Addressing Cumulative Environmental Effects in the Oilsands: Parens Patriae, Public Trust Doctrine and the Federal Government

The goal of this essay is to provide a theoretical examination of how parens patriae and public trust doctrine could be employed in Canada using the example of cumulative environmental effects in the oilsands region.

INTRODUCTION
Cumulative effects are a serious environmental problem for Canada’s resource industries. Nowhere is that more evident than in the oilsands region along the Lower Athabasca River north of Edmonton, Alberta. Decades of development have stressed the natural environment. Projected future growth of the oilsands is only going to increase the pressures on the natural environment. Since 1992, the federal government has had a mandate to assess cumulative impacts of proposed oilsands projects. They have failed in their mandate to prevent the problem from worsening.

There is a need for new legal approaches to address cumulative environmental effects. The Supreme Court decision in Canfor identified expansions of parens patriae and the public trust doctrine as possible avenues for increased environmental protection. This essay examines how the common law remedies of parens patriae and the public trust doctrine can be applied to the growing problem of cumulative environmental effects in the Alberta oilsands region.

Part I answers the following questions. What are cumulative environmental effects? Why do they matter in the oilsands region? What is the role of the federal government?
What is the impact of ongoing litigation? How does the 2004 SCC *Canfor* decision provide new legal tools?

**Part II** starts within an examination parens patrie and its historic origins. Next, the protection of quasi-sovereign interest in the United States and Canada are compared. The issue of public standing and how to bring a private parens patriae action is discussed in the context of cumulative environmental effects in the oilsands. Lastly, available remedies are considered.

**Part III** addresses the role of the public trust doctrine in addressing cumulative environmental effects. The evolution of the doctrine in the United States provides a template for potential expansion in Canada. Substantive and procedural fiduciary duties are defined and applied to the federal government's responsibilities in the oilsands region.

**PART I - BACKGROUND**
This section lays out why cumulative environmental effects are a problem in search of a solution. The section starts by defining what a cumulative effect is, it explains why cumulative effects are of particular concern in the oilsands region, next it details the federal government's role and shortcomings in managing cumulative effects, then it describes why mounting litigation pressures are unlikely to change unless the federal government changes its management practices and lastly it offers a potential legal route to obtaining that change.
Definition of Cumulative Environmental Effects
The purpose of this section is to examine how to improve the federal government’s role in managing cumulative effects assessment. Before getting into the substantive analysis, we must understand what is a ‘cumulative effect’? The term has multiple variations. Because the analysis focuses on the role of the federal government, the Canadian Environmental Assessment Agency’s [CEAA] definition will be used. CEAA defines cumulative effects as “changes to the environment that are caused by an action in combination with other past, present and future human actions.”

Why Examine Cumulative Effects in the Oilsands?
Cumulative effects are the changes to the environment caused by multiple stressors over time and space. Cumulative effects are found in all natural resource extraction projects taking place in Canada. However, the pace of past and future growth in the oilsands makes it the epicentre of cumulative effects analysis in Canada. The region has multiple large-scale extraction projects in operation or in the planning stages. In 2012, the oilsands industry produced more than 1.7 million barrels of crude oil. Production is expected to triple by 2030 to 5.3 million barrels per day. To accommodate this growth, water takings will have to increase, more boreal forests will

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be destroyed, new industrial facilities will be constructed, more tailings ponds will be built, and more pollutants will be released. The Lower Athabasca watershed is already under significant environmental stress and the projected future development will put new pressures on its ecological integrity.⁶

Why Look at Cumulative Effects from the Federal Perspective?
The federal government is uniquely positioned to assess and manage cumulative effects. The federal government has a set of standardized procedures that can be applied in the oilsands region and elsewhere in Canada. Unfortunately, it has an unfortunate history of poor cumulative effects management that has created a legacy of environmental damage.⁷ If federal cumulative effects management practices can be improved in the oilsands region, the change will have national implications.

**Canadian Environmental Assessment Act**
Cumulative effects have been a key component in federal environmental assessments since the first *Canadian Environmental Assessment Act* was implemented in 1992.⁸ Assessing potential cumulative effects remains a crucial part of federal environmental assessments under the revamped *Canadian Environmental Assessment 2012* [CEAA 2012].⁹ Under the current legislation, a project environmental assessment must take into account “the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result

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⁷ Supra note 3.

⁸ *Canadian Environmental Assessment Act*, SC 1992, c 37, s 4(2), 16(1)(d), 16(2).

from the designated project in combination with other physical activities that have been or will be carried out." A cumulative effects assessment must be done prior to determining the significance of adverse environmental effects. The scope of the cumulative effects examined in the assessment is determined by the relevant authority or the Minister responsible. Environmental components that can be included in the cumulative effects assessment include fish and fish habitat, aquatic species and migratory birds.

**Poor Past Performance**

In spite of its extensive operational policy statements and reference guides, the federal government has performed poorly in managing cumulative effects in its oilsands environmental assessments. The reasons behind the poor performance are both structural and political. The federal government has only done project level assessment in the oilsands region. Project level assessments are the least conducive method of the three major environmental assessment approaches – project level assessments, regional environmental assessments, and strategic environmental assessments – for managing the temporal and spatial boundaries of cumulative environmental effects. Project assessments look at smaller geographic areas, the development timelines examined are shorter, and they are focused on the impacts of single project. They can assess direct and indirect effects but they fail in properly handling cumulative effects. Furthermore, federal government agencies have consistently failed to adapt the terms

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10 *Ibid* at s 19(1).
11 *Ibid* at s 19(2).
12 *Ibid* at s 5.
13 *Supra* note 3 at 62.
of references for subsequent environmental assessments to produce the information needed to consider shifting environmental conditions. Additionally, incomplete environmental baselines and environmental data monitoring systems hinder the ability of the government to evaluate potential cumulative effects in the oilsands region. The political problems with environmental assessments are concentrated in the discretion to approve projects with acknowledged significant adverse environmental effects.

**Cumulative Environmental Effects- A Problem That Won’t Go Away**

The Jackpine oilsands mine expansion is an example of the federal government’s reluctance to address cumulative environmental effects. On 9 July 2013, the Joint Review Panel [Panel] for the Jackpine oilsands mine expansion released its recommendations. In their report, the Panel wrote that cumulative effects from past, present, and future would have significant adverse environmental effects on "wetlands; old-growth forests; traditional plant potential areas; wetland reliant species at risk and migratory birds; old-growth forest-reliant species at risk and migratory birds, caribou; biodiversity; and Aboriginal [traditional land use], rights and culture". The Panel also noted a lack of proposed mitigation measures for the cumulative effects but they chose not to make any recommendations. Instead, they indicated that the Lower Athabasca Regional Plan [LARP] would be the “appropriate mechanism for identifying and managing regional cumulative effects”. What the Panel failed to note is that LARP is an in-development initiative of the provincial government in Alberta that is not currently

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15 Supra note 3 at 75
17 The Jackpine Mine is located on the eastern shore of the Athabasca River, approximately 70 kilometres north of Fort McMurray.
offering any substantive guidance to oilsands project.\textsuperscript{19} The Panel went onto conclude that the project was still in the public interest despite the permanent loss of thousands of acres of wetland and boreal forest habitat.\textsuperscript{20}

On 6 December 2013, the federal government approved the oilsands mine expansion despite the concern over cumulative effects and the proposed mitigation measures. Federal Cabinet decided that the “significant adverse environmental effects that the Designated Project is likely to cause, are justified in the circumstances.”\textsuperscript{21} Similar treatment of adverse environmental effects has created a legacy of litigation.

\textit{Litigation}
Cumulative environmental effects have been the source of litigation and will be the source of litigation in the coming decades. In the past twenty years, the federal government has repeatedly been challenged over its failure to properly assess cumulative environmental effects when approving projects.\textsuperscript{22} Currently, a new line of litigation is emerging that challenges the federal government and the provincial

\textsuperscript{22} \textit{Pembina Institute for Appropriate Development v. Canada (Attorney General)} [2008] FCJ No. 324, 2008 FC 302. [\textit{Pembina}](The federal government was sued for its failure to provide reasons for why the adverse environmental effects from the greenhouse gas emissions from the Kearl Oilsands projects would be insignificant.); \textit{Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)}, [2000] 2 FC 263. [\textit{Sunpine}](The federal government was sued to prevent it from limiting assessments to only the project components that fell within federal jurisdiction. The scoping would allow the government to limit the review of the complete adverse environmental effects caused by the project.); \textit{Pembina Institute for Appropriate Development v. Canada (Minister of Fisheries and Oceans),} [2005] FCJ No. 1379. [\textit{Cheviot Mine}](Federal government was sued for failing to do an adequate assessment of an open-pit coal mine.)
government of Alberta for environmental damage caused by the cumulative effects of oilsands and conventional oil projects. The core arguments in this new line of litigation are not about failure to properly assess cumulative effects but about the damage caused by decades of cumulative effects. The litigants claim that the repeated failures of the government to mitigate project impacts has lead to cumulative effects that have limited the ability of First Nations groups to exercise their protected treaty rights to hunt, fish, and trap in their territories. The Beaver Lake Cree Nation, an Indian band located in the Lower Athabasca Region, is alleging that the thousands of permits issued by the federal and provincial government for oil and gas development in their historical territory have led to environmental conditions that prevent them from accessing their treaty rights.\(^{23}\) The Fort McKay First Nation is challenging a decision by the province of Alberta to allow a new oilsands project to be developed beside their traditional territory.\(^{24}\) They are seeking a 20 kilometre buffer zone to protect their territory from the cumulative environmental effects of the proposed oilsands project.

The environmental and legal issues surrounding cumulative effects are only going to grow in the coming years. New legal tools are needed to address this issue.

\(^{23}\) *Lameman v Alberta*, 2013 ABCA 148. (The federal government has observer status because of the aboriginal constitutional rights issue involved in the claim.)

\(^{24}\) *Fort McKay First Nation v. Alberta Energy Regulator*, 2013 ABCA 355. FMFN sought leave to appeal decisions of the Energy Resources Conservation Board and the Alberta Energy Regulator which had approved a project that directly abutted their reserve. Part of the band’s arguments deal with their constitutionally protected rights to hunt, fish and trap. The federal government has observer status for the hearings. See also Kelly Cryderman, “The dispute the entire oil industry is watching” *The Globe and Mail* (14 December 2013) online: <https://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/the-fort-mckay-first-nation-a-line-in-the-oil-sands/article15968340/?page=all#dashboard/follows/> for a discussion on the band’s proposal for a 20 kilometre buffer zone to insulate it from the negative cumulative impacts of the expansion. (Accessed 20 December 2013)
**The Legal Tools in Canfor Decision**

As environmental pressures continue to mount with each new oilsands project that comes online, there is a need for new litigation tools to address the federal government’s failure to properly manage cumulative effects. Fortunately, there is a road map for finding those new tools and that map can be found in the *Canfor*\(^{25}\) decision.

The *Canfor* decision is one of the high points in recent Canadian environmental law. The case deals with environmental damages following a forest fire in British Columbia but it is the obiter comments of Binnie J that hold the promise of new legal tools. Writing in obiter, Binnie J indicated that the Court would be receptive to expanding common law environmental protection in Canada using parens patriae and public trust doctrine arguments. Binnie J’s commentary\(^{26}\) on the availability of parens patriae and the expanded use of the doctrine in the United States suggested that Canadian common law still has room to grow. His discussion of public trust doctrine\(^{27}\) followed a similar trajectory of expanding the role of the state as a protector of the public natural resource interests. Binnie J’s discussion of Crown liability for inaction furthered expanded realm of possible litigation options for Canadian environmental lawyers.\(^{28}\) American courts have utilized parens patriae and the public trust doctrine to prevent environmental damages and to collected monetary compensation for environmental damages.\(^{29}\)

\(^{25}\) *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 SCR 74. [*Canfor*]

\(^{26}\) *Ibid* at 76-78.

\(^{27}\) *Ibid* at 79-80.

\(^{28}\) *Ibid* at 81.

\(^{29}\) *Ibid* at 80.
A flurry of legal analysis and scholarship\textsuperscript{30} followed the \textit{Canfor} decision but the expanded use of parens patriae and the public trust doctrine has occurred. What follows for the remainder of this essay is a discussion of why this has not happened for parens patriae and the public trust doctrine and how that can be changed. The example of cumulative effects in the oilsands region will be used to illustrate legal points and obstacles.

\textbf{PART II - PARENS PATRIAE}

This section will explain the concept of parens patriae and compare its use in Canada and the United States. A parens patriae action is composed of three components. A public interest to be protected, someone to enforce the parens patriae power, and a cause of action. The U.S. and Canadian applications of parens patriae differ on the scope of public interests, they share similar views on who can utilize the power, and they agree on the cause of action component. Looking at each of the components using Canadian and American case law and academic articles will demonstrate how parens patriae might be applied to address cumulative effects. At the end of this section, a discussion of how a private individual can bring a parens patriae action will show how the doctrine can be applied when faced with government inaction.

\textbf{Definition}

What is Parens Patriae?

Parens patriae refers to the standing of the Attorney General to pursue litigation in the public interest. Standing as parens patriae is the common law right\textsuperscript{31} of the Attorney General to seek relief in the courts on behalf of the public.\textsuperscript{32} The role of the government as guardian has been split into two roles. The first, and most often common role, is to act for persons legally unable to act for themselves, i.e. minor children.\textsuperscript{33} The second role is to seek legal remedies for breaches of purely public rights. Remedying a breach of a public right is how the government can seek environmental damages. In general, the government is the only party with the right to seek legal remedies for breaches of purely public rights.\textsuperscript{34}

Public Interests

What public interests or rights a state can protect is one of the critical turning points in the \textit{Canfor} decision. It is also at the heart of the divide between how the United States and Canada apply parens patriae. Public rights has been defined as rights that are shared between members of society and not allotted in a fashion that would give rise to a private right that an individual could enforce on their own.\textsuperscript{35}

The next question is for what kind of interest can a state employ its parens patriae authority. A state can suffer damages to its proprietary, sovereign, or quasi-sovereign

\textsuperscript{31} Parens patriae has also been codified in state statutes but this essay will focus on the common law application of the doctrine.
\textsuperscript{34} I acknowledge that the Ontario Environmental Bill of Rights does grant residents the right to bring an action in public nuisance for harm to a public resource. However, there are procedural hurdles and limitations on potential remedies (including a bar on damages) that reduce its overall effectiveness.
\textsuperscript{35} \textit{Supra} note 33 at 81.
interests. A proprietary interest is an interest that the state asserts on its own behalf as would any other legal entity. A sovereign interest is the state’s interest in seeing that its laws are obeyed and enforced. A quasi-interest is a state’s interest in protecting the health and well-being, both physical and economic, of its citizens. States can use their parens patriae power to protect both their sovereign and quasi-sovereign interests.

**Sovereign Interest**
A sovereign interest is the interest of the state in seeing its laws obeyed. Halsbury’s Laws of England states that “[t]he public is concerned to see that the Acts of Parliament are obeyed, and the Attorney General represents the public as a whole in insisting that the law be observed.” As the protector of the public right, the state is afforded the absolute jurisdiction to enforce its laws. The state creates the laws and is responsible for their implementation and enforcement. This form of parens patriae is universally accepted in Canadian and American common law traditions.

**Quasi-Sovereign Interest**
A quasi-sovereign interest is an interest of state that is apart from the interests of particular private parties. Quasi sovereign interests are defined by what they are not. Quasi-sovereign interests are “not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party.” The quasi-sovereign interests of the state can be divided into two categories: welfare of the populace and questions of federalism. Welfare of the populace gives the State a “quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general”.

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36 Supra note 33 at 81.
37 Supra note 33 at 81.
40 The categories remain open to new additions.
Questions of federalism address the “quasi-sovereign interest in not be discriminatorily denied its rightful status within the federal system”. Welfare of the populace is the area where efforts to remedy environmental damage are concentrated. What constitutes welfare of the populace has been developed through example and counter-example instead of deductive reasoning. “A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant. The vagueness of the concept can only be clarified by turning to individual cases.”

Quasi-Sovereign Interests in the United States
American case law continues to evolve the scope of quasi-sovereign interests section of the parens patriae doctrine. In its infancy, the doctrine was primarily applied to prevent or remedy injury to the health and welfare of the populace. The earliest cases dealt with a citizen’s right to equitable employment, anti-trust issues and consumer protection. Individual cases subsequently found overlaps between the health of the citizenry and the health of the natural resources of the state. Pollution was the common link in the cases that allowed the courts to expand the range of quasi-sovereign interests. Pollution which directly affects a state’s citizens also has a negative impact on its flora and fauna. As States moved to protect their citizens, they also extended protection to their natural resources. Since the beginning of the 20th century, a line of cases around discharge of sewage, flooding, water pollution, diversion of water, and air pollution have

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41 Supra note 39 at 602.
42 Supra note 39 at 600-601.
43 Supra note 39.
44 Supra note 32 at 123.
enlarged the quasi-sovereign interest and consequently extended the reach of the state’s parens patriae authority.

**Quasi-Sovereign Interests In Canada**
A commentator described parens patriae in Canada as being “calcified”.\(^{50}\) It is an appropriate term to refer to the slow movement in placing new public interests under the protection of parens patriae doctrine. Canada has adhered to the English model where sovereign interests are the predominate source of parens patriae actions. The *Canfor* decision hinted that the courts would be receptive to governments expanding the efforts to prevent and remedy environmental harm. Since Binnie J’s obiter comments did not qualify its reference to parens patriae power in the United States, it is logical to presume that there Canadian government may be able to use the same legal tools as their American counterparts.\(^{51}\) Canadian environmental law based upon protecting quasi-sovereign interests and using pollution as a trigger would significantly expand the reach of parens patriae while providing a new legal tool for addressing the problem of cumulative environmental effects.

**The Issue of Public Standing**

*The Tight Grip of the Attorney General*
Expanded parens patriae potential does not automatically equal more environmental protection. The Attorney General still maintains a tight grip on standing to enforce a public right and private use of the doctrine is restricted. Typically, when public rights are infringed, the Attorney General is the only party with standing to bring a suit to remedy


\(^{49}\) *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

\(^{50}\) Supra note 32 at 124

\(^{51}\) Supra note 32.
the wrong.\textsuperscript{52} For a private party to enforce a public right, they must meet one of two conditions in order to sue. The first condition is that they must show that interference with the public right is such that some private right of theirs is interfered with at the same time. The second condition is when the private party, in respect of their public right, suffers special damage peculiar to themselves from the interference with the public right.\textsuperscript{53} Actions that fall outside of those two situations are unlikely to succeed and the public must rely on their government taking action. Discretionary decision making powers have repeatedly undercut the public’s dependence on their government to serve as environmental protector.

\textit{Challenging the Absolute Discretion of the Attorney General}

The discretion of the Attorney General over public rights infringements cases has caused concern in the legal community for many years. Academics and judges have expressed concern that situations may arise when infringement of public rights are not being vindicated because of the discretionary choices of the Crown\textsuperscript{54} and because discretionary choices are exempt from statutory review.\textsuperscript{55} Their fears are grounded in the conflict of interest found in the dual roles of the Attorney General as a Member of Parliament and as the guardian of the rights of the public. The legal community’s concern focuses on the existence of situations when the Attorney General has a moral obligation to lend his or her name to a relator action but chooses not to. They also question whether the Attorney General is always the best plaintiff to protect public rights.

\textsuperscript{52} Wilfred Estey, “Public Nuisance and Standing to Sue” (1972) 10 Osgoode Hall LJ 563 at 566.
\textsuperscript{53} Boyce v Paddington Borough Council, [1903] 1 Ch. 109 at 114.
\textsuperscript{55} Supra note 51 at 567.
The Ex Relatione Exemption
Private parties who fail to meet the special damage requirements have one other option. They can bring parens patriae suits using a legal manoeuvre known as *ex relatione*. *Ex relatione* allows private parties to bring actions that are normally the exclusive right of the Crown by petitioning for ex relator status. As an ex relator, the private party informs the Attorney General of the existence of the infringement and the potential cause of action.\(^5^6\) The Attorney General then decides whether to allow the suit to proceed.\(^5^7\) If he or she allows the suit to proceed, then the Attorney General signs onto the lawsuit as a party to the action and the ex relator gains standing to proceed with the suit. The end result is that that the private individual gains the standing to pursue a remedy that would have normally been disallowed by the courts.\(^5^8\) The Attorney General maintains the discretion to participate as little or as much as they desire. In *Anderson v Victoria*\(^5^9\), the Attorney General lent their name to the suit and then announced that it would not interfere with the trial in any manner to avoid influencing the trial of the right.\(^6^0\)

An ex relator action can be brought without the consent of the Attorney General. The Attorney General should only be added when there is no other course of action available for the plaintiff and their valid claim would not reach the court. The plaintiff applies to the court to add the Attorney General as a party defendant to the action. If the application is granted, then the plaintiff is granted ex relator status. However, it is uncertain if Canadian courts would allow this legal manoeuvre. Canadian case law has

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\(^5^6\) Supra note 51 at 566.
\(^5^7\) Supra note 51 at 567.
\(^5^8\) Note: Parens patriae is a civil action and thus there is a potential for cost awards against the party bringing the suit. Under the ex relator system, costs awards are imposed on the private individual who brought the suit.
\(^5^9\) *Anderson v Victoria*, (1884) 1 BCR 107, Pt. 2 (BCSC).
\(^6^0\) Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest* (1980), No. 46
allowed it, then taken it away, then potentially put it back in the legal toolkit. In *Turtle v City of Toronto*[^61^], the court allowed the plaintiff to add the Attorney General as a party defendant, “[The plaintiff’s] only remedy is to procure through the Attorney General to bring an action with the present plaintiff as a relator, or should the Attorney General decline, then possibly by adding the Attorney General as a party defendant in the action as has been done in some cases.”[^62^] In *Grant v St Lawrence Seaway Authority*[^63^], the plaintiff relied upon the reasoning developing in *Turtle* to add the Attorney General as a party defendant in a public nuisance case. The Court of Appeal ruled that the “discretion of the Attorney General to decide what cases it is proper for him to institute proceedings with respect to public nuisances is absolute”.[^64^] The finality of the *Grant* decision was questioned in *Thorson*[^65^] where Laskin J wrote, “... where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the court must be able to say that as between allowing a taxpayers’ action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case on its merits.” The court appears to have reserved the ability to temper the absolute discretion of the Attorney General as it sees fit, but there is a lack of ex relator case law to test this assertion.[^66^]

**Cause of Action**

[^61^]: *Turtle v Toronto (City)*, [1924] OJ No. 121; 56 OLR 252. [Turtle]

[^62^]: Ibid.


[^64^]: Ibid at 7.


[^66^]: A QuickLaw search reveals that there have been no environmental ex relator cases since *Canfor*. Unsuccessful pre-*Canfor* environmental ex relator attempts include *Re Pim and the Minister of the Environment et al.* [1978] OJ No 3672, 23 OR (2d) 45; *Greenpeace Canada Ltd v MacMillan Bloedel Ltd (BCCA)*, [1994] B CJ No 2148, 118 DLR (4th) 1; and *Manitoba Naturalists Inc v Ducks Unlimited Canada*, [1991] MJ No 611, 86 DLR (4th) 709. In each of these cases, the plaintiffs were denied standing to proceed as ex relators.
Parens patriae is not a standalone cause of action. While the doctrine gives the state or private individual the standing to sue, it does not create a separate cause of action like the public trust doctrine. As such, the doctrine of parens patriae requires a separate cause of action upon which the plaintiff can base their statement of claim. In American natural resources damages cases, public nuisance is the most common cause of action. Looking back to Canfor, public nuisance and negligence were two causes of action. In Canada, the case of Ryan v Victoria defined public nuisance as “any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or convenience” The Canadian public nuisance definition overlaps with the Snapp’s welfare of the populace definition of a “quasi-sovereign interest being an interest in the health and well-being – both physical and economic – of its residents in general.” It is reasonable that public nuisance should continue to the predominant underlying cause of action in a Canadian parens patriae case. Additionally, parens patriae could override the special damages requirement that has blocked private individuals from bringing public nuisance suits.

**Remedies**
Assuming that the parens patriae action has been successful, the next step is to seek a remedy. Remedies for parens patriae actions to recover environmental damages in Canada can be divided into two categories: pre-Canfor and post-Canfor. Pre-Canfor, the consensus was that parens patriae would only provide injunctive relief and it was

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67 Supra note 30.
68 Supra note 25 at 8.
69 Ryan v Victoria, [1999] 1 SCR 201 at 52.
70 Supra note 39 at 602.
the rare case that would allow for the collection of monetary damages. Binnie J’s obiter opens the door for the Attorney General to seek monetary damages for environmental harm, “It seems to me there is no legal barrier to the Crown suing for compensation as well as injunctive relief in a proper case on account of public nuisance or negligence causing environmental damage to public lands, and perhaps other torts such as trespass ...” In the United States, parens patriae has been used to recover for damage to private interests. Whether Canadian courts will take this step is unknown.

Applying Parens Patriae to the Cumulative Effects in Oilsands Region

Having completed a review of the theory and potential of parens patriae, the next step is to see how parens patriae could be applied to a Canadian environmental problem, the oilsands. A parens patriae action in the oilsands region for damages caused by the cumulative effects must go through several steps. The first step is to identify a cause of action. Public nuisance is the best option. There are significant releases of airborne and waterborne pollutants from industrial operations, tailings ponds, and other associated activities that are interfering with the natural environment. The second step is showing that the pollutants affect a natural resource under federal jurisdiction. The best options available are fish, migratory birds, and endangered species. At present, there is scientific consensus that aquatic and migratory bird species in the oilsands region contain higher levels of contaminants than species outside of the oilsands region. However, there is considerable disagreement over if the source of the contaminants is

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71 Supra note 33 at 147.
72 Supra note 25 at 81.
73 Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907). The majority of the damages sought by the State where for damage to privately held forests and orchards.
74 As discussed earlier, this paper is limiting itself to cumulative effects that fall under federal jurisdiction.
75 Margaret Munro, “Mercury levels rising in expanse around Alberta oilsands” (29 December 2013) online: <o.canada.com/news/mercury-levels-rising-in-expanse-around-alberta-oilsands>. (Accessed 17 May 2014)
naturally occurring from oilsands deposits or the result of industrial activity. New scientific research has connected the contaminants to the industrial activity in the region.\textsuperscript{76} Other scientists and government agencies either insist that the contaminants are coming from the natural biodegradation of the oilsands deposits or reserve judgement until further investigations are performed.\textsuperscript{77} Assuming that a pollution connection can be established, the third step is deciding who to pursue the action against. The small number of oilsands projects reduces the number of potential defendants. American courts have allowed governments to bring claims against multiple polluters and to find them jointly and severally liable.\textsuperscript{78} The final step of getting the government to bring the action is more tenuous. As a participant in the process that approved the project, it should be anticipated that the federal government will be reluctant to bring a parens patriae action. The ex relator action with the government as a party defendant is an untested legal option that would require the right set of circumstances: strong scientific evidence, a lack of available options for the private party, and a court willing to hear a novel argument. Finally, potential remedies include injunctive relief to reduce pollutant levels and compensation for the damage caused to the natural resource.


\textsuperscript{78} \textit{Supra} note 33.
Conclusion
Parens patriae is an untapped resource for environmental protection in Canada. As demonstrated by the American use of concept, it allows the State to protect and preserve natural resources. It also gives citizens the opportunity to pursue public interest actions that would normally be denied to them. There are numerous legal obstacles to bringing a parens patriae action but they have not been recently tested in a court of law. Awareness of cumulative environmental effects has changed and it is time to test the court’s willingness to listen to new arguments.

PART III - PUBLIC TRUST
The section examines the potential expansion of the public trust doctrine in Canada following the Canfor decision. It begins by looking at how Canfor opened the door to American-style public trust doctrine concepts. The section continues with an examination of the public trust doctrine in the United States and how it has expanded in the past couple of decades. Next the section looks at fiduciary duties and how they can be used to overcome government inaction. Finally, a range of procedural and substantive duties are discussed and applied to the oilsands example.

Introduction
Canfor Opens the Door
The Canfor decision opened up new possibilities for the application of the public trust doctrine to natural resources conservation in Canada. In referring the deep rooted public rights in the environment in Canada, Binnie J cites Illinois Central, the

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79 For an excellent discussion of the evolution of the public trust doctrine in Canadian case law and statutory law, see Anna Lund, “Canadian Approaches to America’s Public Trust Doctrine: Classic Trusts, Fiduciary Duties & Substantive Review” (2012) 23 J Envtl L & Pol’y 105. For the purpose of brevity, the historical application of the public trust doctrine in Canada will not be discussed.

80 Illinois Central Railroad Co. v Illinois, 146 U.S. 387 (1892) [Illinois Central]
foundational American public trust doctrine case. *Illinois Central* establishes the certain properties are held in trust by the State for the public and that trust is inviolable. Binnie J continued on to raise questions relating to the “Crown’s potential liability for *inactivity* in the face of threats to the environment” and what the status was of regarding the “existence or non-existence of enforceable fiduciary duties owed to the public.”\(^{81}\) The American case law that followed *Illinois Central* has helped provide some definition to what types of property fall under the public trust doctrine and what obligations the government owes to the public.

The Scope of the Trust Obligation

*Canfor* referenced several American cases to suggest how the scope of Canada’s public trust doctrine may be expanded.\(^{82}\) In the United States, the scope of the public trust doctrine has two dimensions: the resource that it attaches to and the uses which it protects.\(^{83}\) The parameters of both dimensions in the United States have continued to evolve and develop since *Illinois Central*.

Public Trust Doctrine Resources

Early Canadian and U.S. public trust jurisprudence centred on the state’s obligation to protect public rights to water such as navigation and fishing.\(^{84}\) Canadian jurisprudence has adhered to these rights while the U.S. legal system has been open to adapting public trust to reflect the changing needs of the public. Canada’s evolution of the public trust doctrine slowed in the 1970s following an interpretation of the public trust doctrine

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\(^{81}\) *Supra* note 25 at 81. (Emphasis added by the Court)

\(^{82}\) *Supra* note 25 at 80.

\(^{83}\) *Supra* note 78 at 128.

\(^{84}\) Sarah Jackson, Oliver M Brandes, and Randy Christensen, “Lessons from an Ancient Concept: How the Public Trust Doctrine Will Meet Obligations to Protect the Environment and the Public Interest in the Canadian Water Management and Governance in the 21st Century” (2012) 23 J ENTVL L & POL’Y 175.
that aligned it with the classic trust model.\textsuperscript{85} In the U.S. the 1970s were a period of rapid evolution of the modern trust doctrine\textsuperscript{86}. Through a combination of case law and state law, the American public trust doctrine model expanded to protect new resources.\textsuperscript{87} The public trust doctrine was used to protect natural resource assets including biological diversity, inland wetlands, wildlife and wildlife habitat connected to navigable waters.\textsuperscript{88}

**Public Trust Doctrine Uses**
The types of uses protected by the public trust doctrine have also followed a similar pattern of expansion in the U.S. The courts continue to show considerable flexibility in adapting the doctrine to reflect the changing needs of the public.\textsuperscript{89} American states have expanded the scope of the doctrine to protect new uses including conservation, tourism, hunting, boating, and general recreation.\textsuperscript{90}

**The Public Trust Doctrine: Government Action or Inaction**
Government as protector and government as defendant are the two halves of the application of the public trust doctrine. While the majority of protective efforts have been brought by the state against violators, there is an evolution towards private parties bringing actions against the government to force them to protect public trust resources and uses. The government as protector will be briefly discussed but the main focus of

\textsuperscript{85} Green v Ontario, (1972), 34 DLR (3d) 20 (Ont. H.C.). [Green v Sandbanks]
\textsuperscript{88} Ibid at 10.
\textsuperscript{89} Supra note 78 at 117.
this section will private actions that require the government to fulfill its public trust duties and obligations.

**Government as Protector**
The right of the government to pursue action under the public trust doctrine has been a long accepted practice in the U.S. The majority of state actions have been grounded in the public's right to healthy aquatic environment and the wildlife contained within. States have successfully sought compensation for damage and injunctive relief to prevent injuries to aquatic ecosystems caused by industrial activity.\(^{91}\)

**Government as Defendant**
As the guardian of the public trust, the government has the right to seek protect and preserve public trust resources. Under the public trust doctrine, where a right is given, an enforceable obligation is created. When there is a breach of the public trust, it is the government who seeks to recover damages either in its *ex officio* capacity or through the use of an *ex relator*. Failure to do so is a violation of its fiduciary duties; duties which the beneficiary of the public interest can claim against the government for a failure to properly protect the public interest. U.S. and Canadian case law has reinforced the public's right to seek a remedy against the government for failing to meet its fiduciary obligations.\(^{92}\)

**United States**
In the United States, successful actions have been brought against governments for failing to adequately protect public trust resources. Two California cases illustrate the

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\(^{92}\) For an example of recent Canadian fiduciary duties case law see *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, 2 SCR 261. For an examples of American fiduciary duties case law, *supra* note 85.
government has an obligation to continuously protect a natural asset and that the
government is the only party that can be held liable for breaches of the public trust. In
*National Audubon Society v Superior Court of Alpine County*, the plaintiff successfully
argued that the shores, beds and waters of Mono Lake were a public trust resource and
that diversions by the City of Los Angeles were in breach of the public trust because
they harmed a trust resource. The court found that the government had a continuing
responsibility to safeguard the trust asset. In *Ctr. for Biological Diversity, Inc. v. FPL
Group, Inc*, the California appellate court affirmed that members of the public – as
beneficiaries to a legal trust - may sue the government for harm to the trust property.

The Center for Biological Diversity sued a private party for installing a model of windmill
turbines with a higher rate of migratory bird deaths than other available options. The
court found that a private group had the right to sue for a breach of public trust but they
could only sue the government for its failure to meet its fiduciary obligations.

**Canada**

In 2006, the plaintiffs in *PEI v Canada* drew heavily from Canfor’s obiter public trust
discussion in their attempt to force the federal government to protect a natural resource
asset. PEI sued the Department of Fisheries and Oceans (DFO) on the grounds that the
cumulative effect of its permitting decisions was a breach of the federal government’s
public trust obligations. The plaintiffs argued that DFO fisheries management decisions

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93 *National Audubon Society v Superior Court of Alpine County*, 658 P.2d 709 (US Cal., 1983) [*Mono Lake*]
L & Pol’y 187 at 195.
95 Ctr. for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008).
96 Kathryn Wiens, “Center for Biological Diversity, Inc. v. FPL Group, Inc.: Encouraging Wind Energy Production While
Protecting the Public Trust” (2009) 32(2) Environ 389.
97 *Prince Edward Island v. Canada (Minister of Fisheries & Oceans)*, (2006) 256 Nfld & PEIR 343, 143 ACWS (3d) 454. [*PEI v
Canada*]
had denied the province and its fishers their rightful share of the collective fisheries resource. The case was not decided on its merits but not before the court recognized that there was a right to sue the government for failing to properly protect the public interest.\(^98\) The right was held by all beneficiaries of the public trust whether they are private individuals or public institutions.\(^99\)

**Duties of the Fiduciary**
A comparison of Canadian and American fiduciary duties illustrates some of the differences between the jurisdictions and demonstrates the potential for an expansion of the public trust doctrine in Canada.

**Canada**
In Canada, a fiduciary duty is established when three criteria are established.\(^100\) “(1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and, (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.” The fiduciary must act in the best interest of the beneficiary. The fiduciary has a duty to avoid conflict of interest. The fiduciary has a duty to preserve property. The fiduciary has the duty to act prudently, impartially, and without candor.\(^101\)

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98 *Ibid* at 37. The Court heard a motion on the proper jurisdiction for the case. After making its ruling, the case did not proceed to trial. When the case is noted up, there are no recent cases that have attempted to advance its recognition of public trust obligations.

99 *Ibid*.

100 *LAC Minerals Ltd. v. International Corona Resources Ltd.* [1989] 2 SCR 574 at 646.

101 *Supra* note 78 at 133.
United States
The classic model of fiduciary duty in America has been expanded by public trust doctrine case law and legislation. Wood details how the application of the public trust doctrine in the United States has refined the set of substantive and procedural fiduciary duties owed by a natural resources trustee. Substantive duties of the trustee include the duty to protect the assets of the trust from damage, the duty to manage the assets so as to maintain their ability to provide a steady abundance of environmental services for future generations, the duty to restore and recoup natural resources damages from third parties who destroy trust assets. Procedural duties of the trustee include the duty of undivided loyalty to preserve the trust's assets, the duty to disclose all matters pertaining to the health of the trust asset and to provide an accounting of any changes to health of the trust asset.

Substantive Duties
The following is a list of areas where fiduciary duties can be applied to protect natural resources.

Protect Against Damage
The duty of protection of the trust asset is the duty is the most recognized form of public trust responsibility. The government has an affirmative duty to protect trust property against damage or destruction. Government inaction that permits trust property to be wasted, damaged or destroyed creates liability to the beneficiaries.

Manage Assets
The duty to manage assets so as to maintain their ability to provide a steady abundance of environmental services for future generations is a fiduciary duty. For fish, it means to

103 Ibid at 94.
maintain harvestable population levels. For forests, it means to maintain a sustainable yield of forest products while maintaining the integrity of forest services.\textsuperscript{104} The government has a fiduciary duty to manage the assets of the trust asset without depleting them. Failure to sustainably manage the resource creates a liability from the government to the public that is enforceable in a court of law.\textsuperscript{105}

\textit{Restore and Recoup Natural Resource Damages}

The most common source of public trust doctrine litigation has been the duty to restore and recoup natural resources damages. Third parties who destroy trust assets are liable for damages. The trustee has an affirmative duty to recover the damages and use them to restore the trust asset. By pursuing and recovering damages from third parties, the government can make the public resource whole again and restore the ability of future generations to access the trust asset. Because the government holds an absolute fiat over natural resources damage recovery, failure to collect damages would be an abdication of trust responsibility. A government that abdicates its trust duty is liable to public.\textsuperscript{106}

\textbf{Procedural Duties}

\textit{Undivided Loyalty}

The duty of undivided loyalty is owed by the trustee to the beneficiary. Government agencies and decision makers are obligated to make decisions in the best interests of the public not for personal or political benefit. If a trustee official uses their office to the

\begin{flushleft}\textsuperscript{104} \textit{Ibid} at 95
\textsuperscript{105} \textit{Ibid} at 96.
\textsuperscript{106} \textit{Ibid} at 98.\end{flushleft}
detriment of the public trust then the duty of loyalty is breached. As a procedural duty, the decision or action would be subject to review and reconsideration.\textsuperscript{107}

\textit{Provide an Accounting}

The duty to provide an accounting requires to trustee to maintain communication channels with the beneficiaries. The beneficiary has a right to know the status of the trust asset and how the trust asset is being managed. This duty is applied through monitoring programs and publication of baselines and scientific standards relied upon by decision makers.

\textit{Bringing a Claim of Violation of the Public Trust Doctrine for Government Inaction}

The unused potential of the public trust is best seen through a hypothetical application to the oilsands region. The example will focus on government inaction as the source of the breach. As previously discussed, the federal government’s participation in the industrialization of the oil sands makes it unlikely that they will seek to apply the public trust doctrine to remedy the damage caused by cumulative effects.

Substantive and procedural remedies are available to address the government inaction on the cumulative environmental effects problem in the oilsands region. An action brought by or against the government for a breach of the public trust doctrine to protect and conserve federally regulated natural resources would seek a substantive remedy. A review of how the CEAA and its affiliated agencies manage cumulative effects in accordance with their public trust responsibilities is seeking a procedural remedy.

\textsuperscript{107} \textit{Ibid} at 99.
Canadian attempts to employ the public trust doctrine have primarily focused on the substantive duties of the trustee. Examples include recovery of natural resources damages, failure to manage assets as to preserve their ability to produce for future generations, and failure of the duty to protect resources. Procedural duties to preserve the public interest have received less attention.

Proving a Substantive Breach

Proving a substantive breach of the public trust doctrine for cumulative effects is a difficult task. The American public trust doctrine law referred to by Binnie J deals with single event pollution releases. Mass fish kills caused by oil spills, mining waste water releases or power plant cooling water discharges are a small selection of the single event scenarios upon which a success public trust claim was made in the U.S. Cumulative effects are different. A series of regulatory choices taken over many decades is not the ideal fact scenario to show there is a breach of the public trust doctrine. The large time scales and geographic boundaries make it difficult to identify the responsible polluter and to show that the government has breached its fiduciary duties. Conclusive proof that the pollution levels are sufficient to damage a federally regulated environmental component like fish or migratory birds remains elusive. Additionally, unresolved arguments within the scientific world over the environmental impact of the oilsands would hinder a cumulative effects public trust doctrine claim.

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108 Supra note 25.
109 Supra note 96.
110 Canada Parks and Wilderness Society v Wood Buffalo National Park (Superintendent), 2003 FCA 197, [2003] 4 FC 672. [CPAWS]
111 Supra note 78.
Different scientists, monitoring agencies, and other organizations have difficulty agreeing on the level of pollutants let alone who is responsible for the pollution.

Resolving the evidentiary issues would open up a pathway for a public trust claim. Clear links between the pollution releases and government’s failure to properly regulate oilsands operators would allow plaintiffs to pursue remedies. Until the causation issues are resolved, the best application of the public trust doctrine is to influence the procedural decisions of the federal government.

Proving a Procedural Breach
Applying the public trust doctrine to procedural decisions is a step rarely taken by the Canadian environmental movement. As an environmental protection tool, the public trust doctrine offers a way forward to improve Canada’s environmental assessment programs and policies.

The federal government’s approach to environmental assessments can be summed up in a single word, discretion. At each step of the environmental assessment process, there is discretion available to decision makers. Discretion in project level assessment has limited the ability of government actors to assess, monitor, and follow up on cumulative environmental effects.


Andrew Gage, “Public Rights and the Lost Principle of Statutory Interpretation” (2005) 15 J Envtl L & Pol’y 107. Nestlé Canada Inc v Director, Minister of the Environment, (25 March 2012) Case No.: 12-131 ERT <www.ert.gov.on.ca>. The interveners raised a public trust doctrine argument but the case was settled before a decision was rendered.

Breaches of Discretionary Decision Making
Wood proposed a model for the public trust doctrine as guide for managing discretion that has hindered environmental protection legislation. Wood identified four points of discretion that commonly occur in environmental management.

1. Agencies interpret broad legislative mandates by promulgating rules and guidance documents.
2. Agencies make individual permits and project decisions, bringing to bear a host of technical assumptions.
3. Agencies have wide latitude in structuring their own operations and projects.
4. Agencies have discretion to enforce their statutes and regulations they administer.\textsuperscript{115}

Looking at CEAA 2012, it is apparent that the drafters purposely left flexibility for the administration of the Act and its associated regulations. In doing so, they created a significant amount of discretion. Invoking Wood’s model for public trust standards of protection would guide regulators in their discretionary choices. Of the four points identified by Wood, the first, second, and fourth points offer the most potential for improving cumulative effects assessment. Applying public trust doctrine principles would improve the interpretation of CEAA 2012’s legislative mandate, project decision and permitting process, and the enforcement of CEAA 2012 regulations on monitoring and follow-up. Failure of the government to incorporate public trust standards into the performance of any of these procedures would be a violation of their fiduciary duty and subject to legal challenge.

Interpreting Legislative Mandates

\textsuperscript{115} Supra note 101 at 103.
The Canadian Environmental Assessment Act 2012 [CEAA 2012] is designed to “allow for natural resources to be developed in a responsible and timely way for the benefit of all Canadians”.\(^\text{116}\) Areas of federal jurisdiction that an environmental assessment must address include: fish and fish habitat, other aquatic species, and migratory birds.\(^\text{117}\) The environmental assessment must look at the potential adverse environmental effects on these areas of jurisdiction including cumulative effects and mitigation measures. Incorporating the public trust doctrine into those analyses would lead to better assessments of the risk of cumulative effects.

**Individual Permit and Project Decisions**
Operational and policy documents are one of the areas that would benefit from additional guidance. CEAA publishes several operational and policy documents to assist proponents in the assessment of cumulative environmental effects.\(^\text{118}\) Under CEAA, there is considerable discretion in defining the temporal and geographic scope of the project for the measurement and assessment of cumulative environmental effects. Decisions on which impacts of past projects to include, what makes a future physical activities certain and reasonably foreseeable, the choice of methodology to assess cumulative environmental effects, what is an acceptable mitigation measure, and the determination of significance would all be bettered through the application of the public

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trust doctrine. Each decision point has a host of technical assumptions that allow the
decision maker considerable discretion to include or exclude potential cumulative
effects. The public trust doctrine would guide decision makers to select the option that
preserve the natural resource asset.

*Improved Monitoring*
Implementing the duty to account for the health and status of the natural resource would
fill a significant gap in the cumulative effects assessment analysis. Lax monitoring or the
failure to properly monitor environmental conditions and provide follow up on promised
mitigation efforts has been a consistent complaint by government and non-government
organizations.\(^{119}\) Ineffectual and substandard biodiversity monitoring has hampered
scientific investigations into the environmental effects of oilsands development. A Royal
Society of Canada study found that the Regional Aquatics Monitoring Program (RAMP)
– the organization charged with integrating monitoring activities across the oilsands
region - failed to monitor areas of concern identified by scientists. The ensuing data
gaps prevented scientist from gaining a complete assessment of the impact of
development and from establishing crucial baseline levels.\(^{120}\) Scientists and non-
governmental organizations have repeatedly criticized the federal and provincial
governments for poor monitoring programs, inconsistent data management, and agency

\(^{119}\) *Supra* note 3; “Oilsands monitoring plan results not available yet” (18 February 2013) online: CBC News
2014)

\(^{120}\) Pierre Gosselin et al, “Royal Society of Canada Expert Panel: Environmental and Health Impacts and Canada’s Oil
capture by the oilsands industry.\textsuperscript{121} The Federal Oilsands Advisory Panel concluded in 2010 that RAMP was failing to properly collect and distribute information,

"Although we are confident it was conceived and currently implemented by people with the best of intentions, it is not designed to be systemic, holistic, or adaptive. There seems to be little integration across media or with other organizations. While environmental data is being collected on water quality and ecosystem parameters, the program suffers from a lack of scientific leadership, it is not focused on hypothesis testing, (i.e., the sampling program design is not effects based). It is not producing world-class scientific output in a transparent, peer-reviewed format and it is not adequately communicating its results to the scientific community or the public."\textsuperscript{122}

The Joint Canada-Alberta Oilsands Monitoring Program comes into effect in 2015. A requirement for consistent and scientifically independent accounting of public trust assets would drive the Monitoring Program towards achieving effective cumulative effects monitoring.

\textbf{Applying a Remedy to a Procedural Breach}

\textit{Remedies for Public Trust Breaches}

American courts have utilized three different remedies after the finding of a breach of fiduciary duty in a public trust case: declaratory relief combined with an injunction, orders to provide a natural resource accounting and restoration plans, and injunctions against harmful activity.\textsuperscript{123} Declaratory relief is another form of judicial review that clarifies the government’s public trust fiduciary obligations. It can be paired with


\textsuperscript{123} \textit{Supra} note 101 at 113.
injunctive relief as necessary to prevent harm to the trust asset. Natural resources accounting and restoration plans allow for the court to develop management plans for the trust assets and deliver periodic updates to the court and the beneficiaries.

Injunctive relief allows the court to halt harmful activities. American courts have enjoined a wide range of activities that impact public assets including preventing government organizations from selling public forestry assets without an environmental consultation\footnote{Lane County Audubon Soc'y v. Jamison, 958 F.2d 290, 293 (9th Cir. 1992)}, preventing grazing in “areas of concern”\footnote{Natural Desert Ass'n v. Singleton, 75 F. Supp. 2d 1139, 1141 (D. Or. 1999)}, and preventing road construction until a biological assessment was completed\footnote{Thomas v. Peterson, 753 F.2d 754, 755-56 (9th Cir. 1985)}. All of these remedies are available in Canada and could be applied as required.

Statutory Interpretation and Judicial Review

According to Gage, public rights are already being employed as a statutory interpretation tool.\footnote{Supra note 112 at 138.} Case law examples support that in the absence of clear and statutory authorization, where discretion is given to the decision maker, the diminishment or destruction of public assets is not allowed. As Gage states, "In such cases it may well be that the legislator did not specifically anticipate that a broad discretion, or even more specific, but vague, discretion, would be relied upon to violate a public right. Thus, by interpreting statutory decision-making powers in light of existing public rights, a legislator gains some confidence that broad powers will not be abused or cause harm to the public. The legislator can presume that a delegated decision-maker will respect the rights of the public unless the legislation indicates a specific intent to authorize a departure from those legal and social norms."\footnote{Supra note 112 at 140.}
The specific power given to Cabinet to approve project with significant adverse environmental effects appears to limit the role of public trust doctrine. Discretionary decisions made by review panels and regulators would be subject to review for the failure to consider the public trust but the ultimate decision to approve a project would override the public trust doctrine.

**An Untested Question**
An untested question - and one not considered in *Canfor* - will have a significant impact on the legal status of an expanded common law public rights doctrine in Canada. Can the common law public trust duty obligations be pre-empted or limited by statutory law or are they elevated to the same level as the constitutionally protected rights to navigation and fishing? In *Illinois Central*, the Court found that the legislature could not grant title to public trust resources.\(^{129}\) Legislative acts could not pre-empt the public trust instilled in the government. If the same protection is given to Canadian public trust resources then a new set of legal tools are available. However, the quasi-constitutional status of the public trust under Canadian law remains undetermined by a court of law.

**CONCLUSION**
The unrealized potential of parens patriae and the public trust doctrine can play an important role in addressing the issue of cumulative environmental effects in the oilsands. As the environmental pressures continue to grow, there will be a need for new common law tools. *Canfor* provided the starting point by looking to the developments in the United States. Achieving similar results will not be easy but it can be accomplished. Parens patriae offers the potential to deal with the continuous low level emissions. The

\(^{129}\) *Supra* note 80.
public trust doctrine can help reshape the federal environmental assessment process to better incorporate cumulative effects. The potential is there. It just needs to be realized.