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Triviality and Significance of Federal Environmental Effects after *Reference re: Impact Assessment Act*

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Decision Commented On: *Reference re Impact Assessment Act*, [2023 SCC 23 \(CanLII\)](#)

This is the sixth ABlawg post regarding the Supreme Court of Canada’s recent opinion in *Reference re Impact Assessment Act*, [2023 SCC 23 \(CanLII\)](#) (*IAA Reference*) (see the first five posts [here](#)). In this post, I address the thorny issue of thresholds, i.e., the level or point at which an effect becomes material or relevant under the *Impact Assessment Act*, [SC 2019, c 28, s 1](#) (*IAA*). Since the opinion’s release last fall, I have read and heard concerns that the majority has imposed some kind of minimum threshold regarding the magnitude of effects required to trigger federal jurisdiction, or that the federal government could only refuse to deem such effects to be in the public interest if they are significant (see [here](#) for a thoughtful commentary on the practical problems with such an approach). As noted by Justices Andromache Karakatsanis and Mahmud Jamal in their dissent, however, it has actually long been an interpretive rule – since the Supreme Court of Canada’s environmental law decision in *Ontario v Canadian Pacific Ltd*, [1995 CanLII 112 \(SCC\)](#), [1995] 2 SCR 1031 (*Canadian Pacific*) – that broadly worded environmental legislation is to be interpreted in a manner that does not capture trivial, or *de minimis*, impacts (*IAA Reference* at para 278). Importantly, however, and as I discussed almost a decade ago in “Ancient Maxim, Modern Problems: *De Minimis*, Cumulative Environmental Effects and Risk-Based Regulation” (2015) 40-2 *Queen's Law Journal* 705, [2015 CanLIIDocs 5272](#), (“Ancient Maxim, Modern Problems”), non-triviality is a *very* low bar; between trivial and significant lies a wide spectrum of impacts, which at the very least includes low and moderate impacts. Trivial or *de minimis* impacts are essentially only those impacts that a regulatory regime could *systematically ignore* while still obtaining its objectives – they are treated the same as *no* impacts whatsoever.

Consequently, this post aims to bring some clarity to the discussion of thresholds, and triviality and significance in particular, bearing in mind that Supreme Court decisions in environmental law are still relatively rare and can have far-reaching and sometimes unexpected consequences.

The Majority’s Approach to Triviality and Significance

The majority’s concerns about triviality and significance are most clearly laid out at paras 192 – 193, wherein they distinguish between the *IAA*’s temporary (during planning and assessment) and permanent (following a hypothetical negative public interest determination) section 7 prohibitions, the former *being constitutional* but the latter not (a distinction that some may have overlooked). As a reminder, section 7 prohibits project proponents from doing any act or thing in connection with the designated project if that act or thing may cause “a change” to fish and fish habitat, listed

(endangered) aquatic species, migratory birds, federal lands, and several other matters. According to the majority:

The s. 7 effects-based prohibitions may well be necessary for practical reasons during the planning and assessment phases of the impact assessment process, when the potential effects of a proposed project have yet to be identified. However, the indefinite application of these same prohibitions following a negative public interest decision statement raises significant concerns. I note that my colleagues disregard the dual role of the s. 7 prohibitions and focussing [sic] exclusively on the temporary “pause” these prohibitions impose during the planning and assessment phases. They do not address the ongoing regulatory function performed by s. 7 following a negative public interest decision and, as a result, they discount the overbroad and indefinite prohibitions imposed by the IAA.

The indefinite s. 7 prohibitions *forbid the proponent from doing any act or thing that may cause any “change” or “impact” specified in the provision. This prohibits causing any positive or negative changes or impacts of any magnitude. My colleagues, in dissent, assert that the term “a change” incorporates a significance threshold, such that it describes only changes that are “significant”, “non-trivial” or “more than de minimis”.* This interpretation is untenable and is inconsistent with established principles of statutory interpretation. My colleagues point to their reading of the IAA’s purposes to support their novel interpretation, but as I have explained, the IAA’s purposes are considerably broader than my colleagues suggest. The sole reference to a significance threshold in the IAA’s extensive purpose clause is found in s. 6(1)(l), which relates to the distinct secondary scheme contained in ss. 81 to 91 of the IAA. Parliament has expressly incorporated a significance threshold into that secondary scheme (e.g., ss. 82 to 84, 87, 88 and 90, all referring to “significant adverse environmental effects”). *Had Parliament intended the “designated projects” scheme to target only “significant” changes, it could have similarly used that adjective in defining “effects within federal jurisdiction”.* It did not do so. This Court must respect Parliament’s drafting choices and cannot amend the IAA as it sees fit. As this Court has held, “however generously one may interpret the statute, one cannot rewrite it” (*IAA Reference* at paras 192-193, citations omitted, emphasis added).

Aside from the majority’s puzzling omission of the reference to significance in the key public interest decision-making provisions of the designated project regime (see IAA at s 62 and s 63(b): “the extent to which the adverse effects within federal jurisdiction...are significant”), the dissenting judges were indeed on entirely solid jurisprudential ground when they asserted that “change” or “impact” under the IAA should be interpreted to exclude trivial, or *de minimis*, changes or impacts. However, both here and elsewhere, the majority and dissent appear to erroneously reduce the universe of potential impacts into a false binary between trivial impacts on the one hand, and significant ones on the other.

At the risk of stating the obvious, not all impacts that are not significant are trivial, and not all non-trivial impacts will be significant. Most commonly, impacts are categorized as low, moderate, or high. Indeed, in its own publication on this question, [“Guidance: Describing effects and](#)

[characterizing extent of significance](#)”, the Impact Assessment Agency of Canada (the Agency) notes that “the extent to which adverse federal effects are significant may be characterized along quantitative or qualitative (descriptive) scales such as “negligible/low/moderate/high” (at s 3.2). One could go into further granularity and describe the spectrum of impacts as spanning from low, low to moderate, moderate, moderate to high, and finally high (significance). Whatever the case and as further discussed below, trivial or *de minimis* impacts are impacts that are so minor that the regulatory regime can essentially ignore them – they are treated equivalent to *no* impact. This means they may even fall below the Agency’s “negligible” impacts, which “in the context of cumulative effects...*may* be important in understanding regional effects as a whole”: (at s 3.2, Table 2, excerpted below).

Table 2: Suggested criteria for characterizing extent of significance of adverse residual effects

Negligible* or Low	Moderate	High
<p>Effects are likely to be negligible or minor in scale if they are negligible or low in magnitude, of short duration, infrequent, small in spatial extent, reversible or readily avoided, and to generate few or minor impacts in social or ecological contexts. Mitigation measures will allow baseline conditions to remain largely unchanged.</p> <p>* A "negligible" effect does not mean "no effect" but that an effect is sufficiently small to likely not result in a noticeable change to the valued component. However, in the context of cumulative effects, a negligible effect may be important in understanding regional effects as a whole. For example, while an effect may be negligible on its own, it may be amplified if other physical activities affect the same valued component.</p>	<p>Effects are likely to be medium in scale if they are moderate in magnitude, of moderate duration, occasionally frequent, possibly/partially reversible, and to generate a moderate level of impacts in social or ecological contexts. Mitigation measures may not fully eliminate, reduce, control or offset effects but should enable affected communities to maintain economic and social well-being, and should prevent the diminishment or loss of key components of the environment and its ecological functioning.</p>	<p>Effects are likely to be severe in scale if they are high in magnitude, permanent/long term, frequent, irreversible, and over a large spatial extent or within an area of exclusive/preferred Indigenous use or of ecological/environmental sensitivity. High levels of impacts in social or ecological contexts are expected. There is a high degree of uncertainty of the effectiveness of mitigation measures, or mitigation measures are unable to fully address effects such that valued components are diminished or lost.</p>

The majority also expresses concerns about triviality in relation to Parliament’s jurisdiction over fisheries (at para 195), Indigenous peoples (at paras 196 – 200) and migratory birds (at paras 201 – 203). My colleague Robert Hamilton has already [discussed](#) the problems with the majority’s cursory treatment of Parliament’s jurisdiction in relation to Indigenous peoples, while my colleague David Wright has [sketched out](#) some ideas with respect to federal jurisdiction over greenhouse gas emissions. For my part, and perhaps due to my former life as a lawyer at Fisheries and Oceans Canada (DFO), I feel compelled to quickly clarify what the majority said – and didn’t say – in relation to the fisheries power, and its reading of the Supreme Court of Canada’s decision

in *Fowler v The Queen*, [1980 CanLII 201 \(SCC\)](#), [1980] 2 SCR 213 (*Fowler*) in particular. The constitutional defect in *Fowler* was in the since-repealed section 33(3) of the *Fisheries Act*, [RSC 1985, c F-14](#) and its failure to clearly link the prohibited conduct to harm to fisheries:

33(3) No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.
(emphasis added)

In assessing this provision, the Supreme Court concluded that it made “no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries” (*Fowler* at 226, emphasis added). The unstated but underlying assumption in this reasoning was that, in some cases at least, the placement of slash, stumps, and other debris may not be harmful to fisheries; indeed, the Court complained of the absence of “evidence...to indicate that the full range of activities caught by the subsection do, in fact, cause harm to fisheries” (*ibid*).

Subsequently, however, in *Northwest Falling Contractors Ltd v The Queen*, [1980 CanLII 210 \(SCC\)](#), [1980] 2 SCR 292, the Supreme Court upheld the *Fisheries Act* section 36(3) prohibition against the deposit of “deleterious substances” in any waters frequented by fish, distinguishing *Fowler* on the basis that, unlike there, the link was explicitly made here: “The definition of ‘deleterious substance’ ensures that the scope of subs. 33(2) is restricted to a prohibition of deposits that threaten fish, fish habitat or the use of fish by man” (at 301).

Presently, in addition to the prohibition against the deposit of deleterious substances, section 35 of the *Fisheries Act* prohibits the carrying on of “any work, undertaking, or activity that results in the harmful alteration, disruption, or destruction of fish habitat” (emphasis added; referred to affectionately as the prohibition against HADD). Decades of case law has confirmed that “any harmful alteration, disruption or destruction of a fish habitat must be something more than minimal or trivial... [and] that the word ‘harmful’ ... modifies only the word ‘alteration’ and not ‘disruption’ or ‘destruction’. The word ‘disrupt’ was defined ... as that which would: ‘interrupt the flow or continuity of...bring disorder to, separate forcibly, shatter, rupture’” (*R v Zuber*, [2004 CanLII 2549](#) (ON SC) at para 14).

All of which is to say, when the majority concludes its discussion of the fisheries power by stating that “a prohibition against doing ‘any act or thing that may cause a change to fish or fish habitat’” would be unconstitutional (*IAA Reference* at para 195), it is essentially restating the *status quo*. Modifying “change” (which is synonymous with the *Fisheries Act*’s “alteration”) to “adverse change” (which is synonymous with “harmful alteration”) is undoubtedly sufficient to ensure such a prohibition’s constitutionality. That being said, the majority’s preoccupation with adverseness also seems misplaced. The question is not whether a change is positive or negative, but rather whether it is relevant or material (i.e., not trivial) to the *proper management* of the fishery resource:

...the fisheries power includes *not only conservation and protection*, but also the general “regulation” of the fisheries, including *their management and control*. They recognize that “fisheries” under s. 91(12) of the [Constitution Act, 1867](#) refers to the fisheries as a resource; “a source of national or provincial wealth”... a “common property resource” to be *managed* for the good of all Canadians... (*Ward v Canada (Attorney General)*, [2002 SCC 17 \(CanLII\)](#) at para 41, emphasis added, as cited by the dissent, *IAA Reference* at para 339).

While time and space does not permit consideration of the other areas of Parliament’s environmental jurisdiction, I suspect the same is true for all of them: the question is one of relevance and materiality, not mere adverseness.

The Dissent’s Approach to Triviality and Significance

The dissent’s approach to triviality and significance is more detailed. For my purposes, the discussion at paras 270 – 279 is the most relevant:

[270] The proper interpretation and scope of the defined term “effects within federal jurisdiction” determines the legal effects of the *IAA* at every stage — from designation (s. 9(1)), to the scope of prohibitions (s. 7), to whether an assessment is required (s. 16), to what effects the assessment report must identify (ss. 28(3) and 51(1)(d)), to the basis for the decision as to the public interest (ss. 60(1) and 62) and any conditions that may be imposed (s. 64(1)).

[271] In the decision under appeal, the majority of the Alberta Court of Appeal interpreted the *IAA* as including “no materiality threshold” and asserted that “there is *no requirement* that any purported adverse federal effects actually *be significant*” ([2022 ABCA 165](#), 470 D.L.R. (4th) 1, at paras. 239-40 (emphasis in original); see also para. 302). It thus claimed that the *IAA* allows “the federal executive to stop any intra-provincial designated project whenever there are *any* adverse federal effects of that project on the components of the environment” (para. 241 (emphasis in original)). The majority of our Court seems to share this view, stating that “effects within federal jurisdiction” applies to “positive and adverse changes *of any magnitude*”, and concluding that “projects with *little or no potential for adverse federal effects* will nonetheless be required to undergo an impact assessment” (paras. 95 and 154 (emphasis added); see also paras. 138, 151-53, 180, 198 and 200). We disagree.

[272] The term “effects within federal jurisdiction”, when properly interpreted, does not encompass *de minimis*, trivial, or insignificant effects. Although “effects within federal jurisdiction” is defined as “a change” to listed “components of the environment that are within the legislative authority of Parliament”, in light of the context and purpose of the *IAA*, the “change” contemplated cannot be an insignificant change that has no potential to make a difference to the environment (s. 2 “effects within federal jurisdiction” (a)). The whole scheme of the *IAA* is concerned with identifying and protecting against *significant* adverse environmental effects in areas of federal jurisdiction.

[273] Starting with the text, the *Oxford English Dictionary* defines a “change” as “an alteration in the state or quality of something; a modification” (online). The word “change” in relation to the environment necessarily connotes a materiality threshold, contrary to the conclusion of the majority of the Alberta Court of Appeal: if the designated project does not cause an alteration in the state or quality of the environment, there would be no “change”. A *de minimis*, trivial, or insignificant “change” would be no real change to the environment.

[274] The context and purpose of the *IAA* as environmental protection legislation confirms that “effects within federal jurisdiction” does not encompass *de minimis*, trivial, or insignificant effects. The long title of the *IAA* speaks of a federal assessment process for “*significant adverse environmental effects*”. The Expert Panel recognized that “consequential” effects were necessary to ground federal jurisdiction (p. 21). The Minister of the Environment and Climate Change testified that the *IAA*’s goal was to assess the projects with the “most potential” to have a “significant impact” on areas of federal jurisdiction (House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, No. 99, 1st Sess., 42nd Parl., March 22, 2018, at p. 18). And a key purpose of the *IAA* and *CEAA 2012* — in contrast to the Guidelines Order and *CEAA 1992* — was to focus assessment efforts on major projects most likely to have significant adverse effects in areas of federal authority.

...

[276] In addition, these provisions of the *IAA* consistently recognize that the “significance” of adverse federal effects fall along a spectrum, and may be more or less significant. Throughout the *IAA*, federal authorities must review, specify, evaluate, and decide based on “the extent” to which the adverse federal effects are “significant”. This statutory language recognizes that not all adverse federal effects are the same. Some may be more significant than others. Under the *IAA*, adverse federal effects are legally relevant for decision making based on *the extent to which they are significant*.

...

[278] The breadth of the definition of “effects within federal jurisdiction” must also be viewed in the specific context of environmental protection legislation — in this case, the *IAA* — and by considering related principles of statutory interpretation. This Court addressed the relevant interpretative principles in *Canadian Pacific* in rejecting the argument that s. 13(1)(a) of Ontario’s *Environmental Protection Act*, R.S.O. 1980, c. 141, which imposed a broad and general prohibition of the pollution “of the natural environment for any use that can be made of it”, was unconstitutionally vague. Justice Gonthier, for the majority, stated that, “[i]n the context of environmental protection legislation, a strict requirement of drafting precision might well undermine the ability of the legislature to provide for a comprehensive and flexible regime”, and noted the recommendation of the Ontario Law Reform Commission that “generally framed pollution prohibitions are desirable from a public policy perspective” (para. 52). General language in environmental protection legislation, he stated, “ensures

flexibility in the law” to “respond to a wide range of environmentally harmful scenarios which could not have been foreseen at the time of its enactment” (para. 52). In addition, Gonthier J. affirmed that the phrase “use” relating to the natural environment was to be interpreted more narrowly in accordance with both the presumption against absurdity, to ensure that the prohibition was applied reasonably and not in cases of “trivial or minimal violations”, and the related principle of *de minimis non curat lex* (the law does not concern itself with trifles) (para. 65). In short, the prohibition was interpreted reasonably, in accordance with its environmental context, and in a way to avoid “unjust or inequitable results” (para. 65)...

[279] In sum, the statutory text, context and purpose, along with the applicable interpretive principles, show that Parliament did not intend to capture *de minimis* effects. Moreover, even if interpreting the *IAA* to capture *de minimis* effects were a reasonably available interpretation, the presumption of constitutionality demands that it be rejected in favour of our constitutionally conforming interpretation.

With two exceptions, the dissent’s interpretive approach is mostly sound. As further discussed in the next part, Canadian environmental laws have long been interpreted to exclude trivial or *de minimis* impacts – both before and after the Supreme Court’s decision in *Canadian Pacific*.

The first exception, however, is this recurring notion that impacts are either trivial or significant (e.g., para 273 above), but the dissent also clearly acknowledges that “‘significance’ of adverse federal effects falls along a spectrum and may be more or less significant” (at para 276). The latter view is correct – impacts occur on a spectrum (e.g., no or negligible, low, moderate, and high) that, critically, will not be known with any certainty until *after* an assessment is done.

The second exception is the suggestion that the *IAA* is, or must be, predominantly concerned with preventing significant adverse federal effects. On this front, the dissent seems to overlook important differences between the previous *Canadian Environmental Assessment Act 2012*, [SC 2012, c 19, s 52](#) (*CEAA 2012*) and the *IAA*. As noted by the Agency in its Guide, “Under [*CEAA 2012*], significance was a binary determination: adverse federal effects were significant or not” (at s 3.1). This is not to suggest that assessment reports did not distinguish between low, moderate, and significant effects – they had to in order to set the stage for final project decision-making – but the final project decision was reduced to significance: only projects that were “likely to cause significant adverse environmental effects” needed to be “justified in the circumstances” by the Governor in Council (*CEAA 2012* at s 52). Under the *IAA*, significance is not a binary determination but, as correctly noted by the dissent above, requires a consideration of *the extent to which adverse federal effects are significant*. Such an approach facilitates more holistic and integrated consideration of project effects. For example, under *CEAA 2012*’s binary approach, a project with fifteen moderately adverse effects required no further scrutiny, while a project with four minor (low) adverse effects but one significant one required additional justification – but no more and no less (justification) as a project with multiple significant adverse effects. Simply put, a singular focus on significance results in fairly arbitrary environmental decision-making.

Reducing final decision-making to significant adverse effects also confounded the role that transparency and democratic accountability are intended to play in impact assessment (both the

majority and dissent give nods to transparency: see para 91 for the majority, paras 222, 259, 263 – 267, and 280 for the dissent). Functionally, descriptors of significance like low, moderate, and high assist the general public, which has limited scientific expertise, to understand and distinguish between project effects and indeed projects themselves, enabling them to determine which projects they support – or not. Parliament also sought, properly in my view and [that of long-time impact assessment scholars and practitioners](#), additional guideposts to help the federal government and the public understand whether project effects are in the public interest (*IAA* at s 63), such as a project’s overall sustainability (which the majority has seemingly and unfortunately truncated to the sustainability of aspects falling under federal jurisdiction, at para 172), its impacts on Indigenous rights, and whether it contributes to or hinders Canada’s climate commitments (which the majority has also required a do-over for, at para 189) – with a further requirement to provide detailed reasons “demonstrating that the determination was based on the impact assessment report and considered all the required public interest factors” (at s 65(2)).

In any event, so long as its decision-making exhibits the hallmarks of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#)), the federal government is obviously not confined to avoiding or mitigating only *significant* adverse federal effects, but rather can seek to avoid or mitigate all non-trivial adverse effects within its jurisdiction. This proposition is distinct from, albeit consistent with, the dissent’s hypothetical where a “federal decision that sought to permit *negligible federal effects* [*i.e.* trivial or *de minimis* effects] to stop a project in the face of substantial public interest factors would be disproportionate, unreasonable, and subject to judicial review” (at para 294, emphasis added). In all cases, however, the federal government may be – and indeed has been over the years – held politically accountable for such decisions.

At this juncture, it seems clear that a proper understanding of triviality, or *de minimis*, is now critical to properly understanding the breadth of federal environmental legislation and jurisdiction in the post-*IAA Reference* world.

De Minimis Non Curat Lex: The Law Does Not Concern Itself with Mere Trifles

In my article, “[Ancient Maxim, Modern Problems](#),” I set out to do two things. First, being cognizant of some confusion and contradictions in the case law from my time as a lawyer with DFO, I wanted to identify and hopefully clarify the role(s) that *de minimis* plays in Canadian environmental law. Second, I wanted to understand what the test for *de minimis* actually was – when are environmental harms so trivial that they may be ignored?

My survey of the case law identified two distinct, albeit related, roles for *de minimis*. The first is as an interpretive aid in relation to broadly worded environmental laws, as affirmed by the Supreme Court in *Canadian Pacific* and re-affirmed in *Castonguay Blasting Ltd v Ontario (Environment)*, [2013 SCC 52 \(CanLII\)](#). Importantly, the maxim does not apply where a legislature or its delegate (e.g., Governor in Council) has employed some degree of mathematical precision (e.g., a prescribed pH or concentration of a harmful substance in effluent); in such instances, the maxim is unnecessary in delineating the zone of risk (see “Ancient Maxim, Modern Problems” at 718 – 721).

The second, less settled role is as a defence (*ibid* at 721 – 724), which would only be available for cases where it is *not applicable* as an interpretive aid (because doing so would be redundant). One concern expressed here is of a separation of powers variety, asking “whether the judiciary ought to ‘second-guess’ the other (democratically elected) branches of government in matters of public interest, whether in choosing the relevant regulatory parameters (for example, requiring effluent to have a pH between 6.0 and 9.5 pursuant to section 4 of the *Metal and Diamond Mining Effluent Regulations*, [SOR/2002-222](#)) or in deciding whether the offending conduct warrants prosecution” (*ibid* at 722). (I pause to note that this concern mirrors somewhat the concern raised by Justice Sheila Greckol at the Alberta Court of Appeal: “It is not for the courts to tell Parliament at what point it is allowed to be concerned about harm to the environment in areas within its constitutional jurisdiction”: *Reference re Impact Assessment Act*, [2022 ABCA 165 \(CanLII\)](#) at para 709).

Another objection to the availability of *de minimis* as a defence that is reflected in the jurisprudence is a concern about cumulative effects. For example, in *R v Kelsey* (1985), 55 Nfld & PEIR 154, which predates *Canadian Pacific* by a decade, the accused was convicted of contravening the previous section 31 of the *Fisheries Act* (the prohibition against HADD) for having installed metal culverts in fish-bearing waters without authorization. On appeal, defence counsel argued that *de minimis* should be applied. The Court disagreed:

In the words of the expert witness Mr. McCuvvin, when commenting on the installation of the culverts, “I am saying that actions like that, that go unchecked, will basically spell the death knell of the productivity of the system”.

The destruction of any environment or ecosystem is indeed a gradual process effected by cumulative acts. (at 160 – 161)

This leads into the second objective of “[Ancient Maxim, Modern Problems](#)”: what does *de minimis* mean? There, I argued that a careful reading of the foundational case, *The Reward* (1818), 2 Dods 265, strongly supported a two-part test that contains within it a simplified cumulative effects analysis:

If one considers the *de minimis* maxim’s foundational case, *The Reward*, however, the test actually involves two related inquiries: “If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.”

Broken down into parts, the first part of the maxim asks whether the offence (“the deviation”) seems minimal (“a mere trifle”). If not, the inquiry is at an end. If it does, however, then the analysis turns to the potential for the combined or cumulative effects of such deviations (“if continued in practice”) to interfere or undermine (“weigh... on”) the legislature’s objectives in promulgating the relevant regulatory regime (“the public interest”). The goal is to identify conduct that the regulatory regime may ignore (“might properly be overlooked”) while still attaining its objective(s).

Although the reference to continuity arguably pertains to the specific offence before the court (and the potential effect if it were to continue in practice), any ambiguity on

this front is resolved by the maxim's actual application in *The Reward*. In finding the accused guilty of exporting Jamaican logwood, the Court stated:

In the present case, the exact quantity is not easily ascertained Three tons of fraud perhaps would not be what the Court could regard as a mere trifle I think it exceeds that amount; but I must look a little further. What is here alleged is, that this is the usual practice of Jamaica. Now, in my mind, this, instead of alleviating the strictness to be exercised, ought to augment it; for, if a practice so abusive prevails generally at that island; if every ship that sails from Jamaica may take three, four, five or six tons of an article, the exportation of which is absolutely prohibited by law, what becomes of the prohibition? ... If it be true [that the law is unduly burdensome], this may be a very proper ground for an application to the Legislature to relax the prohibition but cannot justify the individuals in taking on themselves a breach of the law as their general custom. (at 270 – 271)

(“Ancient Maxim, Modern Problems” at 725).

Drawing on this and more modern environmental caselaw, as well as related developments in cumulative effects assessment in impact assessment and risk-based regulation, I concluded the paper by proposing the following approach to *de minimis* when dealing with broadly worded, or not quantified, environmental legislation:

When applying the *de minimis* maxim, courts, regulators and those subject to regulation should adopt the following steps. First, does the environmental harm seem trivial or minor on its face? If not, the *de minimis* maxim does not apply. If the harm seems trivial, is the conduct giving rise to such harm of a kind that, if allowed, it could undermine a regulator's objectives through cumulative environmental effects? If the conduct is known to be widespread, or it is reasonably foreseeable that it might be, then the potential for cumulative harm exists and the maxim does not apply. Alternatively, if the conduct is infrequent or if the harm would be negligible even if it were widespread, then the maxim applies and the conduct may be properly overlooked. (“Ancient Maxim, Modern Problems” at 737).

This approach, which has since been cited with approval and applied by a couple of courts (*Peel (Region, Department of Public Health) v Le Royal Resto and Lounge Inc*, [2017 ONCJ 767 \(CanLII\)](#); *R v Beets*, [2018 YKSC 21 \(CanLII\)](#)), makes clear that *de minimis* is indeed a low bar. It is not synonymous with low impacts, or impacts of low significance, but rather falls below even those – it is those impacts that a regulatory regime may properly ignore, even if their occurrence is widespread – and still obtains its objectives.

What does all of this mean for the *IAA Reference* and the future of the *IAA*? First, the majority's refusal to incorporate a *de minimis* threshold when interpreting its various provisions and prohibitions (e.g., section 7) was almost certainly an error in law. The Supreme Court's decisions in *Canadian Pacific* and *Castonguay Blasting* are clear precedents on this point. That being said, Parliament could address the majority's concern fairly easily, e.g., by explicitly adding the term

“non-trivial” in the definition of adverse effects. Second, those expecting triviality, or *de minimis*, to do a lot of work in reducing the scope of the federal impact assessment regime, and perhaps the [designated project list regulations](#) in particular, are bound to be disappointed. *De minimis* is concerned with truly trivial impacts; it is not synonymous with all impacts except those that are significant, or of high significance (i.e., it is not synonymous with low and moderate impacts). Third, because triviality will not always be readily apparent – as the Agency’s guidance and the discussion of cumulative effects in particular shows – Parliament can and should maintain the federal government’s occupancy of the space between *de minimis* and significant impacts when it amends the Act. Ultimately, and bearing in mind its scientific capacity and expertise in particular, it is the executive branch that is best placed, whether at the project designation, screening, assessment, or final public interest decision phase, to determine which impacts are trivial and which ones are not (see also *Castonguay Blasting* at para 18). The judiciary’s role will be to ensure that such determinations are reasonable, in accordance with the separation of powers.

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