve actual gains in the feminist project of transformation.⁷⁶

There is, however, another way of looking at caring as an alternative moral perspective that is not simply biologically based. Caring values can be seen as the results of social conditioning and socially constructed reality. Girls and women are socialised to be care-givers and rewarded for their caring behaviours. The gender link is a social construct not biologically-based. Caring values can then be seen as available to men as well as women as long as the social construction of reality is altered to accommodate caring in both males and females. Stripped of their gender linkage, caring and contextual thinking become valid and central components not only of feminist ethics but all ethics and free moral theory from its historical male bias. Gaining freedom from male bias promotes the feminist project of equality that is not only based on sameness but difference as well.⁷⁷ Making caring available to both men and women and valued as an attribute in and of itself may mean that more women can take a legitimate place in decision-making and that more male policy-makers can adopt an ethic of care to enrich and expand their existing lines of thinking.

Caring is thus important when a pluralist society attempts to recognise difference. Recognising difference is crucial in environmental decision-making. For an adequate

⁷⁶ Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992), 215.

⁷⁷ Patricia Ward Scaltas, "Do Feminist Ethics Counter Feminist Aims," in *Explorations in Feminist Ethics: Theory and Practice*, eds. Eve Browning Cole and Susan Coultrap-McQuin (Bloomington: Indiana University Press, 1992), 24.

moral theory of the environment, the different other must include nonhuman nature as well as other humans. The value that is placed on particular animals and places should not be given secondary status as an exception to the universal and impartial claims of justice-based morality. An adequate environmental ethic must presuppose “that humans, animals, and land form elements of a ‘differential unity’, a ‘concrete universal’.”⁷⁸ An environmental ethic must see others that are different from but connected to the “self”. The cautions about caring that have been identified here, as well as many others that have not been discussed, suggest, however, that caring by itself may not be enough for an appropriate environmental ethic. The answer to cautions about caring can be found in the beneficial side of the justice model.

1.32 Justice – Drawbacks and Benefits

Within the justice model of moral deliberation, the self is viewed as separate, self-constituting and autonomous.⁷⁹ Morally relevant characteristics are those that are universal to all humans—rationality or sentience, for example—and moral categories of rights, obligations and entitlement apply uniformly.⁸⁰ Moral questioning is based on distance from relations with others so that universal evaluations can be applied, rather than engagement with, and connection to others and the particular situations of principled

⁷⁸ Roger J.H. King, “Caring about Nature: Feminist Ethics and the Environment,” in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 76.

⁷⁹ Kathryn Tanner, “The Care that Does Justice, Recent Writings in Feminist Ethics and Theology,” Journal of Religious Ethics 24 (Spring 1996): 182.

⁸⁰ Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (New York: Routledge, 1992), 159.

evaluation that they find themselves in.⁸¹ John Rawls'⁸² theory of justice is a useful example of this emphasis on autonomy.

In order to develop his theory, Rawls posits a situation in which humans make moral deliberations behind a "veil of ignorance"⁸³ in what he calls the "original position"⁸⁴ where they are unaware of being in the best or worst position relative to others. This means that the decision-maker would have a personal interest in making sure that everyone is treated fairly. Deliberations are made by a fair procedure that ensures distributive justice through the difference principle.⁸⁵ For Rawls, the self that is deliberating is completely removed and distanced from any knowledge of particular characteristics or circumstances that have contributed to the constitution of an individual's self identity. Many thinkers have criticised Rawls' theory.⁸⁶ For example, Seyla Benhabib argues that Rawls' original position obliterates rather than takes difference into account.⁸⁷

⁸¹ Kathryn Tanner, "The Care that Does Justice, Recent Writings in Feminist Ethics and Theology," Journal of Religious Ethics 24 (Spring 1996): 182.

⁸² John Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1981).

⁸³ The veil of ignorance is designed to screen out coercion and unbalanced power relations.

⁸⁴ In the original position, those involved in a social contract are unaware of how alternatives will affect their own case and therefore must evaluate principles only on general considerations. Being in the original position means that a person does not know their own class, socio-economic status, fortune in the distribution of natural assets and abilities, strengths, conception of good or aversion to risk. The person does know and understand political affairs, economic principles, the basis of social organisation and the laws of human psychology. The only way a negotiator can be sure that he or she is not left out when the veil is lifted is for them to ensure that everyone is treated equally. See Rawls, A Theory of Justice, 136-7.

⁸⁵ The difference principle is where distribution of social goods is based on the greatest benefit for the least advantaged. More explicitly, any difference must be resolved to the benefit of the least advantaged.

⁸⁶ See Chandran Kukathas and Philip Pettit, Rawls: A Theory of Justice and its Critics (Cambridge: Polity Press, 1990), 75-115. For example, Susan Moller Okin points out that parties in the original position are heads of households that expect to be members of a paid workforce. This position reinforces the traditional conception of families in a gender structured society, where the maintenance of the household and child-rearing is performed predominantly by women and women's inequality in things like free choice of occupation is hampered by the experience of the "double-day". Okin argues that the assumption that all families are equitably structured compromises Rawls' theory. Susan Moller Okin, Justice, Gender and the Family (New York: Basic Books, 1989), 95.

⁸⁷ Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics

Autonomous-based theories of justice tend to ignore the significance of the communities of different others within which individuals act and react. Community is secondary in justice thinking, where moral agents are self-sufficient and can satisfy themselves and their needs and wants through management and control of self.⁸⁸ In the justice view, the self must maintain a respectful distance and protective barriers from the other. This means that the self must establish control over its own life. Co-operation and community are set in opposition to the self-interested individual. Conflict often arises as solutions to the competing rights claims of individuals are established through objective and universal rules and principles,⁸⁹ which tend to set up win/lose situations where middle ground becomes impossible. This is the view of morality that has dominated contemporary Western philosophy from Kantian, utilitarian and consequentialist thinkers, as well as more modern models of moral development such as the one put forward by Lawrence Kohlberg.⁹⁰ Feminists and ecofeminists criticise these traditional models for being male-biased because they discount or make invisible the relational ways in which women may construct moral situations.⁹¹

(New York: Routledge, 1992), 161.

⁸⁸ Kathryn Tanner, "The Care that Does Justice, Recent Writings in Feminist Ethics and Theology," *Journal of Religious Ethics* 24 (Spring 1996): 182.

⁸⁹ Kathryn Tanner, "The Care that Does Justice, Recent Writings in Feminist Ethics and Theology," *Journal of Religious Ethics* 24 (Spring 1996): 183.

⁹⁰ Lawrence A. Blum, "Gilligan and Kohlberg: Implications for Moral Theory" in *An Ethic of Care: Feminist and Interdisciplinary Perspectives*, ed. Mary Jeanne Larrabee (New York: Routledge, 1993).

⁹¹ For example, Kohlberg's model sets up a series of hierarchical stages that begin with the self-centred stance of young children and end with justice and equality. The problem with Kohlberg's model is that it is based on a scale measured primarily against male subjects and when women are considered they never seem to achieve the highest level of moral development, which is reserved for men. Mary Jeanne Larrabee, "Gender and Moral Development: A Challenge for Feminist Theory" in *An Ethic of Care: Feminist and Interdisciplinary Perspectives*, ed. Mary Jeanne Larrabee (New York: Routledge, 1993), 3.

The autonomous self of the justice model, oblivious to the community in which it lives, seems particularly implicated in human treatment of nonhuman nature. This self, according to the “state of nature metaphor”⁹² found in traditional moral theories, is wounded by the realisation that it is separate from the other, who is an individual like the self. Recovery from this realisation comes from experiences of war, fear, domination anxiety and death. It is through these experiences that bourgeois males celebrate their passage from nature to culture and from conflict to consensus, whereas women remain in nature, condemned to repeat the cycles of life.⁹³ As Seyla Benhabib argues, “[a]n entire domain of human activity, namely nurture, reproduction, love and care, which becomes women’s lot in the course of development of modern bourgeois society, is excluded from moral and political considerations, and relegated to the realm of nature.”⁹⁴ The justice sphere becomes the place where male heads of households transact. It is separated from the domestic, intimate sphere, which is reserved for women and nature. Benhabib argues that this Promethean conception of self that is shared by liberalism and Marxism, is one that changes itself through the process of changing external reality. It uses instrumental logic⁹⁵ and does not understand the experience of non-instrumental “others” whose self-identity may be explicitly defined by connections to nature and their rejection of instrumental thinking. In a male-biased society, these connected others are referred to as

⁹² Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (New York: Routledge, 1992), 156.

⁹³ Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (New York: Routledge, 1992), 158.

⁹⁴ Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (New York: Routledge, 1992), 155.

⁹⁵ Instrumental logic refers to the notion that the value of the other is determined by its use to the self.

the “primitives”, who are children, fools, and women.⁹⁶ Many “racialised” groups are also seen as “primitives”.

There are many reasons why rights on their own in relation to nonhuman nature may prove to be problematic. Problems may arise when attempts are made to determine who or what has moral standing, or when considerations about nature are moved to the periphery that is the personal rather than the political. Problems also occur when attempts at applying the same rule or right repetitively become difficult because of the constantly fluctuating character of ecosystems. When considerations are rights-based, moral standing is usually attributed according to characteristics that nonhuman natural entities share with humans. These characteristics, which may include for example the ability to feel pleasure or pain, restrict the boundaries of the moral community to include only some non-human animals and neglect the larger environment of rocks, trees, air or water. This is a restrictive response in which inclusion is based on sameness with the human self and any difference, otherness, or particularity that may also be present is seen as a basis for exclusion. In actuality, both the self and the other are radically particularised and the moral self must understand that the other in a relationship is a specific individual and not merely a general, universal, moral category such as friend or person in need. If moral action does not account for this specificity, it is faulty and

⁹⁶ Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (New York: Routledge, 1992), 69.

defective because it fails to legitimise the irreducible particularity of the self, the other and the situation.⁹⁷

Even when proponents of justice models recognise this particularity, they tend to see it as simply a matter of personal attitude and affection rather than relevant to morality.⁹⁸ For these people, care is reserved for the private, lower plain of morality, and justice for the public realms of society. This seems to be a false opposition, not because it may never be true, but because it obscures the instances where they may work together, where “care for particular others is essential to a more generalised morality.”⁹⁹ By setting aside the particular and emotional as personal, as enemies of the rational, morality becomes based only on rules of abstract reason and rights of the impersonal public sphere. According to Val Plumwood, this type of public/private split in morality has been assumed in much of the framework of modern environmental ethics and is not necessarily an improvement over the older schools of thought.¹⁰⁰ When care and respect for nature are dismissed to the personal and private areas of society, there is a real risk

⁹⁷ Lawrence A. Blum, “Gilligan and Kohlberg: Implications for Moral Theory” in An Ethic of Care: Feminist and Interdisciplinary Perspectives, ed. Mary Jeanne Larrabee (New York: Routledge, 1993), 51.

⁹⁸ Lawrence A. Blum, “Gilligan and Kohlberg: Implications for Moral Theory” in An Ethic of Care: Feminist and Interdisciplinary Perspectives, ed. Mary Jeanne Larrabee (New York: Routledge, 1993), 51; and, Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (New York: Routledge, 1992), 150. Kohlberg justifies his relegation of care to the personal and private by claiming that the highest levels of moral development are attained primarily by men because these levels require participation, responsibility and role-taking in the secondary institutions of society. Secondary institutions refer to the workplace and government from which women are still largely excluded from the ultimate decision-making positions or positions of power.

⁹⁹ Val Plumwood, “Nature, Self and Gender: Feminism, Environmental Philosophy, and the Critique of Rationalism,” in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 158-9.

¹⁰⁰ Val Plumwood, “Nature, Self and Gender: Feminism, Environmental Philosophy, and the Critique of Rationalism,” in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 158.

that they will not be taken seriously in decision-making processes that tend to be part of more public socio-economic institutions. For example, there have been many occasions where environmental concerns have been minimised as the idle chatter of hysterical housewives.¹⁰¹

Rights are predicated on an understanding that they will be respected and applied consistently. Response to rights considerations must be formulated with the central idea of repetition or the ability to apply the same rule over and over again in similar situations. It is easy to see that this is not always possible when dealing with diverse ecosystems that may be constantly fluctuating or human situations that are context dependent. In environmental decision-making, the presence of many stakeholders, all with particular rights claims, is typical. Adjudication between conflicting rights claims can often be problematic in a complex world if context and particularity are not recognised as legitimate parts of the deliberation. It would be useful to have something in addition to rights considerations to help solve particular dilemmas, particularly in situations involving nonhuman nature that cannot verbalise its own needs and claims.¹⁰² A care approach must be added to ensure that the needs of the environment are appropriately considered because it is possible to care about the environment even when it is impossible to attribute rights to it.

¹⁰¹ Robert R.M. Verchick, "In a Greener Voice: Feminists Theory and Environmental Justice," Harvard Environmental Law Review 19 (Spring 1996): 41.

¹⁰² Deanne Curtin, "Toward an Ecological Ethic of Care," in Ecological Feminist Philosophies, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 69-70.

To eliminate justice-based thinking from moral consideration would be to throw out the baby with the bath water. Justice-based rights considerations have been used on many occasions to make specific gains in liberation politics in relation to class, race, gender and environmental inequalities. Justice-based rights may provide a framework of minimums below which behaviour must not fall. Justice-based rights could also guard against inappropriate caring. Inappropriate caring may occur when the needs and desires of the other are taken to be synonymous with those of the self (selfish or self-serving) or the needs and desires of the other are placed ahead of those of the self (self-sacrifice). The perspective of the “generalised other” may surmount problems raised by considerations based on care alone by providing “principles, institutions and procedures to enable articulation of the voice of others.”¹⁰³ Rights-based justice models provide a tool for reasoning with those who do not recognise obligations to care. Rights may be used to persuade people who may not have natural empathy for vulnerable others or for others who cannot make their demands heard.¹⁰⁴ Rights may establish a minimum standard of morality below which behaviour is universally condemned. This may help individuals to form a caring response because rights in this case define at least a minimum sense of what any individual would want in a similar situation.¹⁰⁵ Through this

¹⁰³ Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992), 168.

¹⁰⁴ Rita Manning, “Just Caring,” in *Explorations in Feminist Ethics: Theory and Practice*, eds. Eve Browning Cole and Susan Coultrap-McQuin (Bloomington: Indiana University Press, 1992), 50. Joy Kroeger-Mappes, “The Ethic of Care vis-à-vis the Ethic of Rights: A problem for Contemporary Moral Theory,” *Hypatia* 9:3 (Summer 1994): 115 would agree with Mannings view. She argues that if autonomy is central in the justice perspective then how will the powerless, or those people who are not recognised as autonomous, be accommodated if care is not part of moral deliberation.

¹⁰⁵ Rita Manning, “Just Caring,” in *Explorations in Feminist Ethics: Theory and Practice*, eds. Eve Browning Cole and Susan Coultrap-McQuin (Bloomington: Indiana University Press, 1992), 50.

shared sense of moral minimum, rights may provide the basis for collective action,¹⁰⁶ set the boundaries for appropriate caring¹⁰⁷ or even encourage a more caring society.¹⁰⁸

Rights may also prove useful to deliberate under conditions where the needs of the other cannot be directly expressed,¹⁰⁹ that is where one is not in direct contact with the one being cared for or where for some other reason they cannot express their own needs.

This would be the case where humans are caring for the environment.

Humans must listen to the voices of both care and justice, where humans are obligated to “care for” through actions that respond to the needs of persons, animals and the natural environment that form the communities of others within which we live. In these communities, rules and rights provide the basis for the moral decency of this caring response by setting limits on either extreme self-interest or self-sacrifice. According to Benhabib, including the voices of both “concrete” and “generalised” others in dialogic decision-making undermines the distinction between an ethics of justice and rights and one of care and responsibility. The realm of moral discourse is enlarged to include assumptions about needs and interests that underpin rights claims and the context and community that shape conceptions of justice become part of a single vision.¹¹⁰ The moral

¹⁰⁶ Kathryn Tanner, “The Care that Does Justice, Recent Writings in Feminist Ethics and Theology,” *Journal of Religious Ethics* 24 (Spring 1996): 179 explains that autonomy is important because it defines freedom from coercion, control of one’s own life and the opportunity to develop one’s capacity which have been historically denied to women in an oppressive society.

¹⁰⁷ Kathryn Tanner, “The Care that Does Justice, Recent Writings in Feminist Ethics and Theology,” *Journal of Religious Ethics* 24 (Spring 1996): 179 argues that rights provide the base for reflection to determine if a relationship is non-oppressive or if the other even has a valid claim for a caring response.

¹⁰⁸ Rita Manning, “Just Caring,” in *Explorations in Feminist Ethics: Theory and Practice*, eds. Eve Browning Cole and Susan Coultrap-McQuin (Bloomington: Indiana University Press, 1992), 50.

¹⁰⁹ Rita Manning, “Just Caring,” in *Explorations in Feminist Ethics: Theory and Practice*, eds. Eve Browning Cole and Susan Coultrap-McQuin (Bloomington: Indiana University Press, 1992), 51.

¹¹⁰ Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992), 169-70.

community of a complex world must somehow include the voice of the “concrete other” belonging to our natural environment.

1.33 Ecofeminist Care-Justice for Nature

Decision-making that appropriately takes account of difference, requires the inclusion of the perspectives of both the “generalised” and “concrete” others. The perspective of the generalised other demands that every individual is “entitled to the same rights and duties we would want to ascribe to ourselves.”¹¹¹ Rights are based on our commonality, where having a right to something means that the other has a duty not to hinder the enjoyment of that thing. Including the perspective of the “concrete other” expands the focus on commonality to include particularity, where each person is entitled to expect and to assume that the other will act in recognition of the concrete, individual being with specific needs, talents and capacities that they are.¹¹² An ecofeminist care-justice ethical framework for nature would need to incorporate a stronger connection with, rather than separation from, nature. This would translate into something more than instrumental value for the environment and facilitate recognition of the unique present and future responsibilities that humans have for nature’s well being. Moreover, a closer connection with nature would promote more positive duties of caring where participation and action become key. Finally, this care-justice framework for nature would require a

¹¹¹ Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992), 158-9.

¹¹² Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992), 159.

mechanism for dealing with the frequent conflicts that develop because resources today are becoming ever more scarce. In many cases the justice part of this framework is already in place and the challenge is to find a way to add the connection and responsibilities associated with care.

Connection with rather than separation from nature is important for good environmental decision-making because separation tends to promote decisions that maximise benefits for present human stakeholders over those that favour the natural environment or future generations. A sense of connection comes when one sees the self in relationships with many others. As long as we see ourselves as autonomous beings with competing rights claims, we may fail to recognise the possibilities for solutions that present themselves when we understand that we really have the same long-term goals in mind. Recognising nature as a legitimate participant within a dialogic community¹¹³ is important for ensuring that those who speak for nature are heard and taken seriously. A dialogic community that incorporates both care and justice in relation to humans and non-human nature will ensure that people are given the opportunities to speak for a nature that cannot speak for itself.

Speaking for nature in a dialogic community signifies positive and active duties of caring. One way to accommodate active duties of caring could be through increased

¹¹³ A dialogic community is one based on communication between different others that entertains debate and consideration of conflicting viewpoints. This is a genuine dialogue that leads to altered understanding rather than simply a multitude of perspectives being put on the table. The goals of a dialogic community include uncovering a need for change and taking action. Patrick D. Murphy, "Ground, Pivot, Motion: Ecofeminist Theory, Dialogics, and Literary Practice," in *Ecological Feminist Philosophies*, ed. Karen J. Warren (Bloomington: Indiana University Press, 1996), 228-9.

opportunities for the meaningful participation of reasoning individuals in the political process, a process that for the most part has become the territory of experts. By increasing the opportunity for meaningful participatory processes, new and potentially better solutions for the problems of modern societies, including environmental concerns can become available. For this to happen, social structures would need to be transformed into caring institutions that become universally accessible fora of public participation.¹¹⁴ Rights based approaches of the justice model have already been shown to be useful for encouraging a more caring society and perhaps more caring institutions within that society. Access that once was restricted based on class, race, gender, religion, or knowledge becomes available to all and guaranteed by the rights formulations of the justice framework. In some cases, special access may be required for people with a history of marginalisation or people who speak for the other that cannot speak for the self.¹¹⁵ This latter self could very easily be the natural environment. In a caring society, courts would be more accessible by expanding opportunities to obtain standing in actions initiated to protect the environment and ensuring that traditional indigenous knowledge is considered as valid as so-called expert testimony. This would be beneficial because stakeholders and court officials would be given a greater opportunity to gain a better understanding of the highly technical discourse that often frames environmental problems and marginalises those who are unfamiliar with the terminology. In the often less than

¹¹⁴ Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (New York: Routledge, 1992), 80-82.

¹¹⁵ Peter Swan, "Environmental Justice and Minority Ecological Rights," in Do We Need Minority Rights: Some Conceptual Issues, ed. J. Raikka (The Hague: Martinus Nijhoff Publishers, 1996), 179-215.

perfect caring society that we are faced with today, these opportunities could be institutionalised through an expanded Environmental Bill of Rights or broader guarantees of rights of participation within existing environmental policies and statutes.

Finally, the ecofeminist care-justice framework needs a mechanism for dealing with conflict in a complex society where natural resources are often scarce. The rules and rights that form the justice part of the framework are already in place to a great extent in Canadian society and therefore are available and important when conflicts arise. They help to determine and promote appropriate ways of caring. Rules and rights have been shown to be tools of persuasion to protect the helpless. The language of rights may be used to reason with those who may not care, or may not care enough. Rules and rights can also provide a moral minimum where behaviour below a certain level is not considered moral. Moral minimums can offer protection, encourage caring, and provide the basis necessary for collective action. Rules and rights can also be used to deliberate in instances when the one doing the caring is not in direct contact with the one cared for, so that needs and interests can be expressed and understood. This could apply to the natural environment or to people living in dire poverty half way around the world.¹¹⁶ Uneven distribution of resources in an imperfect world means that caring is not always enough to ensure that basic needs are met. Conflict often results because culture and social institutions are generally not structured to include the caring model. In modern

¹¹⁶ Rita Manning, "Just Caring," in Explorations in Feminist Ethics: Theory and Practice, eds. Eve Browning Cole and Susan Coultrap-McQuin (Bloomington: Indiana University Press, 1992), 50.

society “rules and rights should be crafted such that they work towards a caring society.”¹¹⁷ For example, new rules and rights instituted to explicitly give more individuals access to the courts as a means for protecting their environment rather than setting up additional barriers would signify a more caring society.

When the perspectives of the “concrete” and “generalised” other are recognised within a dialogic community, rights can be challenged in relation to need interpretations and legitimate moral concerns are no longer restricted to issues of justice but questions of the good life as well.¹¹⁸ Questions of the good life are important, because the focus changes to care and responsibility within a dialogic community for an environment that may or may not be rights bearing or able to speak for itself in normative deliberations. Caring expands the moral universe to include and accommodate the needs of others as well as self, provides a balance for competing rights claims by encouraging co-operation, and maintains the web of social relationships that provides a sense of community. It is easy to see the advantages of caring when non-human nature becomes part of the community. If moral considerations were derived only through characteristics that are shared with humans, nonhuman nature would be short-changed every time. Discourse must reflect care and responsibility along with rights and duties in any adequate environmental ethic capable of defining the actions necessary for addressing environmental concerns or averting possible ecological crisis.

¹¹⁷ Rita Manning, “Just Caring,” in Explorations in Feminist Ethics: Theory and Practice, eds. Eve Browning Cole and Susan Coultrap-McQuin, (Bloomington: Indiana University Press, 1992), 53.

¹¹⁸ Seyla Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (New York: Routledge, 1992), 169.

1.4 Conclusion

Ecofeminism is a particular form of feminism and environmentalism that recognises the historical real and conceptual mis-connections between women and nature that have resulted in the twin domination of both. Linking feminism and environmentalism is a way to address oppressive conceptual frameworks that sustain these twin dominations and the oppression of other marginalised people in society. Many ecofeminists focus on the ethic of care that was popularised by Carol Gilligan as a way of recognising a different voice in moral deliberations. The ethic of care recognises a self-in-relationship with others that are different. Care adds a certain dimension of connectedness that is not available under a strictly rights-based form of justice. The idea of stewardship has been suggested as a logical expression of ecofeminist care ethics in relation to environmental policy and decision-making, particularly at the local and regional levels.¹¹⁹ Even though stewardship has been part of human thinking about the environment, in some cases for thousands of years, it has appeared, on some occasions, to provide a less than adequate model of environmental protection. Environmental stewardship has evolved into the idea that humans have a responsibility to care for natural resources and land in order to ensure their long-term sustainability. In short, stewardship is a type of environmental ethic. Stewardship, as an ethic, has a long history within

¹¹⁹ MG Reed and O Slaymaker, "Ethics and Sustainability," Environment and Planning A 25 (1993).

indigenous cultures¹²⁰ and in certain Western religious experience.¹²¹ It has a more recent history in legal institutions, in the form of trustee statutes and the public trust doctrine,¹²² and has most recently been adopted in economic circles, where it is fashionable and economically wise to at least appear environmentally friendly. The next chapters of this thesis will establish three representative models of stewardship and critically examine them against the more complete ecofeminist care-justice framework as a means of discovering potential shortcomings and suggesting improvements for better environmental decision-making. Stewardship, as reconstructed through an ecofeminist type of care-justice, should have enhanced ability to address conflicts concerning quality of life that are part of everyday economic and environmental decision-making.

¹²⁰ Mary Ellen Tyler, "Spiritual Stewardship in Aboriginal Resource Management," Environments 22:1 (1993).

¹²¹ Harold Glasser, "Review of Caring for Creation: An Ecumenical Approach to the Environmental Crisis, by Max Oelschlaeger," in Environmental Ethics 17 (Summer 1995) and Max Oelschlaeger, Caring for Creation: An Ecumenical Approach to the Environmental Crisis (New Haven: Yale University Press, 1994).

¹²² J. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" Michigan Law Review 68 (January 1970): 473-566, and Constance D. Hunt, "The Public Trust Doctrine in Canada," in Environmental Rights in Canada, ed. John Swaigen (Toronto: The Butterworth Group of Companies, 1981).

2.0 TRADITIONAL MODELS OF STEWARDSHIP

2.1 Introduction

The word stewardship has taken on many different meanings over the course of human development. Historically, indigenous, religious and legal notions of stewardship have defined the relationship between humans and nature, specifically in relation to natural resources and land. More recently, the idea of stewardship has become common in environmental discourse. Business and industry also make claims of stewardship in relation to their products and services.¹ The number and variety of meanings attached to this concept suggest that the term may no longer be useful for guiding human behaviour, particularly in relation to the environment. It may be that a new or even redeemed meaning for stewardship would have better potential for resolving complex issues where

¹ The notion of stewardship in relation to business practices, processes and products is complicated enough to be the subject of a thesis in its own right. In particular, since environmental protection was brought to the fore in the 1970s and 80s, companies have come to realise that being, or at the very least appearing to be, environmentally friendly was a wise decision. The publicity that accompanied events in this timeframe, such as the Union Carbide toxic chemical disaster in Bhopal, India or the Exxon Valdez oil spill in Alaska, reached a wide audience who were awakened to the dangers presented by industrial practices. People began to protest when these practices did not appear to reflect the environmental values that they held. Among other measures, product boycotts became an effective tool used by individual consumers to change corporate behaviour. Even large corporations such as McDonald's Restaurants were affected. The result was that industry began to talk the talk of environmentalism in order to, at minimum, appear environmentally conscious so that consumers would not take action against their products. The feeling behind the scenes in business circles, however, has to a large extent remained focused on the expense associated with environmental protection preventing companies from being competitive, especially in global markets. Other problems exist because the number of different stakeholders involved in environmental protection developed a variety of definitions for concepts such as product stewardship. Some firms view stewardship as covering the output end of production only so that if products ship in reduced packaging and are recyclable they claim to be environmentally responsible, even if the processes that went into making the product were far from environmentally safe and/or friendly. Other firms attempt to be responsible for all environmental impacts throughout the lifecycle of a product. Before some of these issues can be cleared up, it is reasonable to assume that those making decisions in industry and other sectors of the economy and society will need to adopt an appropriate and hopefully consistent environmental ethic to guide their behaviour. Otherwise confusion and conflict will remain and environmental protection will suffer. This is not to say, however, that some companies may not already be making an effort to be environmentally responsible citizens. For an example of one business perspective on these issues refer to B.W. Steele, "Product Stewardship at Dofasco: A Discussion Paper," *CIM Bulletin* 89:999 (April 1996): 71-76.

environmental values often appear to conflict with other important aspects of social and cultural life.

Stewardship, in its most basic sense, implies caring. Stewardship can be broadly defined as "a guide for human behaviour based on the belief that humans are caretakers and nurturers of the natural world."² Legally, a steward is "[a] man [sic] appointed in the place or stead of another," who, in old English law was, "an important officer who had the general management of all forensic matters connected with the manor of which he was a steward."³ Caring for someone or something can be individualistic and instrumental when it serves the needs or interests of the one doing the caring or more holistic when complex cultural, social, and environmental concerns are also taken into consideration. Caring can be associated with positive obligations that require the steward or trustee to promote the interests of what is being cared for, or passive obligations for protection or preservation, or a combination of both.⁴ In Canada, environmental law is generally associated with passive obligations to refrain from polluting, overuse of natural resources or destruction of habitats needed for the protection of various species. There appears to be a lack of solid foundation for a more positive obligation on the part of governments and citizens to take responsibility for the environment. This seems even

² Donald G. Kaufman and Cecelia M. Franz, Biosphere 2000: Protecting Our Global Environment (New York: HarperCollins College Publishers, 1993), G-14.

³ Black's Law Dictionary, rev. ed. (1990), s.v. "Steward."

⁴ Thomas A. Campbell, "The Public Trust, What's it worth?" Natural Resources Journal 35 (Winter 1994): 76-7.

more prevalent amidst the current trend by governments to cutback environmental regulations that are supposedly hampering economic growth.⁵

Traditionally stewardship principles have been narrowly focused on caring for natural resources such as forests and coastal ecosystems.⁶ A reworked version of stewardship that combines more positive duties of caring for an intrinsically valued environment combined with expanded application within the institutions of modern society may be more effective in relation to natural resources, environmental policy and law. Before stewardship can be reworked, however, it is necessary in this chapter to outline indigenous, religious and legal stewardship as three representative models. These models have influenced human behaviour for centuries. Moreover, the indigenous stewardship model has actually been active in relationships with natural environments since humans inhabited the earth as hunter-gatherers over 10,000 years ago. The models outlined here will be the focus in the next chapter of a critical evaluation and analysis in relation to the care-justice framework developed in the first chapter. The objective of this critical analysis is to rework stewardship using the more largely applicable care-justice framework so that it can provide a more effective model for environmental protection and decision-making.

⁵ This is a common theme that has been reported on in the press for over a year. See for example, Martin Mittelstaedt, "Environmental rules need overhaul, Harris says," The Globe and Mail, 14 November 1996, A6(A), and "Ontario weakening needed pollution rules, critics argue," The Globe and Mail, 12 March 1997, 8(A). Also see Terence Corcoran, "Business pays for being Green," The Globe and Mail, 11 February, 2(B).

⁶ One Canadian example of stewardship in relation to natural resources is analysed in EJ Norrena, "Stewardship of coastal waters and protected spaces: Canada's Approach," Marine Policy, 18 (2), (1994).

2.2 Indigenous Stewardship

Indigenous people⁷ have embraced the concept of stewardship for many centuries. It is intimately connected with their culture, traditional knowledge, spirituality, economics and relationship to nature. Indigenous stewardship is based on holistic notions of the interconnectedness of people, their environment and their gods and reflects respect and caring for non-human nature as a way of life. This caring and respect are based on the desire and necessity to ensure a continued supply of essential life supporting resources for current and future generations.⁸ In many indigenous cultures there is an imperative to live in a sacred manner. This means that there is an obligation “to act responsibly in the use of power and life forces manifested within tribal territories and special places. To exercise 'sacred stewardship', in a tribal socio-cultural context, is to act in a way that shows 'respect' and its spiritual expression.”⁹ Concepts that are important in indigenous stewardship are: human connections with nature, a strong sense of community that also includes all things natural, religion that permeates all aspects of life, the acknowledgement that nature provides the means of subsistence, and explicit considerations of future generations.

The land where native people live and their interconnectedness with non-human life and inanimate objects reflect their history, culture, meaning and identity. Indigenous

⁷ Indigenous people refers to a large and varied peoples with many differences among them. It is typical, however, that indigenous people share a deep understanding of their connection to the land and environment that support them. This connection is manifest in most, but perhaps not all, cases in some form of stewardship.

⁸ Mary Ellen Tyler, “Spiritual Stewardship in Aboriginal Management Systems,” *Environments* 22 (1), (1993):1.

⁹ Mary Ellen Tyler, “Spiritual Stewardship in Aboriginal Management Systems,” *Environments* 22 (1), (1993):2.

people tend not to consider themselves as masters of a nature that is to be used for utilitarian purposes. Rather, nature is valued for itself, similar to a close relative or loved one. Human oppression of nature and even other humans tends to be non-existent.¹⁰ For example, the Haida of Canada's most western islands refer to whales and ravens as their brothers and sisters and to fish and trees as the finned and tree people.¹¹ Nature is considered common property and sacred and thus has value in its own right. The value attributed to nature is substantiated by larger indigenous worldviews that begin with assumptions of plentiful resources, relative equality and the idea that personal success is synonymous with communal success. Since it is assumed that there are plenty of resources to meet everyone's needs, an incessant drive for linear progress does not exist. Time is viewed as circular and repetitious, with endless cycles of birth, growth, decay and renewal. Life is given meaning based on connections between people, the roles that people play in their lives, the various stages of life and associations between life and death.

In indigenous cultures, actions that contribute to community life also give meaning to individual life. Because security, appreciation, relatedness and meaning in life are closely tied together, a strong sense of individuality develops.¹² Peter Wenz finds that this expression of strong individuality among connected indigenous people is somewhat ironic when compared with western cultures. Wenz argues that western

¹⁰ Peter S. Wenz, Nature's Keeper (Philadelphia: Temple University Press, 1996), 119.

¹¹ David Suzuki and Peter Knudtson, Wisdom of the Elders, (New York: Bantam Books, 1992), xxxii-xxxxiii.

¹² Peter S. Wenz, Nature's Keeper (Philadelphia: Temple University Press, 1996), 135-39.

societies typically strive for autonomy and individuality as ultimate human values, yet this autonomy is often expressed in conformity. For example, he notes that Western consumer products are promoted “on the assumption that people are so insecure that they will grasp at any toothpaste, hair style, or shoe that promises, however unrealistically, to provide social acceptance.”¹³ Indigenous people are individuals that gain strength not from conformity but from their sense of community.

Religion and ethics permeate all aspects of indigenous social life. The oral traditions of the Gitksan and Wet'surwet'en of North West British Columbia speak of spiritual stewardship of tribal territories. This spiritual or sacred stewardship is based on laws of respect for the environment and the organic world that they depend on for physical and spiritual survival.¹⁴ Religion supports these First Nations people's existence in the world. Their religion is “one of harmony, vitality, and appreciation of the world around them.”¹⁵ First Nations put nothing above nature. Even their gods are part of nature. Things are not divided into religious versus secular because religion pervades and informs all life.¹⁶ Indigenous peoples have a strong sense of place that is related to their connection to the natural environment. They are socialised through their culture and religion to perceive and do things that make sense in relation to local climate, flora, fauna

¹³ Peter S. Wenz, *Nature's Keeper* (Philadelphia: Temple University Press, 1996), 140.

¹⁴ Mary Ellen Tyler, “Spiritual Stewardship in Aboriginal Management Systems,” *Environments* 22 (1), (1993): 2.

¹⁵ David Suzuki and Peter Knudtson, *Wisdom of the Elders*, (New York: Bantam Books, 1992), 19.

¹⁶ David Suzuki and Peter Knudtson, *Wisdom of the Elders*, (New York: Bantam Books, 1992), 19.

and terrain. The indigenous self is strongly connected to the land, which has functions similar to those of God in Western cultures. Land is sacred and cannot be owned.¹⁷

This does not mean that conflict between humans and nature is absent in indigenous cultures. Nature must be utilised on a daily basis in order to survive, however, this is usually accomplished with a great deal of respect. Respect and courtesy are mandatory in all interactions with nature. Taking a life to sustain one's own is done with great reverence, where complex rituals and ceremonies reinforce familial bonds between Native-Aboriginal people and their environments.¹⁸ According to the Gitksan and Wet'surwet'en tribal chiefs, the tendency for humans to over-exploit resources "was shown in myths and was regarded as immoral... every animal and fish was an individual that shared common characteristics with man [sic] ...each killing was thought of as a religious act."¹⁹ Indigenous spiritual stewardship represents a "complex system of social and environmental interrelationships which involve reciprocal rights, obligations and responsibilities" where "environmental management becomes an holistic and simultaneous process."²⁰

A final and important feature of indigenous stewardship is its explicit obligation to future generations. Resources must be used wisely and with respect to ensure their continued future supply. Respect is demonstrated through individual or collective

¹⁷ Peter S. Wenz, *Nature's Keeper* (Philadelphia: Temple University Press, 1996), 142-3.

¹⁸ Roderick Frazier Nash, *The Rights of Nature: A History of Environmental Ethics*, (Madison: The University of Wisconsin Press, 1989), 117-8.

¹⁹ Mary Ellen Tyler, "Spiritual Stewardship in Aboriginal Management Systems," *Environments* 22 (1), (1993): 2.

²⁰ Mary Ellen Tyler, "Spiritual Stewardship in Aboriginal Management Systems," *Environments* 22 (1), (1993): 2.

activities that reflect the spiritual dimension of human behaviour. In many cases, myths are used to instruct and interconnect socio-cultural values and actions with spiritual and physical life support systems across many generations.²¹ For the Gitksan and Wet'surwet'en, human beings are involved in a continuum with animals, fish and the spirit world. People and animals can be reincarnated if the 'law' is obeyed by treating human and animal spirits with respect. Explicit concern for future generations reflects an implicit notion of equity in indigenous stewardship.

Several key elements of environmental stewardship should be remembered in the context of indigenous people. One is the holistic notion of humans and nature, where one is not above the other. In addition, thinking is circular, where life moves from birth to death and on to birth again, rather than linear. Individual success is measured in relation to success of the community. Another important idea is the obligation to respect not only other humans but also an environment that is necessary for cultural and spiritual survival. This caring for the environment encompasses not only the needs of the present but also future generations and requires more than passive compliance to rules or laws. Tribal members are actively involved with oral traditions, myths and ritual feasts as methods to inform and guide respectful and responsible behaviour. Above all, indigenous stewardship encompasses a unique and strong connection to the natural environment that

²¹ Mary Ellen Tyler, "Spiritual Stewardship in Aboriginal Management Systems," *Environments* 22 (1), (1993): 4.

is manifested through respectful consideration when use of natural resources becomes necessary for survival.

2.3 Religious Stewardship (The Judeo-Christian Model)

For the purpose of this discussion, religious stewardship refers to Western notions based on Judeo-Christian traditions.²² Religious stewardship is significant in environmental circles because it forms an integral part of the ongoing debate over whether Judeo-Christian traditions are the cause of²³ or the cure for²⁴ ecological crisis. Some people argue that biblical stories of creation, particularly in Genesis, account for a Western view that “man [sic] is created in the image of God and given dominion over and charged to subdue a profane nature.”²⁵ Other people present an alternative interpretation of the creation story that reflects the idea that humans, rather than being given permission to dominate nature, “have particular responsibilities, powers and privileges to dress the

²² While it is entirely possible that other religions, such as Islam, Zen Buddhism or Shinto, may also reveal close human relations to nature or even alternative notions of stewardship, discussion of these religions is beyond the scope of this thesis, in particular as they do not figure prominently in the context of western society. For example, in Shinto, Japan's oldest religion, the close relationship of humans with nature is evident as its many gods, known as Kami, are actually the basic forces found in mountains, rivers, rocks, trees and other parts of the natural environment. With Shinto, there is no substantial difference or discontinuation between Kami and human beings and the religion dictates that people feel awe to some of the natural elements that greatly influence human existence, hence the Kami of Rain or the Kami of Thunder. Concepts in Shinto that may be important for the treatment of the natural environment (keeping in mind that there is no discontinuity between humans and nature) include: the notion that it is a religion based on pluralistic ideas that suggest coexistence is possible even among those who do not share the same values; the idea of placing ultimate value on the community and the development of the community; and, the practice of rituals that are offered to console the spirits of the Kami, to pacify negative forces of both humans and nature and to strengthen positive forces for constructing a better community. This and more detailed information on Shinto is available in The Worldbook Multimedia Encyclopedia, s.v. “Japan” and “Shinto” and also “Shinto index” [<http://www.jinja.or.jp/english/s-0.html>].

²³ Lynn White Jr., “The Historical Roots of Our Ecological Crisis,” *Science* 155 (March 1967): 1203-7.

²⁴ Max Oelschlaeger, Caring for Creation: An Ecumenical Approach to the Environmental Crisis, (New Haven: Yale University Press, 1994).

²⁵ Carol S. Robb and Carl J. Casebolt, eds., Covenant for a New Creation, (Maryknoll: Orbis Books, 1991), 4. This view is based on the First Story of Creation in Genesis 1:28, which says “God blessed them, saying: ‘Be fertile and multiply; fill the earth and subdue it. Have dominion over the fish of the sea, the birds of the air, and all living things that move on the earth.’”

garden and keep it, to be stewards of the earth.”²⁶ Unfortunately, this latter interpretation, which forms the basis of the “Christian stewardship” model, does not seem to be entirely unaffected by the alternative “dominion over” model. It may be that dominion over thinking has limited the ability of the Christian stewardship model to gain prominence in secular society. This section will present a more detailed account of religious stewardship, including the influence of the “dominion over” interpretation from Genesis, and attempt to highlight some concepts central to the model that will be critically examined in the next chapter.

It is useful to begin by briefly exploring the “dominion over” interpretation of the creation story, in order to later determine its influence on the stewardship model. The “dominion over” interpretation is primarily focused on the creation story found in Genesis 1, which, in a very simplified version, states that first God created light and then all the living creatures which he felt were good. Then he created humankind in his own image, and let them be masters of the fish, the birds, the cattle, and all the wild beasts and reptiles on the earth.²⁷ The idea of “dominion over,” which means to rule, control, have jurisdiction or sovereignty over, has frequently been misinterpreted to mean possession and domination, the latter commonly referring to power, supremacy and mastery. The idea of domination has been used on many occasions to support the abuse of nature to

²⁶ Carol S. Robb and Carl J. Casebolt, eds., Covenant for a New Creation, (Maryknoll: Orbis Books, 1991), 4. This alternative interpretation is based on Genesis 2:15 which states that “[t]he Lord God then took the man and settled him in the garden of Eden, to cultivate and care for it.”

²⁷ Carol S. Robb and Carl J. Casebolt, eds., Covenant for a New Creation, (Maryknoll: Orbis Books, 1991), 4-5.

suit the needs and often the whims and fancy of human beings who are supposed to be a step above nature, as the only rational creatures in God's creation. Environmental destruction and pollution, which seem to be natural extensions of the "dominion over" model, are deemed to be the result of the fall²⁸ of Adam and Eve in the Garden of Eden.²⁹

In the "dominion over" view, humans see themselves as separate from nature that can be used for their own utilitarian purposes. This has been seen to flow from placing too much importance on redemption, which has detracted from the value of the earth as God's wonderful creation, and in turn contributed to the legitimisation of environmental destruction.³⁰ Some people argue that Christianity inherited a concept of linear time, according to which life is an endless journey towards more progress. Linear time tends to lack recognition of various cycles and connections that also exist. This concept supported the growth of anthropocentric religious notions extending from Judaism, through Christianity and beyond. Lyn White Jr. argued that by seeking to conquer pagan notions that trees and mountains had guardian spirits to protect them "Christianity made it possible to exploit nature in a mood of indifference to the feelings of natural objects."³¹ White pointed to St. Francis of Assisi, and his notion that humans were not supposed to be monarchs of creation but rather part of a democracy of all God's creatures, as a

²⁸ The fall refers to the idea of original sin that resulted from Adam, being tempted by Eve and the serpent, eating the forbidden fruit and being banished from the Garden of Eden. This also has implications in the idea that woman is the evil temptress, the distraction and the obstacle to holiness, which resulted in the justification of men's domination over women. Refer to Peter S. Wenz, *Nature's Keeper*, (Philadelphia: Temple University Press, 1996), 20. As argued earlier in this thesis, this connection between women and nature and their twin domination by men is seen to be a major cause of environmental destruction.

²⁹ J. Baird Callicott, "Genesis and John Muir," in *Covenant for a New Creation*, eds. Carol S. Robb and Carl J. Casebolt (Maryknoll: Orbis Books, 1991), 117.

³⁰ Peter S. Wenz, *Nature's Keeper*, (Philadelphia: Temple University Press, 1996), 16.

³¹ Lynn White Jr., "The Historical Roots of Our Ecological Crisis," *Science* 155 (March 1967): 1205.

potential role model for modern ecology and environmental ethics.³² St. Francis may have been a true pioneer of the alternative view of the creation story that forms the basis of Christian stewardship.

In the Judeo-Christian stewardship view, human beings are considered unique among all God's creation³³ and therefore carry unique responsibilities and rights. One important responsibility is to care for the rest of God's creation for present and future generations.³⁴ Humans are supposed to be "God's stewards of creation - the caretakers of nature - not nature's new owners."³⁵ By creating nature and declaring it good, God gave nature intrinsic value. But if nature has intrinsic value, then how can humans use natural resources in their own interest for survival purposes? The answer in the stewardship account is that, because humans are burdened with responsibilities in relation to non-human nature, they also have complementary privileges. In other words, humans are "entitled to the usufruct³⁶ of our dominion so long as we rule it benignly and do not draw on capital reserves."³⁷ Capital reserves are all the natural resources that humans depend on for their survival. Moral obligations fall solely on humans as moral agents capable of

³² Lynn White Jr., "The Historical Roots of Our Ecological Crisis," *Science* 155 (March 1967): 1206.

³³ God's creation refers to the rocks, birds, trees streams, non-human animals and humans that make up and inhabit the earth as part of the universe.

³⁴ J. Baird Callicott, "Genesis and John Muir," in *Covenant for a New Creation*, eds. Carol S. Robb and Carl J. Casebolt (Maryknoll: Orbis Books, 1991), 108.

³⁵ J. Baird Callicott, "Genesis and John Muir," in *Covenant for a New Creation*, eds. Carol S. Robb and Carl J. Casebolt (Maryknoll: Orbis Books, 1991), 108.

³⁶ A usufruct may be defined as "...the right of using and enjoying and receiving the profits of property that belongs to another" *Black's Law Dictionary*, 6th ed., s.v. "Usufruct"

³⁷ J. Baird Callicott, "Genesis and John Muir," in *Covenant for a New Creation*, eds. Carol S. Robb and Carl J. Casebolt (Maryknoll: Orbis Books, 1991), 112.

caring for nature while at the same time using it respectfully to survive. Christian stewardship has been defined as

[a] caring keeping of the earth that works to preserve and restore the integrity of the created order, doing the will of the Creator, and seeking for the Creator's kingdom of integrity and peace—a kingdom devoid of human arrogance, ignorance, and greed. Christian stewardship is so living on Earth that heaven will not be a shock to us.³⁸

In this view, those who believe in the impending environmental crisis attribute it to human sinfulness, or the human inability to be true to Christian doctrine, and not to the substance of the doctrine itself. Christians thus have the same responsibility for environmental destruction as those who do not follow any particular religion and all people must become part of the solution.³⁹ In the Christian stewardship model, humans become members of the ecological community that belongs to God, but must live up to certain responsibilities to care for the community because of their ability to reason and free will to choose between actions.

Unfortunately, following religious stewardship principles may not always be a simple matter. According to Frederick Kirschenmann, there is a conflict of values regarding land that is deeply embedded in history. Kirschenmann states that many religious people came to the Americas with a dream that they were chosen to carry out a special mission to build a New Kingdom of God. They felt that they had a moral obligation to prosper through mining natural resources, clearing trees, taming wilderness

³⁸ Calvin DeWitt, A Sustainable Earth: Religion and Ecology in the Western Hemisphere (Mancelona, MI: AuSable Institute, 1987) quoted in Laurel Kearns, "Saving the Creation: Christian Environmentalism in the United States," Sociology of Religion 57:1 (1996): 58.

³⁹ Laurel Kearns, "Saving the Creation: Christian Environmentalism in the United States," Sociology of Religion 57:1 (1996): 59.

and generally making the land productive. This obligation was even used to justify expropriating land from Native Americans, who the new settlers felt had abdicated their duty to improve the land. Yet these same settlers also considered it an obligation to protect and preserve the land that God had given them as a gift. Thus, a tension between progress and preservation has existed from the beginning and to a large extent this dual land ethic still exists today.⁴⁰ This creates problems for decision-makers, attempting to apply a Judeo-Christian model of stewardship, who must choose between development projects and the protection of natural resources and the natural environment.

Max Oelschlaeger, in his book Caring for Creation: An Ecumenical Approach to the Environmental Crisis, outlines another problem in caring for the natural world. He calls this problem the “paradox of environmentalism.”⁴¹ By paradox of environmentalism he means that neither scientific nor ethical arguments have meant that environmentally harmful policies and social norms have been replaced by productive ones. This has resulted in an environmental movement that “has not proven itself adequate to the task of creating a democratic consensus on sustainability.”⁴² Oelschlaeger proposes that religious discourse is one possible way to promote the political will among democratic people to elect leaders who would create public policies to promote environmental sustainability. He argues that it is an over-simplification to believe that

⁴⁰ Frederick Kirschenmann, “The Ecology-Economic-Ethic Connection in Land Use,” in Covenant for a New Creation, eds. Carol S. Robb and Carl J. Casebolt (Maryknoll: Orbis Books, 1991), 80.

⁴¹ Max Oelschlaeger, Caring for Creation: An Ecumenical Approach to the Environmental Crisis, (New Haven: Yale University Press, 1994).

⁴² Max Oelschlaeger, Caring for Creation: An Ecumenical Approach to the Environmental Crisis, (New Haven: Yale University Press, 1994), 23.

Judeo-Christianity caused environmental crisis and that Judeo-Christianity must not be abstracted from the greater whole of history as an explanatory variable.⁴³ Oelschlaeger focuses on the convergence rather than divergence of creation stories. He argues that the stories converge on a "caring for creation" metaphor, which he says has the potential to transform post-industrial society.⁴⁴ He feels that religion can help people to come together in a common purpose of sustainable action while at the same time valuing the contributions of diversity in individual experience and knowledge. The 'caring for creation' metaphor provides substantive definition for the sense of common purpose.⁴⁵

Oelschlaeger's caring for creation seems to be one particular manifestation of religious stewardship. While recognising the potential of this metaphor to bring the Judeo-Christian religious community and the environmental movement closer together, a word of caution on its potential to promote systemic change must not be overlooked.

According to Harold Glasser, Oelschlaeger's argument is problematic because it is

...dependent on too many contingencies: the collaboration of modern science with religion; the conviviality of religion to participatory democracy; the ability of creation stories to establish value priorities that supersede utilitarian individualism; the power of religious discourse to facilitate environmentally oriented institutional reform and policy change; the capacity of an ethical foundation grounded in stewardship to adequately reflect diverse biological interests; and the likelihood that pragmatically employing religious fundamentals to promote ecological concerns will not generate a backlash of similarly pragmatic counter arguments that promote ecologically or socially infelicitous results.⁴⁶

⁴³ Max Oelschlaeger, Caring for Creation: An Ecumenical Approach to the Environmental Crisis, (New Haven: Yale University Press, 1994), 25.

⁴⁴ Max Oelschlaeger, Caring for Creation: An Ecumenical Approach to the Environmental Crisis, (New Haven: Yale University Press, 1994, 183.

⁴⁵ Max Oelschlaeger, Caring for Creation: An Ecumenical Approach to the Environmental Crisis, (New Haven: Yale University Press, 1994, 105.

⁴⁶ Harold Glasser, "Review of Caring for Creation: An Ecumenical Approach to the Environmental Crisis,

These appear to be valid concerns and they lay out what seems to be an almost impossible task for the Judeo-Christian stewardship ethic. Yet, the greatest strength of the “caring for creation” metaphor may be its ability to allow humans to think about the ecological crisis and natural resource use in a different way from the dominion over model. In this new way of thinking, individual, social, legal and political choices can be based on key elements of caring for nature.

As in indigenous notions of stewardship, a useful religious stewardship ethic must attribute intrinsic value to the earth. It should incorporate a notion of fairness between current and future generations for the use of natural resources and should require positive obligations of care, respect, and responsibility for the entire ecological community. Intrinsic value would ensure that natural resources are considered from more than a merely self-interested point of view. Positive obligations would require active caring and responsibility, so that what is needed for survival is handled in the least destructive way possible. Most important of all, however, may be the ability of religious stewardship to break free of the “dominion over” view that has permeated modern societies for centuries.

2.4 Legal Stewardship

Similar notions to those found in both indigenous and religious stewardship models have been institutionalised in modern secular society through legal mechanisms

designed to control the ill effects of development decisions. As development progresses, existing supplies of trees, water, fish or other natural resources needed for human survival often become depleted or degraded. This has resulted in a change in human attitudes toward natural resources, which has in turn elicited a regulatory response. In the United States, the regulatory response has been massive and over time governments have evolved into caretakers or trustees of these ever decreasing natural entities, a role that is reflected in the expansion of "trustee statutes"⁴⁷ and the development of a public trust doctrine.⁴⁸ The public trust doctrine and various trustee statutes are important manifestations of stewardship ethics in modern secular society, in particular as a legal mechanism for protecting the natural environment.⁴⁹ For Canada, the public trust doctrine has the potential to become a useful tool for overcoming some of the barriers present in environmental law⁵⁰ and incorporating sustainable development principles into

⁴⁷Thomas A. Campbell, "The Public Trust, What's it Worth," Natural Resources Journal 34 (Winter 1994): 74-5. With reference to the United States, Campbell defines the "trustee statutes" as: the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund, 42 U.S.C. §§ 9601-75, 1988, as amended), the Clean Air Act (CWA, 33 U.S.C. §§ 1251-1387, 1988) and the Marine Protection, Research and Sanctuaries Act (MPRSA, 16 U.S.C. §§ 1431-45, 1988).

⁴⁸The Public Trust Doctrine "provides that submerged and submersible lands are preserved for public use in navigation, fishing, and recreation and state, as trustee for the people, bears the responsibility of preserving and protecting the right of the public to the use of the waters for those purposes. *Oregon Shores Conservation Coalition v. Oregon Fish and Wildlife Com'n*, 62 Or.App. 481, 662 P.2d 356, 364." Black's Law Dictionary, 6th ed., s.v. "Public trust doctrine."

⁴⁹Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," Michigan Law Review 68 (January 1970): 471-566. This famous article has been credited as a catalyst to the recent expansion of the public trust doctrine from simple application to navigable waters to broader application in environmental law that includes such entities as inland state and national parks, wetlands, forests, and even city streets and municipal water supplies. See for example, Timothy Patrick Brady, "But Most Of It Belongs To Those Yet To Be Born": The Public Trust Doctrine, NEPA, And The Stewardship Ethic," Environmental Affairs 17 (1990): 631. In his article, Sax argued that the public trust doctrine had promise in environmental law because it contained a concept of a legal right in the general public, it is enforceable against the government and it is capable of being interpreted consistent with environmental values.

⁵⁰Constance D. Hunt, "The Public Trust Doctrine in Canada," in Environmental Rights in Canada, ed. John Swaigen, (Toronto: Butterworths, 1981), 151. According to Hunt, one barrier in Canadian environmental law is the absence of positive duties on the part of citizens and government to protect and care for the environment. Other impediments include reluctance by the courts to interfere with the responsibilities of administrative bodies, lack of standing, and lack of solid doctrinal foundation for citizen environmental suits.

both domestic and international institutional commitments.⁵¹ However, the public trust doctrine has not received much attention in Canada, in the environmental context especially in comparison to the United States.⁵² The only Canadian attempt to apply the doctrine, Green v. Ontario,⁵³ was rejected in 1973.⁵⁴

Trustee statutes are important because they acknowledge the value of natural resources and associate a cost with their loss.⁵⁵ Associating cost calculations with the depletion of natural resources means that production processes can more accurately reflect the effects on the natural environment of doing business. Even though this doctrine has grown in the United States, there is considerable amount of controversy over its effectiveness, legal and theoretical grounding, and whether or not it should be used for environmental protection. The objective here is not to provide a comprehensive account of the copious amount of academic research that exists in relation to this doctrine, but to briefly sketch a public trust model that reveals some of the same key elements of caring and responsibility that inform indigenous and Judeo- Christian notions of stewardship.

⁵¹ John C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized," Journal of Environmental Law and Practice 7:1 (December 1996): 42.

⁵² Not only has the public trust doctrine been put to more use in the United States, research reveals that it has been, as Lloyd Cohen describes it, "discussed ad nauseum." Lloyd R. Cohen, "The Public Trust Doctrine: An Economic Perspective," California Western Law Review 29 (1992): 239-276. The first footnote in Cohen's article provides an extensive list of articles on the doctrine that only scratches the surface of the literature in this area. A recent search of only one periodical database revealed 232 American references to the public trust doctrine between 1980 and the present.

⁵³ Green v. The Queen in Right of the Province of Ontario, (1972), 34 DLR (3d) 20 (Ont.HCJ)

⁵⁴ Constance D. Hunt, "The Public Trust Doctrine in Canada," in Environmental Rights in Canada, ed. John Swaigen, 151- 194 (Toronto: Butterworths, 1981). Searches for references to the public trust doctrine in a Canadian context has yielded the exact opposite result (less than five of a general nature and only two specific references) than the American situation. See also John C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized," Journal of Environmental Law and Practice 7:1 (December 1996) for a more recent account of the public trust doctrine in Canada that confirms these earlier findings.

⁵⁵ Thomas A. Campbell, "The Public Trust, What's it Worth," Natural Resources Journal 34 (Winter 1994): 75.

This section will examine the historical development of the public trust and the Canadian experience with the doctrine, as well as highlight some of the controversy and promise associated with it. An underlying theme in relation to legal stewardship is an obligation on the state to care and be responsible for an expanding range of resources that are common to all.

It is generally accepted that the public trust doctrine has origins in ancient Roman civil law, in particular with reference to the Institutes of Justinian,⁵⁶ where running water, the sea and seashore were types of property common to all.⁵⁷ These resources were allocated for public use, were not available for private ownership and were subject to the guardianship of the Roman people.⁵⁸ All individuals could use these resources so long as their use did not infringe on use by other people.⁵⁹ Under Roman law, rivers and ports belonged to the public, who then enjoyed joint rights to fishing and navigation. At first there was some confusion as to whether these public resources were owned by the people or by no one, however, it eventually emerged that the state was actually the owner.⁶⁰ It is

⁵⁶ The Institutes of Justinian is "[o]ne of four component parts or principal divisions of the Corpus Juris Civilis, being an elementary treatise on the Roman Law in four books. The work was compiled from earlier sources . . . and was first published November 21, A.D. 533." Black's Law Dictionary, rev. ed. (1990), s.v. "Institutes of Justinian."

⁵⁷ Timothy Patrick Brady, "'But Most Of It Belongs To Those Yet To Be Born': The Public Trust Doctrine, NEPA, And The Stewardship Ethic," Environmental Affairs 17 (1990): 624, and Lloyd R. Cohen, "The Public Trust Doctrine: An Economic Perspective," California Western Law Review 29 (1992): 250.

⁵⁸ Constance D. Hunt, "The Public Trust Doctrine in Canada," in Environmental Rights in Canada, ed. John Swaigen, (Toronto: Butterworths, 1981), 152.

⁵⁹ Harry R. Bader, "Anataeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law," Environmental Affairs 19 (1992): 751.

⁶⁰ Johanna Searle, "Private Property Rights Yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine," South Carolina Law Review 41 (1990): 898.

interesting to note that, although the state did seem to protect public uses of these resources, no legal action could be taken against the government for failure to do so.⁶¹

As the Roman Empire declined, public rights to these common resources transformed into private ownership. Public rights to common resources then re-emerged in English common law. These public rights included access to waterways needed for commerce and free ability to move on land and water.⁶² The public trust doctrine in English law reinforced the idea that tidal lands belonged to the King, who in turn could grant the land to private owners as long as the ownership did not infringe on the public's use of the resources.⁶³ This idea of royal ownership was not readily accepted until Mathew Hale, a late 18th century English judge, established that "tidal lands were only presumed to belong to the crown in the absence of evidence to the contrary, and that such land was to be held in trust for the benefit of the public's communal uses in the form of fishing and commerce."⁶⁴ One important idea to note with respect to English common law and the public trust doctrine is that the restriction on alienation of Crown lands was on the King and not Parliament, as Parliament was already considered to represent the interests of the people. Parliament, however, could use its power to enlarge, restrict or modify public rights to resources common to all. The King, who held legal title "in trust"

⁶¹ Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," Michigan Law Review 68 (January 1970): 475.

⁶² Constance D. Hunt, "The Public Trust Doctrine in Canada," in Environmental Rights in Canada, ed. John Swaigen, (Toronto: Butterworths, 1981), 152.

⁶³ Johanna Searle, "Private Property Rights Yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine," South Carolina Law Review 41 (1990): 899.

⁶⁴ Lloyd R. Cohen, "The Public Trust Doctrine: An Economic Perspective," California Western Law Review 29 (1992): 251.

of this category of land and water, could not distribute or sell this property as he could the private property that he held for his own personal use.⁶⁵ According to Hale, even though the King was allowed to pass title to foreshore to an individual, the public retained an interest in navigation. This form of trust duty to preserve free navigation for the public acted as a break on the power of the Crown.⁶⁶

In the United States, the public trust doctrine developed based on these ideas from Roman and English law. This doctrine “arose from the recognition that certain interests and rights in some natural resources are so important to every citizen that they must be preserved and protected for the public as a whole. These resources are to be available to the public free of private uses and are to be held in trust by the government for the benefit of the public.”⁶⁷ The basic philosophy of trustee law in general and the public trust doctrine in particular requires that certain duties be placed on a trustee. These duties may include a duty to the beneficiary of the trust to exercise such care as would be used when dealing with one's own property or a duty to use reasonable skill and care to make the trust property productive. The trustee must take possession of all property of the estate, must protect and defend the legal rights and interests of the estate and preserve and enhance the value of the property of the estate. This means that the duties of the trustee,

⁶⁵ Joseph L. Sax, “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,” Michigan Law Review 68 (January 1970): 476.

⁶⁶ Timothy Patrick Brady, ““But Most Of It Belongs To Those Yet To Be Born”: The Public Trust Doctrine, NEPA, And The Stewardship Ethic,” Environmental Affairs 17 (1990): 626.

⁶⁷ Thomas A. Campbell, “The Public Trust, What's it Worth,” Natural Resources Journal 34 (Winter 1994): 76.

who in the case of natural resources is the government, are not passive but require the promotion, as well as preservation, of the trust.⁶⁸

In the United States, the common law basis for the public trust doctrine can be traced back to the 1821 case Arnold v. Mundy⁶⁹ and the Illinois Central Railway Company v. Illinois⁷⁰ case, an 1892 decision of the United States Supreme Court. The court found in Arnold v. Mundy that the original grant of land to Arnold by the Crown was void because it should have been granted subject to the right of the public to navigate and fish.⁷¹ This first recognition of the public trust doctrine in American common law was based on the assumption that, by the law of nature, rivers that flow and ebb, bays and seashores are common to all citizens and provide places where people could find the resources necessary for sustenance.⁷² The Illinois Central Railway Company v. Illinois case involved the grant of land submerged in Lake Michigan to the railway company. The government decision to grant land under a body of water to a private enterprise was overturned by the courts. The court's decision was based on the idea that, when a state holds a resource that is available for free public use, the court cannot condone any attempt by the government, as the trustee, to reallocate the resource to more restricted uses or subject public uses to the self-interest of private parties.⁷³ Based on the decisions

⁶⁸ Thomas A. Campbell, "The Public Trust, What's it Worth," Natural Resources Journal 34 (Winter 1994): 76.

⁶⁹ Arnold v. Mundy, 6 N.J.L. 1 (1821).

⁷⁰ Illinois Central Railway v. Illinois 146 U.S. 387, (1892).

⁷¹ Lloyd R. Cohen, "The Public Trust Doctrine: An Economic Perspective," California Western Law Review 29 (1992): 255.

⁷² Harry R. Bader, "Anataeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law," Environmental Affairs 19 (1992): 751.

⁷³ Constance D. Hunt, "The Public Trust Doctrine in Canada," in Environmental Rights in Canada, ed. John Swaigen, (Toronto: Butterworths, 1981), 156.

in these two cases, it was evident that the U.S. Supreme Court was willing to scrutinise government action to ensure that public rights were not violated.⁷⁴

Another, more recent, key case in relation to the public trust doctrine is National Audubon Society v. Superior Court of Alpine County,⁷⁵ more commonly referred to as the Mono Lake decision. In this case, the court found that, under the appropriate water rights system and the public trust doctrine, the state had valid supervisory power “over water allocation decisions in order to protect their public trust uses” and a duty to “reconsider earlier administrative decisions approving diversions of the four Mono Lake tributaries into works supplying Los Angeles with fresh water.”⁷⁶ The court also found that the public trust doctrine could be applied to non-navigable tributaries of navigable waters and that an agency must consider the impact of water diversions on trust resources before they are approved. Responsibility, however, did not end with approval of the diversion. It was deemed that the state had a duty to continue supervision in order to continue protection of the resource.⁷⁷

Although the public trust doctrine and trustee statutes have experienced some degree of success in environmental law in the United States, these stewardship-based legal mechanisms face many obstacles in Canada. There have been no attempts at common law actions and very few statutory claims in relation to the public trust in

⁷⁴ Constance D. Hunt, *The Public Trust Doctrine in Canada*, in Environmental Rights in Canada, ed. John Swaigen, (Toronto: Butterworths, 1981), 156.

⁷⁵ National Audubon Society v. Superior Court of Alpine County 464 U.S. 977 (1983).

⁷⁶ Alison Rieser, “Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of Theory,” Harvard Environmental Law Review 15 (1991): 403.

⁷⁷ Harry R. Bader, “Anataeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law,” Environmental Affairs 19 (1992): 751.

Canadian courts to date.⁷⁸ As mentioned earlier, Green v. Ontario, the most significant attempt to gain judicial acceptance of a statutory public trust, was not successful.⁷⁹ In Green, the statement of claim was struck down on the basis of standing. This meant that an “action on behalf of the plaintiff and all other people in the province of Ontario could only be maintained by the Attorney-General, with Green acting as a relator in the proceedings. ... For Green to launch an action in his own name would have required that he had suffered some particular, direct or substantial damage over and above that sustained by the public at large.”⁸⁰ This is a problem shared by those who try to launch public nuisance suits in respect to environmental problems. Other impediments to the public trust in the Green case were related to the subject matter of the trust being uncertain, the impossibility of determining a *cestui que trust*⁸¹ in the parks situation, and problems with “the exercise of the government's discretion.”⁸² It has been argued, however, that the decision in this case was erroneously based on relating the public trust to classic trust law rather than the more appropriate notion of a relationship of confidence, or a trusting relationship.⁸³

⁷⁸ John C. Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized,” Journal of Environmental Law and Practice 7:1 (December 1996): 23.

⁷⁹ For further discussion of this case, refer to John C. Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized,” Journal of Environmental Law and Practice 7:1 (December 1996): 23.

⁸⁰ Constance D. Hunt, “The Public Trust Doctrine in Canada,” in Environmental Rights in Canada, ed. John Swaigen, (Toronto: Butterworths, 1981), 180.

⁸¹ This term refers to “he who has a right to a beneficial interest in and out of an estate the legal title to which is vested in another...the beneficiary of a trust” Black's Law Dictionary, rev. ed. (1990), s.v. “Cestui que trust”.

⁸² Constance D. Hunt, “The Public Trust Doctrine in Canada,” in Environmental Rights in Canada, ed. John Swaigen, (Toronto: Butterworths, 1981), 175-6.

⁸³ John C. Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized,” Journal of Environmental Law and Practice 7:1 (December 1996): 27-8. Maguire argues that, while the public trust doctrine is trust-like and imposes a fiduciary duty on the Crown, it should not be viewed as a classical trust and therefore cases should not be decided in reference to

Even though a common law basis for the public trust doctrine may be on shaky ground in Canada, it may still be possible to develop a notion of public trust from statutes such as the National Parks Act.⁸⁴ This act dedicates the National Parks of Canada “to the people of Canada for their benefit education and enjoyment” and “the National Parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.”⁸⁵ John Maguire has argued that statutory notions of public trust, as found in the National Parks Act, or more recently in environmental protection statutes in the Yukon and Northwest Territories,⁸⁶ may have “the potential to infuse Canadian public property law with public trust principles.”⁸⁷ This may be particularly true when “the liberalising effect of the Charter on judicial decision-making”⁸⁸ is taken into consideration, as judges become less reluctant to scrutinise the actions of the government.

It would seem prudent in light of the extensive amount of writing on the public trust doctrine to examine some of the main arguments for and against its application to environmental law. These arguments primarily focus on the legitimacy of expanding judicial intervention into legislative actions, the use of the public trust doctrine to

classical trust tests such as were used in *Green*. A fiduciary duty is “[a] duty to act for someone else’s benefit, while subordinating one’s personal interests to that of the other person. It is the highest standard of duty implied by law (e.g., trustee, guardian).” Black’s Law Dictionary, rev. ed. (1990), s.v. “Fiduciary duty.”

⁸⁴ National Parks Act, R.S.C 1970, c-N-13 as amended

⁸⁵ Constance D. Hunt, *The Public Trust Doctrine in Canada*, in Environmental Rights in Canada, ed. John Swaigen, (Toronto: Butterworths, 1981), 171.

⁸⁶ This refers to the Yukon Territory Environment Act, S.Y. 1991, c.5 and the Northwest Territories’ Environmental Rights Act, S.N.W.T. 1990, c.38.

⁸⁷ John C. Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized,” Journal of Environmental Law and Practice 7:1 (December 1996): 37.

⁸⁸ John C. Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized,” Journal of Environmental Law and Practice 7:1 (December 1996): 36.

promote self-interest rather than the public's interest, and the avoidance of takings⁸⁹ legislation. James Huffman, one of the most outspoken opponents of the public trust doctrine, argues that the reasoning behind the doctrine promotes the subjective self-interest of environmentalists, who represent a certain group of often minority preferences, over democratic legislative decisions.⁹⁰ Furthermore, it is argued that protection of interests in fishing and navigation are not really at the heart of freedom but rather freedom is defined more accurately by interests in "free enterprise, commerce, and the right of every individual to share in the exploitation of nature's bounty."⁹¹ This latter point seems closely related to "dominion over" philosophy that has been connected with much environmental degradation at the hands of human actors. This may be a reason that an environmentally positive notion of stewardship has not been widely accepted within the institutions of our society.

Other opponents of the public trust doctrine argue that it is fundamentally unjust to extinguish property rights without legal compensation.⁹² This critique relies upon takings legislation in the United States that requires government compensation when individual property is appropriated. Critics argue that the public trust doctrine side-steps

⁸⁹ "Takings" legislation, which is more common in the United States, refers to government action that directly interferes with or substantially disturbs the owners use of a piece of property.

⁹⁰ Alison Rieser, "Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of Theory," Harvard Environmental Law Review 15 (1991): 414-5. Here Rieser is referring to arguments put forward by James Huffman in many articles including "A Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy," Environmental Law 19 (1989): 527-571.

⁹¹ Alison Rieser, "Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of Theory," Harvard Environmental Law Review 15 (1991): 415.

⁹² Lloyd R. Cohen, "The Public Trust Doctrine: An Economic Perspective," California Western Law Review 29 (1992): 239-276.

takings legislation because it does not require compensation to be made when property rights are affected.

Still others argue that the public trust doctrine is a seriously flawed solution to the environmental crisis because it has hindered the growth of what are considered more promising approaches such as Aldo Leopold's land ethic,⁹³ Native American thought and ecofeminism. Moreover, using the trust approach "places responsibility for protection of natural resources in the hands of individuals (trustees) who share our society's presuppositions and understandings and thus are unlikely to provide far-reaching protection for the environment."⁹⁴

Alternatively, proponents of the public trust doctrine argue that it provides a substantive force that other environmental legislation may be lacking. Supporters of expanding the public trust doctrine argue that it is a mechanism for the judiciary to use in addressing democratic failure in relation to the public interest in certain resources.⁹⁵ Judicial scrutiny is deemed to be required because resource decisions regarding varied public interests are often based on criteria such as cost-benefit analyses that fail to take

⁹³ Aldo Leopold, "The Land Ethic," in Environmental Philosophy: From Animal Rights to Radical Ecology, eds., Michael E. Zimmerman and others, (New Jersey: Prentice-Hall Inc., 1993), 95.

⁹⁴ Richard Delgado, "Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform," Vanderbilt Law Review 44:6 (November 1991): 1209-1227.

⁹⁵ Alison Rieser, "Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of Theory," Harvard Environmental Law Review 15 (1991): 411. Rieser, a proponent who is in this article searching for a theory to support the further development of ecological integrity and a public trust right, is commenting here on Joseph Sax's central argument for expanding the role of the judiciary in scrutinising decisions of the legislature on the use and distribution of natural resources that are considered common to all. Referring directly to Sax, Rieser maintains that judges must have a legal doctrine from which they can ensure full consideration of the public interest because legislative and administrative decisions often favour development interests without proper visibility to the general public, access to influence over decision processes can be unequal and decisions can often excessively favour local interests.

account of all public gains and losses⁹⁶ including those that are hard to measure such as aesthetic value or value to future generations. Harry Bader⁹⁷ notes that the public trust doctrine forces courts to take account of ecological diversity and stability as representative of obligations to protect common resources for present and future generations. This is in contrast to other environmental legislation that is more procedurally oriented in requiring, for example, that an environmental assessment need only be conducted without providing any particular substantive criteria that must be met. In addition, Bader feels that, knowing that the courts are willing to follow the public trust doctrine, developers are encouraged to become more ecologically sensitive so that approval for projects is facilitated. Developers are happy because there is no need to rule against a particular project if it only causes changes that ecosystems can adapt to. Timothy Brady⁹⁸ agrees with Bader's position. He argues that, even though statutes such as the United States National Environmental Policy Act (NEPA)⁹⁹ are supposed to incorporate the public trust doctrine, they have been reduced to mere procedural notions through Supreme Court interpretations. Brady goes on to point out what may be one of the most important functions of the public trust doctrine. He argues that the public trust doctrine, acting as a law anticipatory of new values and standards of conduct in society, could be an effective tool to introduce the stewardship ethic into legal systems in

⁹⁶ Alison Rieser, "Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of Theory," Harvard Environmental Law Review 15 (1991): 412.

⁹⁷ Harry R. Bader, "Anataeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law," Environmental Affairs 19 (1992): 749-763.

⁹⁸ Timothy Patrick Brady, "'But Most Of It Belongs To Those Yet To Be Born': The Public Trust Doctrine, NEPA, And The Stewardship Ethic," Environmental Affairs 17 (1990): 621-646.

⁹⁹ National Environmental Protection Act, 42 USC 1969, as amended.

particular and society in general.¹⁰⁰ Promoting these new values is accomplished by attacking a legal system of land ownership that is environmentally unsound.¹⁰¹

The public trust doctrine and trustee statutes demonstrate key elements in legal interpretations of stewardship. Once again these appear to resemble both indigenous and religious notions of the concept. These include non-passive obligations of care, responsibility and duty concerning the environment in addition to the notion of equity in relation to future generations. The problem that arises, however, concerns the potential for this stewardship ethic to make its way into a secular society that is predominantly motivated by the idea of individual freedom to exploit nature for one's own self-interest. In addition, even if humans do embrace the notion of stewardship within their value systems, there is no guarantee that governments will follow. Today, development forges ahead at the expense of environmental destruction and democratically elected governments continue to slash environmental regulations even as concern for the environment is beginning to return to the fore of people's minds.¹⁰²

2.5 Conclusion

Stewardship of the natural environment is not a new idea in human thinking.

Indigenous cultures have followed stewardship principles for thousands of years and, in

¹⁰⁰ Timothy Patrick Brady, "'But Most Of It Belongs To Those Yet To Be Born': The Public Trust Doctrine, NEPA, And The Stewardship Ethic," *Environmental Affairs* 17 (1990): 631.

¹⁰¹ Timothy Patrick Brady, "'But Most Of It Belongs To Those Yet To Be Born': The Public Trust Doctrine, NEPA, And The Stewardship Ethic," *Environmental Affairs* 17 (1990): 645.

¹⁰² Paul McKay, "Toxic waste floods sewers: lax laws pose environmental threat, report warns," *Ottawa Citizen* 17 February 1998, 1(A) and Tom Spears, "Canadians think green, poll reveals: 73% choose protection of the environment over economic progress," *Ottawa Citizen* 18 February 1998, 3(A).

modern society, Judeo-Christian, religious notions of stewardship have been consistently expressed. Both of these models of stewardship show considerable promise for having the necessary elements to guide environmental regulation, policy and decision-making. Indigenous stewardship puts humans in an holistic relationship with nature where they are required to respect the environment and non-human nature to protect their cultural and spiritual survival. Indigenous stewardship involves reciprocal rights, obligations and responsibilities to care for the environment to meet the needs of present and future generations. Judeo-Christian stewardship is based on one particular interpretation of the Creation story that prompts humans to assign intrinsic value to nature. This sets up non-passive obligations of care, respect and responsibility for the environment for the good of present and future generations. Humans are stewards of the earth on the one hand with permission to use its resources for survival on the other.

For stewardship to have an effect on environmental policy and decision-making it must be institutionalised in secular society and not just in religious circles or native cultures, although much can be learned from both of these experiences. Although legal stewardship, in the form of the public trust doctrine and trustee statutes, has incorporated many ideas taken from indigenous and religious stewardship, it seems to be either underdeveloped or is the subject of much controversy in secular society, at least in Canada. A reconstructed legal stewardship, in the form of the public trust doctrine, may prove useful in the development of a reconstructed and more effective stewardship model within the environmental decision-making institutions in Canada.

The models of stewardship examined in this paper demonstrate several commonalties that should be able to form the basis of a new, reconstructed model. This reconstructed stewardship would need to incorporate a notion of caring that would guard against over-exploitation of the natural environment and a pro-active responsibility to take action to address the ecological crisis. This new stewardship must recognise and react to the interests of all involved to find just solutions to problems. Ultimately, an effective reconstructed stewardship must actively engage citizens and consequently their governments in taking responsibility for caring for their environment. This new model will be developed through a critical examination of indigenous, religious and legal stewardship by comparing the three models against the care-justice framework developed in the first chapter of this thesis.

3.0 STEWARDSHIP IN A COMPLEX WORLD

3.1 Introduction

Stewardship is a concept that has guided human behaviour over a very long period of time. However, responsibility for nature has become much more complex since indigenous people first introduced stewardship into their hunter-gatherer societies. According to Hans Jonas, modern technology has introduced actions of a new character that demand a new ethic of responsibility for nature. By this new character, he is specifically referring to the speed with which humans are transforming their environments and the irreversibility and cumulative effects of environmental decisions.¹ Jonas argues that events such as the Hiroshima bombing during the Second World War and the subsequent nuclear arms race were the starting points for “a new and anxiety-ridden rethinking of the role of technology in the Western world.”² This feeling of impending doom from nuclear forces is augmented by the growing realisation of the impact of technology on the environment. This has forced the confrontation of philosophical questions about human/nature and mind/matter dualisms and the realisation that humans have a duty to avert ecological crisis.³ According to Jonas, the mind is beginning to recognise itself as a source of doom, yet the mind also has the capability to

¹ Hans Jonas, The Imperative of Responsibility (Chicago: The University of Chicago Press, 1984), 6-7.

² Hans Jonas, “Philosophy at the End of the Century: A Survey of Its Past and Future,” Social Research 61:4 (Winter 1994): 825.

³ Hans Jonas, “Philosophy at the End of the Century: A Survey of Its Past and Future,” Social Research 61:4 (Winter 1994): 826.

form concepts of good, duty and guilt, and through freedom of choice has the capability to be responsible for its actions. Since the mind recognises that human actions now threaten the entire planet, the mind is also capable and must recognise its responsibility for the planet's survival. Humans, through a new stewardship model, may be better able to realise and accept their responsibility for nature and avert ecological crisis.

Just as humans must cast a critical eye on their own responsibility for ecological destruction, the same critical eye must be applied to an examination of the various historical models of stewardship identified here so that problems can be left behind and promising aspects can be taken forward. The purpose of this chapter is to provide that critical eye which will draw together aspects of the stewardship models that fit into the care-justice framework to construct a new stewardship model to help humans living in a complex modern world accept responsibility for their actions and protect threatened environmental resources. This new stewardship, particularly in the form of the public trust doctrine, will then be applied in chapter four to Canadian environmental statutes in general and the new CEPA Bill C-32 in particular.

3.2 Traditional Stewardship Models Revisited

Although traditional indigenous, religious and legal stewardship models are by no means identical, they each provide particular concepts that would be valuable even in today's world, while they also pose problems that must be addressed. Many of the valuable concepts resonate across the three models, which perhaps reinforces their value

for the future, while other concepts unique to a particular model may also be valuable. The ecofeminist care-justice framework developed earlier in the thesis will be used here to highlight the most promising concepts, which will then be brought into the new model.

3.2.1 Nature and Indigenous Connection

Within an ecofeminist care-justice framework, connection and context are very important in decision-making involving nonhuman nature. Indigenous stewardship offers key insights into care and connection that should be included in an ecofeminist care-justice stewardship model. Indigenous stewardship recognises the interconnectedness of people and land, realises the importance of a continued supply of life supporting resources for current and future populations, and assigns intrinsic value to nature that is integral to social and cultural life. In indigenous cultures nature is considered common property, and oppression of nature or other humans tends to be non-existent. While incorporating these ideas into any new model of stewardship is very important, a question remains as to how they fit into a world that is much more complex and driven by very different assumptions than what has been the experience of indigenous cultures.

As much as indigenous stewardship recognises care and connectedness aspects of the care-justice framework that are required for preservation of the natural environment, these more simple societies do not seem to require the same level of rules and rights as the modern complex world. In indigenous cultures, behaviour is usually shaped by social disapproval and personal shame on the one hand, and by ensuring that every individual

has access to the resources necessary to live a decent life on the other.⁴ Access to resources is strongly related to the assumption of plentiful resources often held in indigenous cultures. In other words, conflict situations over scarce resources are not as prevalent, therefore rules and rights become almost unnecessary. In the complex world of the late twentieth century, however, the idea of scarcity and conflict over natural resources cannot be avoided. The earth is now considered full and migration can do little to alleviate scarce resource situations. Hans Achterhuis, who writes on scarcity and sustainability, suggests that European Enlightenment mentality⁵ and the myth of progress can be partly interpreted as a flight from scarcity and that scarcity provides the legitimation for the conquering mentalities of colonialism and expansionism.⁶ Thus, limitless economic growth and expansion have become the answer for scarcity and survival in the modern world, and somewhere along the way other values related to a good life have been left behind or minimised. In complex modern societies, it becomes difficult to accept the belief that less is better when life experience revolves around the idea that more of everything necessarily brings greater satisfaction.⁷ The idea of plentiful resources that is inherent in the indigenous model becomes problematic for modern

⁴ Peter S. Wenz, *Nature's Keeper* (Philadelphia: Temple University Press, 1996), 121.

⁵ Enlightenment mentality, associated with modern science and technology, industrial capitalism, market economy, mass communication, and the information superhighway, is based on values such as liberty, equality, human rights, the dignity of the individual, respect for privacy, democratic politics and the due process of law. Faith in progress, reason and individualism of the enlightenment mentality, unfortunately, has had the unintended consequence of being a force of destruction as well as a power of liberation. This destruction often comes with the idea of conquering of the natural world as a means to ensure human survival, but this destruction now puts in serious question the viability of the human species. Weiming Tu, "Beyond the Enlightenment Mentality: A Confucian Perspective on Ethics, Migration and Global Stewardship," *International Migration Review* 30:1 (Spring 1996): 64-5.

⁶ Hans Achterhuis, "Scarcity and Sustainability," in *Global Ecology*, ed. Wolfgang Sachs (Halifax: Fernwood Books, 1993): 104-116.

⁷ Hans Achterhuis, "Scarcity and Sustainability," in *Global Ecology*, ed. Wolfgang Sachs (Halifax: Fernwood Books, 1993): 115.

complex societies, suggesting that adopting indigenous ways of inhabiting the earth is not only unlikely but highly impractical in today's world. In complex societies, the justice or rules and rights part of the framework is an integral part, imposing restraint in the face of scarcity. Restraint does not need to be imposed in an indigenous model as restraint inheres in the notion of respect, interconnection, continuation and intrinsic value that inform the model.

Stewardship within the care-justice framework will need to incorporate the strong connection to the natural world that is present in the indigenous model. Along with considerations of future generations and a strong sense of community, the single most important notion that must be taken from the indigenous stewardship model is the knowledge about human and nature connections. This knowledge would allow us to reconnect to the natural world in a way that may not be possible through Enlightenment mentality.⁸ Reconnection to the natural world would enable us to understand and accept the need for restraints to be imposed in our interactions with nature.

3.2.2 Keepers of the Garden

An ecofeminist care-justice framework emphasises explicit consideration of future generations, and intrinsic, not utilitarian value being assigned to nonhuman nature. These elements of the care-justice framework can be reclaimed from a particular form of Judeo-Christian religious stewardship. The “dominion over” nature religious model

⁸ Mary Ellen Tyler, “Spiritual Stewardship in Aboriginal Resource Management,” *Environments* 22:1 (1993): 6.

which attributes only instrumental value to nature that is to be used for utilitarian purposes must be abandoned. "Dominion over" interpretations, which have been associated with Enlightenment goals of linear progress and the desire to conquer pagan multi-theistic notions of aboriginal peoples, are the ideas most closely associated with the perpetuation of environmental destruction. "Dominion over" notions must be replaced with ideas from the alternative model.⁹ Through this alternate interpretation of the creation story, religious stewardship tells us that nonhuman nature has intrinsic value and that humans have responsibilities to ensure a sustainable future.

This more favourable version of Judeo-Christian stewardship assigns intrinsic value to a nature that God created and pronounced as good. Humans, as rational beings, have a unique status and unique responsibilities in relation to caring for nature. Because humans think, we are capable of making choices that can both protect and preserve nature or potentially destroy it. Responsibilities come with complementary privileges to use natural resources for survival purposes as long as it is done benignly by protecting natural capital reserves.¹⁰ By virtue of this unique status, moral obligations fall directly on humans, who then have specific responsibilities for ensuring the viability of future generations. In this alternate view, religious stewardship limits "dominion over" actions by reinforcing the belief that humans "will not be saved *from* creation but redeemed *with*

⁹ Harold Glasser, "Review of Caring for Creation: An Ecumenical Approach to the Environmental Crisis, by Max Oelschlaeger," in Environmental Ethics 17 (Summer 1995): 62.

¹⁰ J. Baird Callicott, "Genesis and John Muir," in Covenant for a New Creation, eds. Carol S. Robb and Carl J. Casebolt (Maryknoll: Orbis Books, 1991), 111-12.

all of creation.”¹¹ According to the New Testament, Christians must care for creation so that it can fulfil its purpose as part of God’s plan for redemption from original sin.¹² Religious stewardship reflects the idea that ecology and Christianity are intimately connected and for Christians to be saved they must save God’s creation.¹³

It would appear that a new stewardship informed by a care-justice framework would recognise the intrinsic value of nature and the unique responsibilities and complementary privileges that are assigned to humans as stewards of God’s creation. Yet some people argue that, while it is possible that religious stewardship may hold many of the answers to environmental destruction, such as the potential for greater engagement of political actors,¹⁴ it is a much more simplistic solution than complex social structures demand. How then can stewardship be reconciled in modern secular society, a society that often sees no need for God, where institutions are based more on separation than connection? At the very least, it is beneficial to pay attention to the intrinsic value attributed to nature and the corresponding responsibilities to protect and preserve nature for current and future generations and reclaim these aspects of religious stewardship in the new care-justice stewardship model. The public trust doctrine may assist in framing these values in a way that is more consistent with a secular society.

¹¹ Brent Waters, “Christian theological resources for environmental ethics,” *Biodiversity and Conservation* 4 (1995): 852.

¹² Brent Waters, “Christian theological resources for environmental ethics,” *Biodiversity and Conservation* 4 (1995): 851-2.

¹³ Laurel Kearns, “Saving the Creation: Christian Environmentalism in the United States,” *Sociology of Religion* 57:1 (1996): 59.

¹⁴ Max Oelschlaeger, *Caring for Creation: An Ecumenical Approach to the Environmental Crisis* (New Haven: Yale University Press, 1994), 62.

3.2.3 The Public Trust in Secular Society

Legal stewardship, in the form of trustee statutes and the public trust doctrine, is an important manifestation of both care and justice ethics in modern secular society. Through legal stewardship, in the form of the public trust doctrine, positive legal duties for caring have developed within secular society. Decisions can be made that account for community interests. Reconnection to nature is achieved by including those who speak for nonhuman nature within the dialogic decision-making community. Positive legal duties of caring are promoted within the institutions of a secular society that over time has moved away from the caring model of ethical deliberation. In addition, through the justice aspect of the public trust doctrine, important rights to environmental quality are recognised and democracy is promoted through increased opportunities for meaningful participation by concerned citizens in decision-making processes that move beyond “dominion over” thinking. Leaving “dominion over” thinking about the natural environment behind allows decision-making to follow a more holistic ecosystem approach and take explicit consideration of future generations.

Under a care-justice framework, the self-in-relationship, connection and community that includes nonhuman as well as human nature now and in the future are very important in ethical considerations. The public trust doctrine has evolved, particularly in the United States, to incorporate these ideas of the care-justice framework into environmental decision-making. The public trust doctrine has been put forward “as a

necessary and substantive common law theory designed to protect those resources in the natural environment that are central to the well-being of the community.”¹⁵ Under the public trust doctrine, the state is bound to care for and preserve natural resources for all citizens as beneficiaries of the trust. Private citizens can bring actions against the state to enforce the public trust; the state can bring public trust actions against private citizens; and, private citizens can make claims against other private citizens, as a way criticising current environmental decisions and taking protective action to care for the community’s interests in a healthy natural environment. In all of these cases, the doctrine is used to ensure that individuals can actively participate in a dialogic community within the decision-making institutions of society that is designed to ensure that decision-makers do not make poor environmental decisions.¹⁶ This is one of the key components of the care-justice framework that have already been revealed in this thesis.

The possibilities for this doctrine as a tool for promoting the care ethic and providing legal rights for protecting valuable resources are extensive and far reaching. The doctrine has the ability to make environmental laws more effective by providing for mandatory duties of public officials and liberal access to the courts to facilitate public enforcement of the duties.¹⁷ In addition, through decisions like Mono Lake, the public trust doctrine can help humans to move away from anthropocentric notions of nature as

¹⁵ Harry S. Bader, “An Analysis of the potential impact of the Public Trust Doctrine on the Sovereign’s Use of its Eminent Domain Power,” *Hamline Law Review* 18:1 (Fall 1994):50-63.

¹⁶ Harry S. Bader, “An Analysis of the potential impact of the Public Trust Doctrine on the Sovereign’s Use of its Eminent Domain Power,” *Hamline Law Review* 18:1 (Fall 1994):59.

¹⁷ Gary D. Meyers, “Divining Common Law Standards for Environmental Protection: Application of the Public Trust Doctrine in the Context of reforming NEPA and the Common Wealth Environmental Protection Act,” *Environmental and Planning Law Journal* 11:4 (August 1994): 289-306.

separate from humans and exploitable to a more-connected with nature ecosystem approach. The ecosystem approach includes both human and nonhuman nature within the positive duties for protection, preservation and promotion of the subject resource.¹⁸

For a model of stewardship to fit under a care-justice framework, it must also take explicit account of intergenerational equity issues. One of the strengths of the public trust doctrine is its ability to incorporate obligations to future generations similar to those found important to both indigenous and religious stewardship. Through the institutionalisation of the public trust doctrine, the long-held belief that certain land, and other resources, should be beyond the absolute control of the present generation is reinforced in modern law.¹⁹ In this way the public trust doctrine becomes an anticipatory tool acting as a catalyst for change in society's attitudes toward property. The focus here changes from law's traditional function of simply reflecting values commonly held in society to setting new standards of conduct in much the same way as the civil rights movement set out new behaviour for racial equality.²⁰ These new standards of conduct may include new ways of protecting natural resources that are now intrinsically valued, new considerations of the rights of future generations to a viable and healthy natural world and the realisation of active duties of caring. Applying the public trust doctrine in

¹⁸ Gary D. Meyers, "Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife," Environmental Law 19: 3 (Spring 1989): 723-735.

¹⁹ Timothy Patrick Brady, "'But Most Of It Belongs To Those Yet To Be Born': The Public Trust Doctrine, NEPA, And The Stewardship Ethic," Environmental Affairs 17 (1990): 634. Brady explains that the root of this concept within the public trust doctrine most likely comes from conceptions that through the efforts of the present generation future society may become more like a past Golden Age.

²⁰ Timothy Patrick Brady, "'But Most Of It Belongs To Those Yet To Be Born': The Public Trust Doctrine, NEPA, And The Stewardship Ethic," Environmental Affairs 17 (1990): 642.

modern legal structures allows the various stakeholders, as well as the larger population through outside influences such as media attention, to gain knowledge of and take action based on new meanings within their communities.

The public trust doctrine has the potential to change the way property, and consequently nature, are viewed. It can promote a reconnection to nonhuman nature similar to that found in indigenous cultures. It is a legal doctrine that can modify “a legal system of land ownership that is environmentally unsound.”²¹ Historical property law is filled with “laissez faire” ideals of ownership where land can be subject to almost divine property rights with freedom to use and/or abuse as the owner sees fit. The development and use of the public trust doctrine and other environmental laws have blurred these individual property rights with public rights to the extent that the public interest in natural resources, wetland, coastlines and environmental protection has started to override limitless freedom.²² The philosophy behind individual private property rights is not coherent with the communal ideal of protecting resources to pass on to future generations. The public trust doctrine provides a means to balance individual and collective interests. Through the public trust philosophy, decision-makers within dialogic and interactive communities must now consider the environmental consequences of linear progress instead of simply using market calculations to make use decisions.

²¹ Timothy Patrick Brady, ““But Most Of It Belongs To Those Yet To Be Born”: The Public Trust Doctrine, NEPA, And The Stewardship Ethic,” Environmental Affairs 17 (1990): 645.

²² Johanna Searle, “Private Property rights yield to the Environmental Crisis: Perspectives on the Public Trust Doctrine,” South Carolina Law Review 41:4 (Summer 1990): 912.

Even though the public trust doctrine has been widely applied in the United States, it remains the subject of vigorous debate over whether it promotes or limits democracy in modern society. Professor Sax, who represents one side of the debate, argues that judicial intervention through public trust litigation will lead to better public decisions based on better information becoming available to both decision-makers and citizens.²³ According to Sax, “[t]his judicial device serves to call attention to the inadequacies in conventional public techniques for evaluating resource decisions involving diffuse public uses.”²⁴ He cites examples of public parks and beaches being converted to little-needed ski areas, private yacht clubs, garbage dumps, or highways, with very little consideration given to what is lost in these decisions. In his estimation, the public trust doctrine provides an instrument for judicial democratisation of decisions affecting natural resources where the public interest is not always considered.²⁵ This may include decisions made with little visibility in the public eye, or where access to and influence over decision-makers are unequal, or when the decision reflects excessive localised perspectives.

The other side of the debate is characterised by those who claim the public trust doctrine limits democratic processes. Professor Huffman argues that public trust

²³ Alison Rieser, “Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of Theory,” Harvard Environmental Law Review 15 (1991): 413.

²⁴ J. Sax, “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention” Michigan Law Review 68 (January 1970): 564.

²⁵ Alison Rieser, “Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of Theory,” Harvard Environmental Law Review 15 (1991): 411.

reasoning “threatens to replace democratic, legislative decisions with these subjective, and in some cases, minority preferences.”²⁶ Huffman argues that the

courts and commentators have opened the door to dramatic expansion of governmental power with resultant intrusions on individual rights. The trust concept contradicts democratic theory by separating the state, as trustee, from the public, as beneficiary, as if they were two distinct entities. The constitutional rights concept invites the creation of new rights at the expense of existing rights—environmental rights at the expense of property rights.²⁷

Upon hearing this argument, the first question that comes to mind is how any progress could have been made in ending slavery and other struggles over injustice if this line of reasoning had prevailed. Rather than look at the public trust doctrine as replacing one set of rights with another, it would seem beneficial to consider it more as a balancing mechanism between various, sometimes competing, rights in complex, pluralistic societies. Alison Rieser comments that, in complex societies attempting to make decisions about complex ecosystems, it may be more productive “to rely on an array of property arrangements. In such a system, both private and government ownership may be subordinate to a property interest held by the ‘unorganised public’ in the ecological integrity of natural resources.”²⁸ She says this interest would be represented through the public trust doctrine. The public trust doctrine would therefore seem to hold a significant place as a democratising force,²⁹ rather than a hindrance to democracy, in any society that

²⁶ Alison Rieser, “Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of Theory,” *Harvard Environmental Law Review* 15 (1991): 415.

²⁷ James Huffman, “A Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy,” *Environmental Law* 19 (1989): 567.

²⁸ Alison Rieser, “Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of Theory,” *Harvard Environmental Law Review* 15 (1991): 415.

²⁹ Michael C. Blumm, “Public Property and the Democratisation of Western Water Law: A Modern View of the Public Trust Doctrine,” *Environmental Law* 19:3 (Spring 1989): 580. Blumm explains that the overall thrust of the trust is public access, either to trust resources or to decision-makers with the authority to allocate trust resources.

must preserve and even promote natural resources and the environment for the benefit of present as well as future generations of both human and nonhuman nature.

3.2.4 Care-Justice and Stewardship

When each of the traditional stewardship models is assessed in light of the care-justice framework, important concepts for a new stewardship are revealed. Through indigenous stewardship, the importance of reconnecting to the natural world becomes apparent. Instead of humans seeing themselves as separate from and superior to nonhuman nature with a license to exploit it to achieve linear progress, they must include nature, at the very least as an interested partner in their decision-making processes. By including quality of life in use decisions, suddenly the beauty or recreational potential of a resource, even the value of the resource in its own right, takes on new meaning in use decisions. Through religious stewardship, humans are instructed to assign intrinsic value to God's creation because it is good, not simply because it has some use value. By valuing nature in its own right, responsibilities for care and preservation of nature and considerations of balance between present and future generations become apparent. Structures in society must move beyond "dominion over" calculations and recognise and negotiate the tension that exists between unfettered prospering and the preservation of precious resources. But how are these ideas to be applied in modern secular and complex societies?

For him, this means that the doctrine becomes a democratising force in that it prevents monopolisation of trust resources and promotes natural resource decision-making that involves and is accountable to the public.

Legal stewardship in the form of the public trust doctrine, which has the potential to incorporate the notions of the care-justice framework highlighted in indigenous and religious stewardship and more, seems to be an ideal model of stewardship for modern complex societies. Beyond including caring principles, the public trust doctrine provides a tool for criticising existing notions of environmental protection and a mechanism to promote and guarantee rights of increased participation of citizens in environmental decision-making processes. The public trust doctrine has an inherent notion that natural resources are beyond the sole control of present generations and must be preserved for the benefit of generations to come. The trust notion carries with it positive duties and responsibilities to promote as well as preserve and generally care for the natural environment rather than simply refraining from doing some particular thing. The public trust doctrine takes into account the context of specific circumstances, such as those defined by an ecosystem perspective. It also serves to protect the rights, or justice part of the care-justice framework, of individuals to scrutinise the actions of their governments, or other citizens, by participating in legal decision-making processes. The public trust doctrine may lead governments to think more broadly of the consequences of their decisions and the judiciary to be more willing to allow standing for those who wish to speak for nature in legal frameworks.

The public-trust doctrine coincides very well with stewardship based on a model that includes both care- and justice –based considerations. As such the public trust doctrine, in fulfilling the anticipatory function of law, has the potential to promote a more

caring and just society through its use in environmental decision-making and legal structures. Canadians are the keepers of a large portion of natural resources that are so important for continued growth, prosperity and quality of life. Yet, as noted in the last chapter, the public trust doctrine has not developed in Canadian legal institutions.

Differences between legal and constitutional development in Canada and the United States are not sufficient to explain why the doctrine does not have a Canadian presence.³⁰

It may be that the answer is as simple as an historical tendency, especially prior to the Canadian Charter of Rights and Freedoms,³¹ toward strong judicial reluctance to interfere in legislative matters or in areas considered so important that they should be left to democratically elected officials. John Maguire, in a recent article on the public trust doctrine in Canada, argues that a Canadian statutory base may assist in achieving the kind of acceptance the doctrine has had in the United States.³² Despite some cautions, the public trust doctrine could prove useful for incorporating both care and justice considerations into legal institutions and for democratising environmental decision-making in Canada, assuming it could find a home somewhere in Canadian law.

³⁰ John C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized," Journal of Environmental Law and Practice 7:1 (December 1996): 1-42.

³¹ Canadian Charter of Rights and Freedoms. Part I of the Constitution Act, 1982, RSC 1985, app. II, no.44.

³² Maguire refers to arguments forwarded by Constance D. Hunt, "The Public Trust Doctrine in Canada," in Environmental Rights in Canada, ed. John Swaigen (Toronto: The Butterworth Group of Companies, 1981). Hunt maintains that "the only viable alternative is to press for the passage of legislation which would establish the notion of the public trust in the environment, and provide the means whereby citizens could enforce it." (186)

3.3 Conclusion

As demonstrated by the multitude of American examples, stewardship in the form of the public trust doctrine is a useful mechanism for incorporating care along with justice into modern society, yet Canada seems to have done little more than give it a cursory glance. Gradually incorporating this doctrine into environmental statutes, particularly since Canadian judicial attitudes towards scrutinising government activities seem to be changing, may give the doctrine the base it needs to develop further in Canadian law. Chapter 4 will examine how the public trust doctrine could be developed in Canada.

4.0 CEPA AND THE PUBLIC TRUST DOCTRINE

4.1 Introduction

Incorporating the public trust doctrine more fully in Canadian environmental legislation may open some doors toward incorporating care along with justice considerations in decision-making processes. Unfortunately, the Canadian judiciary has been reluctant to accept the doctrine as valid in the Canadian legal system. Many people have argued that the public trust doctrine would benefit from a strong statutory base which would help it to develop and flourish in an environment where the Canadian judiciary are reluctant to accept the doctrine and consequently their role in scrutinising government actions.¹ This chapter will examine how both care and justice may be promoted within the Canadian judiciary, as well as the Canadian public, by incorporating a new concept of stewardship based on a care-justice model into the Canadian legal system. As the public trust doctrine in the form it currently takes in the United States is a good example of this type of care-justice stewardship, the chapter will focus on finding a home for it in Canadian statutory law, particularly in Bill C-32,² the proposed new CEPA. The first section will look at environmental statutes and public trust discourse. This section will begin with background on how statutory law fits into the Canadian environmental legal field. This will be followed by a discussion of American and

¹ David VanderZwagg, "The Concept and Principles of Sustainable Development: "Rio-formulating" Common Law Doctrines and Environmental Laws." Windsor Yearbook of Access to Justice 13 (1993): 69. See also Constance Hunt, "The Public Trust Doctrine in Canada," in Environmental Rights in Canada ed. John Swaigen. (Toronto: The Butterworth Group of Companies, 1981), 186 and John C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized," Journal of Environmental Law and Practice 7:1 (December 1996): 33.

² The House of Commons of Canada, 1st Session, 36th Parliament, 46-47 Elizabeth II, 1997-98, Bill C-32.

Canadian examples of public trust language, with a particular focus on instances of explicit statutory recognition. The final part of this section will consider opportunities for incorporating the notion of public trust into statutory instruments at the federal level. The second section will show how a new stewardship could be claimed in Canada through the incorporation of public trust discourse into the new CEPA

4.2 Environmental Statutes and the Public Trust

4.2.1 Environmental Law in Canada

It is important to understand how the Canadian legal system protects the environment in general before specific understanding of how the public trust doctrine can be infused into statutory law is possible. In Canada, there are three main sources of law: judicial, legislative and executive. Judicial rulemaking in all parts of Canada, except Quebec, is based on the common law tradition. Under the common law, judges decide cases on the basis of previous decisions in similar or analogous situations.³ In the civil courts, common law environmental actions tend to deal with how one party or parties may be interfering with another's enjoyment of their environment. The main causes of action under common law are trespass, nuisance, strict liability and negligence. Although

³ Stare decisis refers to abiding by the decisions in previous cases that is for the courts to stand by precedent and not to disturb settled point. This doctrine dictates that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the [parties and property are the same. Black's Law Dictionary, 6th ed. S.v. "Stare decisis."

common law actions can be effective, they are not often pursued because of requirements for property ownership and the time and money that they consume.

Environmental laws are enacted by Parliament and provincial legislatures. They are given substance and enforced by government bureaucrats acting on behalf of the government. The Criminal Code,⁴ the Fisheries Act⁵ and the Canadian Environmental Protection Act⁶ are examples of federal statutes used for environmental protection. The Constitution Act⁷ is an overarching statute that establishes federal and provincial heads of power over various matters. Since 1982, the Constitution also contains the Canadian Charter of Rights and Freedoms.⁸ Most statutes in the environmental field consist of enabling legislation that gives power to make rules about certain subjects such as fish, navigable waters or natural resources to the “governor in council.”⁹ Technically this means rules are made by the Cabinet. However, in reality it means that the Minister of a particular department and his or her staff or certain agencies actually make and enforce the rules. Because environmental law is such a broad topic, the discussion to follow will

⁴ Criminal Code, RSC1985, c. C-46, as amended

⁵ Fisheries Act, RSC 1985, c. F-14

⁶ Canadian Environmental Protection Act, RSC 1985, c.16 (4th Supp.), first enacted as SC 1988, c.22, as amended

⁷ Constitution Act, 1867, 30 &31Vict., c. 3 (UK) (formerly the British North America Act)

⁸ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, RSC 1985, app. II, no. 44.

As Charter cases unfold, environmental law may be impacted in a number of ways. If interpretations lean towards the right to environmental quality being considered a fundamental civil liberty or if the use of the Charter signifies that the judiciary is becoming more open to restricting governments from interfering with those liberties, environmentalists would probably be happy. If on the other hand, the Charter is used to restrict legislatures from passing strict environmental law, the opposite would be true. Since the inception of the Charter, there seems to be a slight tendency for the judiciary to be more open to interfering in the business of government.

⁹ The “governor-in-council” essentially means the Cabinet. There are many good sources of information on legal terms such as this one and environmental law in Canada. The ones used here include Allan Greenbaum, Alex Wellington and Ellen Baar, eds., Social Conflict and Environmental Law: Ethics, Economics and Equity, (Toronto: Captus Press, 1995), Estrin, David and John Swaigen. Environment on Trial: A Guide to Ontario Environmental Law and Policy, 3rd ed. Toronto: Emond Montgomery, 1993 and Elaine L. Hughes, Alastair Lucas and William A. Tilleman II, eds., Environmental Law and Policy. (Toronto: Emond Montgomery Publications Limited, 1993).

provide a brief overview of environmental statutes at the federal and provincial levels as a means of situating the CEPA for the discussion to follow.

The division of powers between federal and provincial jurisdictions is supposed to be exclusive and exhaustive, with each level being supreme in its own areas. While the environment and pollution are not assigned explicitly to either level of government, they are considered aggregates under other subjects. Under the Constitution Act, provincial governments have jurisdiction over environmental matters primarily through S. 92(13) "Property and Civil Rights in the Province," and s. 92(16) "Generally all matters of a merely local or private nature in the Province." Other provincial power over environmental matters comes from S. 109 governing control and ownership of land, mines and minerals and S. 92 governing non-renewable natural resources, forestry and electrical energy. Federal jurisdiction in environmental matters is derived from several heads of power including s. 91 (10) "Navigation and Shipping," s. 91 (12) "Sea Coast and Inland Fisheries," s. 108 "Canals, Harbours, Rivers and Lake Improvements," and s. 91(29) and 92 (10) "Federal Works and Undertakings."¹⁰ Other federal powers are derived from criminal law, the peace, order and good government clause of the Constitution Act, and trade and commerce and public debt and property heads of power.

In certain situations there is concurrency over matters relating to agriculture and the export of non-renewable and forestry resources, however, under the paramountcy¹¹

¹⁰ Allan Greenbaum, Alex Wellington and Ellen Baar, eds., Social Conflict and Environmental Law: Ethics, Economics and Equity, (Toronto: Captus Press, 1995), 31-33.

¹¹ Paramountcy means that one level of legislation wins over another if the two come into conflict.

doctrine, federal legislation would prevail in the case of a conflict.¹² On the positive side of concurrency, if one level of government fails to act to protect a resource then the other is free to do so. On the negative side, federal and provincial standards may conflict or create confusion for those trying to obtain work permits or, in the worst case, provide an excuse for neither level of government to act.¹³ These problems have been the subject of many debates on constitutional reform in Canada. Even though it is recognised that environmental matters must remain a shared concern, the Standing Committee on the Environment stated in its 1992 report that there was a “need for continued federal leadership on environment and sustainable development.”¹⁴ This was recently echoed in a new report from the Standing Committee on the Environment and Sustainable Development.¹⁵

Federal leadership in relation to the environment comes through several key pieces of legislation. For example, the Fisheries Act restricts work or undertakings that could result in the disruption or destruction of fish habitat, where it is an offence to deposit any type of deleterious substance into water frequented by fish. Other important federal acts include the Arctic Waters Pollution Prevention Act,¹⁶ the Atomic Energy

¹² Allan Greenbaum, Alex Wellington and Ellen Baar, eds., Social Conflict and Environmental Law: Ethics, Economics and Equity V 1&2, (Toronto: Captus Press, 1995), 33.

¹³ David Estrin, and John Swaigen. Environment on Trial: A Guide to Ontario Environmental Law and Policy, 3rd ed. (Toronto: Emond Montgomery, 1993), 24-5.

¹⁴ Allan Greenbaum, Alex Wellington and Ellen Baar, eds., Social Conflict and Environmental Law: Ethics, Economics and Equity, (Toronto: Captus Press, 1995), 75.

¹⁵ According to a recent article in the Ottawa Citizen, Environment Commissioner, Brian Emmett, says that Environment Canada is “skilled at developing innovative policy and almost useless at following through.” Susan Riley, “Environment Canada: All talk, no action, no will,” www.ottawacitizen.com/columnists/riley/980527/1737604.html.

¹⁶ Arctic Waters Pollution Prevention Act, RSC 1985, c. A-12.

Control Act,¹⁷ the Hazardous Products Act,¹⁸ the Navigable Waters Protection Act,¹⁹ and the Migratory Birds Convention Act.²⁰ As this examination shows, there are many statutes that deal in some way with environmental protection at the federal level, yet the main environmental statute is the Canadian Environmental Protection Act (CEPA).

CEPA is an Act designed to protect the environment as well as human life and health. This statute, which was passed in 1988, is binding on both federal and provincial crowns and incorporates several previous environmental statutes into one more all-encompassing Act covering an extensive list of responsibilities. These responsibilities include: scientific research and the collection of data for the preparation of objectives, guidelines and codes of practice; the regulation of toxic substances and nutrients; the federal handling of toxic substances in respect to government departments, agencies and lands; the handling of international air pollution; and, permits pertaining to ocean dumping.

4.2.2 The Public Trust Doctrine, Its Language and Environmental Statutes

Most Canadian environmental statutes direct governments to play a discretionary role in protecting the natural environment. This means that those who administer the statutes are able, but not required by the legislation, to apply and enforce them. There are few, if any imposed obligations. Some people maintain that incorporating the public trust

¹⁷ Atomic Energy Control Act, RSC 1985, c. A-16.

¹⁸ Hazardous Products Act, RSC 1985, c. H-13.

¹⁹ Navigable Waters Protection Act, RSC 1985, c. N-22

²⁰ Migratory Birds Convention Act, RSC 1985, c. M-7.

doctrine into environmental statutes may at least partially address this problem by imposing specific duties on governments, and even on the private sector, to manage and use resources in trust for the public.²¹ David VanderZwagg has argued that explicitly including the public trust doctrine in Canadian environmental statutes may help overcome judicial hesitance to interfere in decisions taken by elected officials.²² Moreover, he argues that explicit statutory inclusion of the doctrine may be required for its further development, even though the Canadian Charter has forced judges towards balancing public decisions against entrenched private rights associated with property ownership.²³ Finally, by providing more rights to individuals for bringing claims forward, the inclusion of the public trust in environmental protection statutes would help to achieve a balance between conflicting public demands for greater environmental protection and less government at the same time.²⁴ This means that greater environmental protection may be attained through private citizens providing part of the enforcement function instead of the government officials who currently provide the sole enforcement function.²⁵

²¹ Law Reform Commission of Canada, "Applying the Tests of Real Crime to Environmental Pollution," in Social Conflict and Environmental Law: Ethics, Economics and Equity V 2, eds. Allan Greenbaum, Alex Wellington and Ellen Baar, (Toronto: Captus Press, 1995), 54.

²² David VanderZwagg, "The Concept and Principles of Sustainable Development: "Rio-formulating" Common Law Doctrines and Environmental Laws." Windsor Yearbook of Access to Justice 13 (1993): 69.

²³ David VanderZwagg, "The Concept and Principles of Sustainable Development: "Rio-formulating" Common Law Doctrines and Environmental Laws." Windsor Yearbook of Access to Justice 13 (1993): 68.

²⁴ John C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized," Journal of Environmental Law and Practice 7:1 (December 1996): 33.

²⁵ Environment Canada, Reviewing CEPA The Issues #10: Public participation for Environmental Protection, 1994, 41.

Current public trust doctrine incorporates the idea that certain natural resources are so important to the public interest that they warrant special judicial protection of the state's affirmative stewardship obligations towards them.²⁶ Moreover, the trust should be viewed as a "flexible tool of judicial intervention, rather than merely a means of establishing state ownership."²⁷ Laws and legal institutions, through instruments like the public trust doctrine, play an important, but not exclusive, role in ensuring that the environment becomes more central to decision-making processes.²⁸ The public trust doctrine may also be used to promote acceptance of sustainable development principles in Canada²⁹ by outlining substantive obligations to future generations which in turn could become a way for Canada to implement its global environmental commitments.³⁰ This type of public trust doctrine coincides well with the care-justice framework discussed in Chapter one of this thesis. It reflects a connection to natural resources that is more than instrumental. There are non-passive obligations for the care of natural resources, there are opportunities to act on those obligations and there is an explicit requirement to care for future generations.

²⁶ Brent R. Austin, "The Public Trust Misapplied: *Phillips Petroleum v. Mississippi* and the Need to Rethink an Ancient Doctrine," Ecology Law Quarterly 16:4 (November 1989): 1011.

²⁷ Brent R. Austin, "The Public Trust Misapplied: *Phillips Petroleum v. Mississippi* and the Need to Rethink an Ancient Doctrine," Ecology Law Quarterly 16:4 (November 1989): 1018.

²⁸ Constance D. Hunt, "The Changing Face of Environmental Law and Policy," UNB LJ 41 (1992): 81.

²⁹ David VanderZwagg, "The Concept and Principles of Sustainable Development: "Rio-formulating" Common Law Doctrines and Environmental Laws," Windsor Yearbook of Access to Justice 13 (1993): 62.

³⁰ John C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized," Journal of Environmental Law and Practice 7:1 (December 1996): 40.

In the United States, there have been over 100 reported decisions based on the public trust doctrine.³¹ As well, the public trust doctrine has been included in several federal and state statutes, including the 1969 National Environmental Policy Act³² (NEPA). Several examples of American public trust language will be explored here to demonstrate how the doctrine might be included in Canadian environmental law.

Constance Hunt uses the 1970 Michigan Environmental Protection Act³³ (MEPA) as an example of how the public trust doctrine has been codified in specific legislation. This Act “authorises any person to bring suit against either a public agency or private equity for declaratory or equitable relief to protect the ‘air, water and other natural resources and the public trust therein from pollution, impairment or destruction’.”³⁴ Taking this type of action reflects a positive duty to care for natural resources to which one is connected.

MEPA goes further than a simple statutory recognition of the public trust because it gives private citizens the right to initiate or participate in environmental proceedings. In addition, it enlarges the role of the courts by allowing the plaintiff environmental damages similar to a holder of private property. It also reduces the discretionary power of public agencies by subjecting them to judicial review of decisions that affect the protection of natural resources.³⁵

³¹ David VanderZwagg, “The Concept and Principles of Sustainable Development: “Rio-formulating” Common Law Doctrines and Environmental Laws.” Windsor Yearbook of Access to Justice 13 (1993): 61.

³² National Environmental Policy Act, 42 USC 1969, as amended.

³³ Michigan Environmental Protection Act, Michigan Comp. Laws Ann., s.691.1201-1207 (1972 Supp.).

³⁴ J Sax and R. Conner, “Michigan’s Environmental Protection Act of 1970: A Progress Report” Michigan Law Review 70: 1003, quoted in Constance D Hunt “The Public Trust Doctrine in Canada.” In Environmental Rights in Canada ed. John Swaigen. 151-194. (Toronto: The Butterworth Group of Companies, 1981), 158.

³⁵ Constance D Hunt “The Public Trust Doctrine in Canada.” In Environmental Rights in Canada ed. John Swaigen. 151-194. (Toronto: The Butterworth Group of Companies, 1981), 159.

Instances of public trust language also occur in NEPA, which is considered to be the pre-eminent American statute concerning the present generation's duty to future generations.³⁶ Gary Meyers argues that this legislation is significant because it looks at preventing future degradation, as well as correcting past mistakes, by using "all practical means and measures ... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfil the social, economic, and other requirements of present and future generations of Americans."³⁷ Objectives for achieving this important goal include fulfilling "the responsibilities of each generation as trustee of the environment for future generations" while assuring "for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings" and generally maintaining "an environment which supports diversity and variety of individual choice."³⁸ While public trust language specifically makes the current generation trustees of the environment, NEPA has been interpreted as primarily procedural legislation requiring only that an environmental assessment be conducted, which seems to have hampered its substantive progress. Greater substantive progress could be achieved if the public trust doctrine displayed concrete examples of trusteeship, such as the ability to halt a project before it significantly harms the environment.

³⁶ Timothy Patrick Brady, "“But Most Of It Belongs To Those Yet To Be Born”: The Public Trust Doctrine, NEPA, And The Stewardship Ethic," Environmental Affairs 17 (1990): 635.

³⁷ Gary D. Meyers "Divining Common Law Standards for Environmental Protection: Application of the Public Trust Doctrine in the Context of reforming NEPA and the Common Wealth Environmental Protection Act." Environmental and Planning Law Journal 11:4 (August 1994): 290.

³⁸ Gary D. Meyers "Divining Common Law Standards for Environmental Protection: Application of the Public Trust Doctrine in the Context of reforming NEPA and the Common Wealth Environmental Protection Act." Environmental and Planning Law Journal 11:4 (August 1994): 290. Here Meyers is directly referring to NEPA text.

The American examples show that public trust language must hold people to positive duties of care. Positive duties of caring and the ability to participate and take action are important components of the care-justice framework. The duty to care and protect must be apparent in the words and opportunities to take actions of caring, such as bringing legal actions forward, provided. For care-justice stewardship, the language must also reflect human connection to nature, not domination over it. Moreover, public trust language must demonstrate that the current generation has a duty to protect and preserve natural resources for the generations that are to come. Government and the public must be held accountable for their responsibility to preserve of the natural environment.

Canada's experience with the public trust doctrine is not as rich as that of its American neighbours.³⁹ Provincial legislation in Canada tends to hamper the promotion of a public trust notion. For example, statutes that set up government departments tend to give the Minister broad discretionary powers without imposing any positive duties related to how the departmental mandate should be carried out.⁴⁰ This broad discretion and administrative power tend to weaken any areas where a trust duty may be implied and developed.⁴¹ In the 1980s, the National Parks Act⁴² was considered one of the most

³⁹ There has only been one case so far that has been argued in Canada on the basis of the public trust doctrine. This is a striking comparison to the 100 or more public trust cases in the United States. Green v. Ontario, which argued for a public trust in relation to the National Parks Act, was unsuccessful for a number of reasons previously explored in this thesis. More people, however, are beginning to take up the cause of arguing the benefits of adopting public trust legislation.

⁴⁰ Constance D Hunt "The Public Trust Doctrine in Canada." In Environmental Rights in Canada ed. John Swaigen. 151-194. (Toronto: The Butterworth Group of Companies, 1981), 168.

⁴¹ Constance D Hunt "The Public Trust Doctrine in Canada." In Environmental Rights in Canada ed. John Swaigen. 151-194. (Toronto: The Butterworth Group of Companies, 1981), 170.

⁴² National Parks Act R.S.C 1970, c-N-13 as amended.

promising places from which to establish a public trust duty.⁴³ This Act states that “[t]he National Parks of Canada are hereby dedicated to the peoples of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the National Parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.”⁴⁴ The Act shows promise for setting up a trust duty because parks are protected for future generations by making it very difficult to reduce the park size. That is, an actual legislative amendment is required to make this change, rather than simply enabling those who administer the Act to do so at their discretion.⁴⁵

The 1990s show significantly more promise for establishing a statutory base for the public trust. The 1991 Yukon Territory Environment Act⁴⁶ refers to the government as the “trustee of the public trust to protect the natural environment from actual or likely impairment”⁴⁷ and permits residents of the Yukon to bring an action to enforce the trusteeship duty of the government.⁴⁸ The ability to bring an action is said to be “in the public interest,”⁴⁹ and the plaintiff does not have to adhere to traditional rules of significant personal harm to gain standing in the case.⁵⁰ This Act defines the public trust

⁴³ Constance D Hunt “The Public Trust Doctrine in Canada.” In Environmental Rights in Canada ed. John Swaigen. 151-194. (Toronto: The Butterworth Group of Companies, 1981), 171.

⁴⁴ National Parks Act R.S.C 1970, c-N-13 as amended, S. 4.

⁴⁵ Constance D Hunt “The Public Trust Doctrine in Canada.” In Environmental Rights in Canada ed. John Swaigen. 151-194. (Toronto: The Butterworth Group of Companies, 1981), 171.

⁴⁶ Environment Act, S.Y. 1991, c. 5.

⁴⁷ Environment Act, S.Y. 1991, c. 5., subsections 8(1) and 38(1).

⁴⁸ John C. Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized,” Journal of Environmental Law and Practice 7:1 (December 1996): 34.

⁴⁹ Environment Act, S.Y. 1991, c. 5., S.7 quoted in John C. Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized,” Journal of Environmental Law and Practice 7:1 (December 1996): 34.

⁵⁰ Environment Act, S.Y. 1991, c. 5., S. 10 quoted in John C. Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized,” Journal of Environmental Law and Practice 7:1 (December 1996): 34.

as “the collective interest of the people of the Yukon in the quality of the natural environment and the protection of the natural environment for the benefit of present and future generations.”⁵¹ This Yukon Act also removes other complications by providing that actions cannot be dismissed because the trust is not irrevocable or certain or that a beneficiary could not be identified.⁵² The 1990 Northwest Territories’ Environmental Rights Act⁵³ emphasises that every resident person has the right to protect the environment and the public trust. This definition of the public trust very closely resembles the one found in the Yukon Act.⁵⁴ Although both of these pieces of legislation show significant promise as statutory bases for the public trust doctrine by outlining explicit trust duties, the fact that both are non-binding on the Crown may present problems as they are interpreted by the courts.⁵⁵ Other problems for using these vehicles to promote the notion of public trust include a vast array of defences to private civil actions. These defences include lack of material impairment to the environment and compliance with statutory or permit standards.⁵⁶

⁵¹ Environment Act, S.Y. 1991, c. 5., S. 2.

⁵² Environment Act, S.Y. 1991, c. 5., subs. 10(2) quoted in John C. Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized,” Journal of Environmental Law and Practice 7:1 (December 1996): 34.

⁵³ Environmental Rights Act, S.N.W.T. 1990, c. 38.

⁵⁴ John C. Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized,” Journal of Environmental Law and Practice 7:1 (December 1996): 35.

⁵⁵ John C. Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized,” Journal of Environmental Law and Practice 7:1 (December 1996): 35. This is because the underlying title to all ungranted lands in the territories is held by the Crown in the right of Canada and the federal Parliament would need to be called upon to remedy this situation.

⁵⁶ David VanderZwagg, “The Concept and Principles of Sustainable Development: “Rio-formulating” Common Law Doctrines and Environmental Laws.” Windsor Yearbook of Access to Justice 13 (1993): 75. VanderZwagg is referring to S.W.N.T. 1990, c. 38, s.6(5) (a)(ii) and s.6(5)(b).

Including explicit statutory references to the public trust in Canadian environmental legislation may provide a base for other opportunities at the federal level to expand this important stewardship doctrine. These references would also give more teeth to the Yukon and Northwest Territories environmental statutes by extending the application of these Acts to federal Crown lands, agencies and employees who are located in the territories.

4.2.3 Incorporating the Public Trust at the Federal Level

Federal statutes may be the best place to begin promoting the public trust doctrine in Canada. While it is important to recognise that the provinces have a distinct and important role to play in environmental protection, it must also be recognised that the federal government's responsibility to regulate at extra provincial and international levels, along with the setting of national standards, is also important.⁵⁷ Moreover, because the public trust doctrine is closely associated with sustainable development principles, judges and legislatures may take a renewed interest in promoting the doctrine within mainstream Canadian domestic law as a means of implementing international commitments.⁵⁸ Given that openness to judicial activism is expanding in Canada⁵⁹ and

⁵⁷ B. Rutherford and P. Muldoon, "Designing an Environmentally Responsible Constitution," quoted in Elaine L. Hughes, Alastair R. Lucas and William A. Tilleman II, eds., *Environmental Law and Policy*, (Toronto: Emond Montgomery publications Limited, 1993): 80.

⁵⁸ John C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized," *Journal of Environmental Law and Practice* 7:1 (December 1996): 42. The idea that the public trust doctrine aptly reflects sustainable development principles such as integration, precaution, intergenerational equity and public participation has been highlighted by David VanderZwagg. VanderZwagg suggests that recasting the public trust doctrine might assist in ensuring more balanced decisions between the environment and the economy. David VanderZwagg, "The Concept and Principles of Sustainable Development: "Rio-formulating" Common Law Doctrines and Environmental Laws." *Windsor Yearbook of Access to Justice* 13 (1993): 80.

⁵⁹ David VanderZwagg, "The Concept and Principles of Sustainable Development: "Rio-formulating"

the importance of the federal standard setting role has achieved greater recognition,⁶⁰ it may be an ideal time to encourage action in the area of the public trust doctrine and federal statutes. One of the most important federal environmental statutes is the Canadian Environmental Protection Act. This Act follows an ecosystem approach⁶¹ by combining six previous federal statutes to provide for “cradle-to-grave”⁶² regulation of toxic substances.⁶³ Incorporating the public into the new CEPA may at minimum encourage other federal departments and jurisdictions to see the benefits of the doctrine as a promoter of a new stewardship ethic in Canadian society.

4.3 Stewardship Through a New CEPA (Bill C-32)

4.3.1 CEPA and its Review

On June 26, 1987, Bill C-74 was introduced into the House of Commons and, after extensive amendments at the parliamentary committee stage, the first Canadian Environmental Protection Act was proclaimed on June 30, 1988.⁶⁴ The new CEPA was considered a complex statute consisting of several parts that gave the federal government the authority to regulate toxic substances, establish environmental quality objectives and guidelines, and generally control many other areas of pollution and waste related to

Common Law Doctrines and Environmental Laws.” Windsor Yearbook of Access to Justice 13 (1993): 68.

⁶⁰ Constance D Hunt “The Public Trust Doctrine in Canada.” In Environmental Rights in Canada ed. John Swaigen. 159-60.

⁶¹ Constance D. Hunt, “The Changing Face of Environmental Law and Policy,” UNB LJ 41 (1992): 98-99.

⁶² Cradle-to-grave refers to the consideration of the entire life of a chemical from its manufacture to sale, distribution, environmental release and disposal.

⁶³ Constance D. Hunt, “The Changing Face of Environmental Law and Policy,” UNB LJ 41 (1992): 99.

⁶⁴ Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995): 23.

oceans, international boundaries, and federal holdings.⁶⁵ It replaced or subsumed several previous Acts dealing with environmental contamination. It established a framework for the regulation of pollution as far as operational and use aspects of toxic substances do not come under provincial jurisdiction.⁶⁶ As CEPA is the main environmental protection statute of the federal government, it is a good place to start looking for opportunities to incorporate the public trust doctrine.

Environment Canada administers CEPA, but Health Canada is also involved in the assessment of toxic substances.⁶⁷ The preamble of CEPA recognises the important role of the federal government in demonstrating national leadership by establishing “national environmental quality objectives, guidelines and codes of practice.”⁶⁸ CEPA also includes a list of ten duties with respect to the administration of the Act.⁶⁹ While CEPA provides a list of pertinent definitions, it does not set out any particular rights that the public may have in relation to the environment, which is defined as air, land, water, organic or inorganic matter and interacting natural systems.⁷⁰

⁶⁵ Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, *It's About Our Health! Towards Pollution Prevention: CEPA Revisited*, (June 1995): 23.

⁶⁶ David Estrin and John Swaigen, *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, 3rd ed. (Toronto: Emond Montgomery, 1993), 480.

⁶⁷ *Canadian Environmental Protection Act*, RSC 1985, c.16 (4th Supp.), first enacted as SC 1988, c.22, as amended, S 3(2).

⁶⁸ *Canadian Environmental Protection Act*, RSC 1985, c.16 (4th Supp.), first enacted as SC 1988, c.22, as amended.

⁶⁹ *Canadian Environmental Protection Act*, RSC 1985, c.16 (4th Supp.), first enacted as SC 1988, c.22, as amended, .S. 2(a) through (j). These duties include: taking both preventative and remedial measures to protect the environment; integrating environmental protection with socio-economic decision-making; acting in co-operation with the provinces; encouraging the participation of the people of Canada; building the capacity of the people of Canada to protect their environment; solving environmental problems through sound knowledge, science and technology; and, controlling of toxic substances.

⁷⁰ *Canadian Environmental Protection Act*, RSC 1985, c.16 (4th Supp.), first enacted as SC 1988, c.22, as amended., S. 3(1).

Although encouraging public participation is set out as one of the Administrative Duties of the Government of Canada in CEPA, the Act has been faulted as lacking in this area. CEPA does provide for a civil cause of action for loss or damage suffered “as a result of conduct that is contrary to any provision of this Act or the regulations”⁷¹ and also covers requests for an injunction to prevent loss or damage. However, the legislation requires that the loss or damage be personal. Therefore, it would most likely be subject to the same problems of obtaining standing and defining significant harm as the public nuisance actions previously referred to. These same problems were encountered in the only public trust-based court action attempted in Canada to date.⁷² The legislation contains no provision for simply protecting the environment when significant personal harm has not been experienced. This civil cause of action has also been identified as problematic because it does not cover any damage that occurs when behaviour contrary to the goals of the Act is authorised under the Act or through regulations.⁷³

Other methods for citizen participation are also problematic. For example, citizens are able to participate in protecting their environment by requesting an investigation of alleged offences under the Act.⁷⁴ While this could be a very useful provision because citizens would not be faced with pursuing an environmental action,

⁷¹ Canadian Environmental Protection Act, RSC 1985, c.16 (4th Supp.), first enacted as SC 1988, c.22, as amended, S. 136 (1)

⁷² Green v. The Queen in Right of the Province of Ontario, (1972), 34 DLR (3d) 20 (Ont.HCJ).

⁷³ Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995): 225.

⁷⁴ Canadian Environmental Protection Act, RSC 1985, c.16 (4th Supp.), first enacted as SC 1988, c.22, as amended, S. 108.

history with the Act shows that this provision has rarely been used.⁷⁵ For these reasons, the House of Commons Standing Committee on the Environment and Sustainable Development made many recommendations for improving CEPA when they officially reviewed the Act.⁷⁶

This official review of CEPA, which resulted in a lengthy report,⁷⁷ was mandated in the original Act to occur within five years after its enactment.⁷⁸ Many things had changed during the four years since CEPA's enactment. The governing party changed, court rulings helped to define federal environmental jurisdiction, international environmental issues became more prominent and resources available to Environment Canada were reduced significantly.⁷⁹ In addition, technological developments in scientific research helped to identify new environmental problems and to better define old ones. Virtually all of the witnesses who spoke on the subject agreed that the federal government should play a leadership role in environmental protection by establishing national standards and respecting fiduciary obligations to native people and lands.⁸⁰

Because it would be impossible in the context of this paper to review the 140 recommendations detailed by the report in over 200 pages, this discussion will focus on

⁷⁵ Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995): 222.

⁷⁶ Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995).

⁷⁷ Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995).

⁷⁸ Canadian Environmental Protection Act, RSC 1985, c.16 (4th Supp.), first enacted as SC 1988, c.22, as amended, S 139 (1) & (2).

⁷⁹ Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995), 1.

⁸⁰ Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995), 2.

recommendations for a new overarching sustainable development approach, opportunities for more public participation, and new citizens' rights to environmental protection.

These are the recommendations most in line with the spirit of the public trust doctrine.

The Committee recommended that sustainable development be accepted as an overarching policy goal in the new CEPA and that the underlying principles for this goal should include pollution prevention,⁸¹ the ecosystem approach,⁸² preserving biodiversity,⁸³ the precautionary principle,⁸⁴ and user/producer responsibility.⁸⁵ These principles would ultimately contribute to an integrated environmental strategy.⁸⁶ At the heart of sustainable development is an equitable distribution of socio-economic and environmental effects within society, among regions and between generations.⁸⁷

⁸¹ Pollution prevention refers to the use of processes, practices, materials, products or energy that avoids or minimises the generation and use of pollutants and waste. This should be done without shifting or creating equal or greater risks to human health or the environment. Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995): 316.

⁸² An ecosystem approach means administering the Act in a manner that maintains the functional integrity of ecosystems. Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995): 313.

⁸³ Biological diversity refers to the variability among living organisms from all sources, *inter alia*, terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are a part; this includes diversity within species, among species and of ecosystems. Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995): 311.

⁸⁴ The precautionary principle states that in respect of all substances suspected of posing serious threats to the environment or to human health, on the basis of weight of evidence, lack of full scientific certainty shall not be sufficient reason for postponing preventive or remedial measures. Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995): 316.

⁸⁵ Under user/producer responsibility for all substances suspected of posing a serious threat to the environment or health on the basis of weight of evidence, the onus shall be on the proponent or producer to demonstrate that the substance is safe, rather than on government or concerned citizens to prove that it is harmful. Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995): 317.

⁸⁶ Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995): 39.

⁸⁷ Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995): 41.

Following testimony from aboriginal peoples, it was recommended that sustainable development should consider the needs of the next seven generations.⁸⁸

The Review Committee emphasised the importance of section 2(d) of the 1988 CEPA, which requires the federal government to “encourage the participation of the people of Canada in the making of decisions that affect the environment.”⁸⁹ They felt that, although the 1988 CEPA recognised the importance of public participation, it did not go far enough to include mechanisms whereby this could be accomplished. Improving public participation can be achieved in a number of different ways including increased access to information or the environmental bills of rights legislation similar to the 1970 precedents set out in the Michigan Environmental Protection Act.⁹⁰

The Review Committee recommended that an electronic public registry be established under the new CEPA, that notice of proposed regulations, environmental quality objectives, guidelines and codes of practice be made public, and that a reasonable opportunity for public comments be given and considered by the Minister. Other recommendations stated that a mechanism for members of the public to request a review when substances assessed as toxic have no subsequent controls be put in place, that the National Pollutant Release Inventory be given an explicit statutory base, and that

⁸⁸ Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995): 43.

⁸⁹ Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995): 39.

⁹⁰ This Act has already been discussed in relation to the public trust doctrine. The idea behind environmental bill of rights coincides with that of the public trust doctrine in that it sets out the rights of citizens in relation to their environment and provides them with the tools to ensure that they are carried out. Canada, Report of the House of Commons Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention: CEPA Revisited, (June 1995): 204.

whistleblower protection be strengthened. In addition, the Review Committee recommended changes to the citizens' right to sue for loss, damage or an injunction related to an offence under the Act to respond to the problems cited in relation to the existing citizen suit provisions. Expanding citizen suits to include actions based on environmental protection, in addition to those based on personal harm, would mean that the judiciary could be called upon to scrutinise government actions when significant harm to the environment occurs because the government failed to enforce the Act. A closer look at the proposed Bill C-32, may reveal areas where public trust notions may appear in the spirit of the new law if not in the actual text. It may be that it would not be a very big leap to make specific mention of the public trust doctrine in the new legislation before it has passed through the legislative process.

4.3.2 Bill C-32 and the Public Trust

The government of the day made an effort to introduce new environmental legislation after the Standing Committee tabled its report in June of 1995. A new Bill C-74 was introduced to the House of Commons in December of 1996, however it was not passed before Parliament was dissolved for the June 1997 federal election. After further consultation with various stakeholders, a revised Bill C-32 was introduced into the House of Commons on March 12, 1998. The Bill underwent second reading and was referred to the Standing Committee on the Environment and Sustainable Development on April 28, 1998. It is estimated that the legislative process will be complete and the new CEPA will

receive royal assent by fall of 1999. Although Bill C-32 does not take specific account of the public trust doctrine, it shares similar underlying principles relating to sustainable development and citizen participation that reflect at least the spirit of the trust notion, if not the doctrine itself.

The argument that the public trust doctrine may be a means to promote the principles of sustainable development in Canadian society, as well as meet Canada's international commitments, has been put forward on more than one occasion. Although the initial declaration of Bill C-32 makes a commitment to sustainable development and the protection of the environment as being essential to the well being of Canadians, there is no specific mention of a trust duty on the part of the government to keep the environment safe, in the public interest.⁹¹ All of the sustainable development principles recommended by the Review Committee are mentioned in the preamble of Bill C-32. However, the government of Canada merely "acknowledges" them, "recognises" them," and "is committed to" implementing them. There is no mention, however, of a requirement for protecting air, water, natural resources or anything else considered to be part of the environment as defined in the Bill, or the "public trust therein." In the same way, although Bill C-32 seems committed to the idea of sustainable development, there is no specific mention of the responsibilities of the present generation as trustees of the environment for future generations, that may be similar to public trust legislation in the

⁹¹ The House of Commons of Canada, 1st Session, 36th Parliament, 46-47 Elizabeth II, 1997-98, Bill C-32, Declaration.

United States.⁹² Neither is there any mention of a duty on the part of the state “to protect and preserve the public’s interest in the environment” or any kind of “reserving the environment for the common use” of the people.⁹³

Public participation is expanded considerably under Bill C-32 compared to what was available to citizens under the 1988 CEPA. Part 2 of Bill C-32, which is modelled on the Ontario Environmental Bill of Rights, deals with public participation. This part of the Bill requires the establishment of an environmental registry to better inform the Canadian public about activities under the Act, even though the Minister may determine what form it will take. It also has provisions to protect the identity of anyone who voluntarily reports an offence or likely offence, and in the case of employees of the Government of Canada, agency of the government or Crown corporations, ensures against any retaliation for making a report. Recognising that giving Canadians the tools to act to protect their environment is as important as providing them with information, Part 2 of the Bill also has important new provisions for the investigation of offences or potential offences under the Act.

Unlike the 1988 CEPA where any two individuals can request an investigation of an offence, Bill C-32 allows any one individual to request this type of investigation. Moreover, unlike the original CEPA, Bill C-32 permits any individual that has requested an investigation to “bring an environmental protection action” if the Minister does not

⁹² The House of Commons of Canada, 1st Session, 36th Parliament, 46-47 Elizabeth II, 1997-98, Bill C-32, Preamble and S 3(1).

⁹³ This type of public trust wording was revealed earlier in this document as necessary to provide a substantive duty to the trust.

“conduct an investigation and report within a reasonable time” or if “the Minister’s response to the investigation was unreasonable.”⁹⁴ This action can be brought against any person alleged in the application for investigation that has caused significant harm to the environment.⁹⁵ Unlike the provisions for the investigation where the Minister has the discretion to discontinue an investigation, the environmental protection action “may be settled or discontinued only with the approval of the court and on the terms that it considers appropriate.”⁹⁶ Limiting relief to a declaratory order,⁹⁷ an order for the defendant to refrain from the activity or an order for the defendant to prevent the activity, with relief coming in the form of costs of the action as opposed to claiming damages⁹⁸ reflects the “public interest” nature of the action. In addition, civil causes of action are also available for personal loss or damage, as they were in the original CEPA.⁹⁹

There is a drawback, however, to trying to equate these citizen participation mechanisms with the public trust doctrine. With Bill C-32, a violation under the Act is a necessary requirement before an environmental protection action can proceed. In other words, citizens may sue the offender if the government fails to enforce its obligations, but they cannot sue the government if it authorises an activity that results in environmental

⁹⁴ The House of Commons of Canada, 1st Session, 36th Parliament, 46-47 Elizabeth II, 1997-98, Bill C-32, S 17 through 22(1).

⁹⁵ The House of Commons of Canada, 1st Session, 36th Parliament, 46-47 Elizabeth II, 1997-98, Bill C-32, S22(2).

⁹⁶ The House of Commons of Canada, 1st Session, 36th Parliament, 46-47 Elizabeth II, 1997-98, Bill C-32, S36.

⁹⁷ A declaratory order refers to a statutory remedy that is explanatory in nature where the plaintiff is in doubt as to his legal rights. Black’s Law Dictionary, rev. ed. (1990), s.v. “Declaratory judgement.”

⁹⁸ The House of Commons of Canada, 1st Session, 36th Parliament, 46-47 Elizabeth II, 1997-98, Bill C-32, S22(3).

⁹⁹ The House of Commons of Canada, 1st Session, 36th Parliament, 46-47 Elizabeth II, 1997-98, Bill C-32, S40.

harm. Herein lies the key difference between the new provisions in Bill C-32 and the public trust doctrine. Nonetheless, despite the absence of specific substantive notions, it appears that Bill C-32 has many characteristics that reflect the intent of the public trust doctrine. Perhaps it would not be a very big leap then to give the public trust duty a permanent home and thus provide the necessary statutory base from which the doctrine can expand in Canada. By allowing citizens a more active voice in caring for the environment, stewardship-based decision-making may eventually become second nature in Canadian society.

4.3.3 Care-Justice in Canada: Stewardship Today and Tomorrow

While finding a home for the public trust doctrine in the Canadian legal system would be beneficial from the perspective of promoting care-justice stewardship in Canadian society, it may be a difficult task. Many arguments have been put forward that current legal structures may not be able to account for the emerging knowledge that humans are distinct from, yet a part of and dependent on, the natural environment for their survival. Humans can no longer dominate and take from nature endlessly. Some argue that legal structures are too rigid to account for caring for nature,¹⁰⁰ while others see the law as reflecting current social values and/or acting as an anticipatory tool to promote new values within our society.¹⁰¹ Still others have argued that law's most

¹⁰⁰ In Canada, current legal structures make it very difficult to gain standing in environmental protection actions and confusion over federal and provincial jurisdiction muddies the waters enough that environmental protection can easily slip through the cracks. If the environment itself cannot gain standing, legal systems must incorporate some better notion of environmental value if humans are to halt their obsession with economic progress at all cost.

¹⁰¹ This role of law has been discussed previously in the thesis. It generally refers to the idea that law may anticipate and set new standards of conduct even though struggle to remain in more familiar modes of behaviour is the

crucial role in the environmental context may be to mediate the “debate between those who are satisfied with the status quo and those who are striving to visualise alternatives and put them into practice.”¹⁰² Environmental law must reconcile economy and ecology so that natural capital is preserved and “the common rights of all to ecological services essential for civilised existence”¹⁰³ are protected. For example, environmental law should be able to manage potential conflict between the private economic benefits that can be derived from a stand of trees and the ecological services such as flood control and climatic stabilisation that accrue from the very same forest.

Managing conflicts between ecological and economic interests in natural resources is not an easy task, especially within the federal structure of the Canadian legal system. A traditionally justice-based Canadian environmental legal system presents several problems for those who want to protect natural resources. Gaining legal standing can be difficult for an intervenor who does not own property or has not personally experienced a significant and unique harm. In addition, the appropriate role of judicial intervention in any type of social policy continues to be the subject of heated discussion, specifically by those who feel that these decisions are better left to elected representatives in democratic societies. Further complications arise from the complex, technical nature

usual response. Brady, Timothy Patrick. ““But Most Of It Belongs To Those Yet To Be Born”: The Public Trust Doctrine, NEPA, And The Stewardship Ethic.” *Environmental Affairs* 17 (1990): 629-630.

¹⁰² Karen Mickelsen and William Rees, “The Environment: Ecological and Ethical Dimensions,” in *Environmental Law and Policy*, eds. Elaine L. Hughes, Alastair R. Lucas and William A. Tilleman II (Toronto: Emond Montgomery publications Limited, 1993), 23.

¹⁰³ Karen Mickelsen and William Rees, “The Environment: Ecological and Ethical Dimensions,” in *Environmental Law and Policy*, eds. Elaine L. Hughes, Alastair R. Lucas and William A. Tilleman II (Toronto: Emond Montgomery publications Limited, 1993), 10.

of environmental disputes and scientific uncertainty about the causes and solutions of many ecological problems.

The legal profession can take steps to remedy some of these problems and enhance opportunities for reaching Canadian sustainable development objectives. This can be accomplished through a multidisciplinary approach and greater knowledge of legal tools used elsewhere. Legal stewardship as manifested by the public trust doctrine, in particular as it has developed in the United States, has been shown to be a positive fit with the care-justice framework necessary for appropriate environmental decision-making. The American public trust doctrine promotes the realisation of our connection with rather than separation from nature by providing opportunities for this connection to be expressed in dialogic and participatory decision-making processes. In addition, positive legal duties of caring and important rights to environmental quality are expressed in the doctrine. Through the ecosystem approach and the specific consideration of future generations that are demanded by a care-justice framework, use of the public trust doctrine becomes an anticipatory tool in the hands of judges to promote care-justice stewardship as they manage seemingly conflicting economic and environmental interests. Progress in the environmental field achieved at the international level will drive national and provincial developments in environmental protection. For example, the adoption of the public trust notion by the Northwest Territories is not only reflective of progress made with the doctrine in the United States, but has the potential to spur action elsewhere

in Canada.¹⁰⁴ Action designed to incorporate the ecofeminist care-justice ethic in Canadian legal structures could and probably should come by incorporating the public trust doctrine into the revised CEPA, Bill-C-32, that is currently undergoing the clause by clause review stage of the legislative process. This seems to be an ideal place to start because it is a comprehensive, wide-reaching, standard-setting federal environmental statute.

While it does not actually incorporate any specific public trust notions, the net effect of the proposed Bill C-32 is that Canadians will have the right to sue for damage to the environment when the government has not enforced its laws.¹⁰⁵ This is a mechanism whereby government actions can potentially come under judicial scrutiny as they do when public trust duties are included in environmental statutes in other jurisdictions. This may open the door to greater judicial acceptance of the public trust doctrine in Canada and pave the way for further development of the doctrine and consequently the ecofeminist ethic of care-justice in Canadian society, not only in statutory law but in common law actions as well. As judicial acceptance of the public trust doctrine expands, Canadians may be encouraged to move toward a new care-justice stewardship ethic for the protection of their environmental heritage. The public trust doctrine has the potential to help Canadians understand their connection to their environmental heritage, which belongs not only to them but also to generations to come.

¹⁰⁴ Constance D. Hunt, "The Changing Face of Environmental Law and Policy," UNB LJ 41 (1992):100-103.

¹⁰⁵ Canada. Environment Canada. Strengthening Environmental Protection in Canada: new Canadian environmental legislation. "The Act at a Glance." http://www.ec.gc.ca/cepa/quanda_e.html

It is encouraging to realise that the government has listened to the hundreds of witnesses representing stakeholders from a broad cross-section of Canadian society and in turn implemented many of the Review Committee's recommendations. It is also interesting and hopeful that the rights of Canadian citizens in relation to environmental protection are being expanded and tools have been provided whereby these rights can be exercised. While important opportunities for citizens to bring environmental protection actions before the courts have been included in Bill C-32, specific inclusion of public trust duties to protect the environment in the interests of the Canadian people would go even further as an anticipatory tool to promote the growth of the stewardship ethic in Canada. Specifically including the public trust doctrine could be as simple as revising the declaration at the beginning of Bill C32 to read "[i]t is hereby declared that the protection of the environment and *the public trust therein* is essential to the well being of all Canadians..." In addition, the words "as a result of a duty owing to the people" could be added to any number of clauses in the preamble. While the ideal action may be to set-up an environmental bill of rights at the federal level, inclusions of the public trust could help solidify citizens' rights to sue for environmental protection and represent one step along the road of promoting a care-justice environmental ethic in Canada.

4.4 Conclusion

Even though it may be somewhat late to think that specific public trust references could find their way into the new revised CEPA, consideration of the new legislation and

its relation to the public trust doctrine could help promote the care-justice stewardship ethic among the Canadian population. Engaging more Canadians in the debate may encourage other public institutions, as well as the private sector, to accept more responsibility for the environment during their day-to-day decision-making processes. This would ultimately help to preserve Canada's natural environment for its future generations, perhaps even the seven generations recommended by the aboriginal people that appeared before the CEPA Review Committee.

CONCLUSION

Well, I don't think we can afford to indulge ourselves any longer by denying or refusing to face the facts. The future of our children is now in serious jeopardy, and each day that we carry on with business as usual reduces the range of options that will remain open to them. As time passes, the options for change diminish while the costs skyrocket.¹

Humans can no longer afford to cling to old notions about the human-nature relationship and how it has guided human behaviour. Business as usual, as in separation from and domination of nature along with autonomous justice-based decision-making have brought us to the point where some new guide to human behaviour is necessary to ensure a sustainable future for our children and grandchildren. A new way of thinking, a new model for decision-making, including care along with justice in a more complete ethical framework, is the change from business as usual that is necessary for complex social and environmental decision-making to become more effective and appropriate. While justice provides moral minimums for our behaviour and protection against self-serving and self interested decisions, care provides the sense of connection to the natural environment and consideration of the broader circumstances of environmental problems that are necessary to move away from the either/or thinking that has been a dominant pattern in environmental protection. Either/or thinking such as humans/nature, logging/wilderness preservation, and jobs/environmental protection, has been shown to

¹ David Suzuki, Earth Time, (Toronto: Stoddart Publishing Co. Limited, 1998), 255.

adversely affect our ability to develop acceptable environmental solutions. Humans must think seriously about their responsibility as stewards of the earth.

Stewardship models have been around since humans have inhabited the earth. In modern, complex, secular societies of the late twentieth century, traditional stewardship models, which are geared to more simple social systems, must be rethought and used to derive a more complete care-justice framework for environmental decision-making. Legal stewardship, in the form of a widely applied public trust doctrine, has the potential to promote care-justice thinking in Canadian society. The important question is how to establish the conditions for wider application of the doctrine in Canada? If the doctrine were included in federal statutory law, judges may be able to use the doctrine as an anticipatory tool to promote care-justice thinking in Canadian society. One home for the doctrine at the federal level could have been Bill C-32, the new act to revise the Canadian Environmental Protection Act.

Unfortunately, while the public trust doctrine was given more than a cursory review in relation to this new legislation, only weak notions of public scrutiny of government action and increased participatory rights for citizen's desiring to protect their natural heritage have been incorporated in Bill C-32. Language that would demonstrate specific recognition of the public trust doctrine has not been included in the legislation. More specific incorporation of the public trust into the revised CEPA would have provided a stepping stone along the path toward a broader acceptance of care within the justice framework that is prevalent in society today. While it would be ideal if stronger

public trust notions could be incorporated into federal and provincial legislation through the use of specific public trust language and the implementation of environmental bills of rights, what we have so far with Bill C-32 is a door open just enough to allow for greater gains in the future.

If business as usual is no longer an option, where should we go from here? David Suzuki argues that we have to change our thinking and define the issues differently so that, for example, jobs must no longer be pitted against environmental protection. We must recognise that air that is external to us is also internal and that we are made up of the same water and elements that make up the planet. Suzuki argues that “[w]e literally are the Earth” and “[o]nce that we have understood that, we will realise that we can’t go on trying to resolve environmental problems like asthma, endocrine disruptors, breast cancer, lymphoma, and so on by finding cures after the fact.”² The interesting thing here is that Suzuki frames environmental problems in terms of human health, which further emphasises our connection with nature and the fact that if we don’t change our thinking, decision-making models, and societal structures now it may be too late. This means that we need to continue to press for the promotion of care-based decision-making within our legal, economic and political structures. We should be encouraged by the door opening that has been provided to us by Bill C-32 and use it to promote broader discussion about the public trust doctrine and how it can be adapted in Canada to ensure our children’s and

² David Suzuki, Earth Time, (Toronto: Stoddart Publishing Co. Limited, 1998), 261.

grandchildren's future as we move into the twenty-first century. We must act now before it is too costly or too late.

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