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CLE Working Paper No.2/2020--Responsible Scholarship in a Crisis: A Plea for Fairness in Academic Discourse on the Carbon Pricing References

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CLE WORKING PAPER SERIES

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**PETER A. ALLARD
SCHOOL OF LAW**

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Responsible Scholarship in a Crisis: A Plea for Fairness in Academic Discourse on the Carbon Pricing References

Stepan Wood¹
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Dayna Nadine Scott³

Forthcoming (2020) in the Dalhousie Law Journal

Abstract

The Canadian federal government's carbon pricing legislation has generated substantial public and academic debate. In this paper we argue that academic debate should adhere to standards for responsible conduct of research during crises such as the current climate emergency, and avoid the nastiness and distortion that infect populist political rhetoric and social media. We discuss the norms of responsible scholarship that apply to Canadian legal academics, with a focus on standards that demand scrupulous fairness to other scholars and to the materials one is analyzing. We argue that a recent article by Professor Dwight Newman on the Saskatchewan and Ontario reference cases upholding the constitutionality of the federal carbon pricing law does not live up to these standards in two ways. First, it treats other scholars unfairly by distorting their scholarly work and lumping them into derogatory, unsubstantiated general types. Second, it is unfair to the legal materials under consideration by portraying the relevant case law in an unduly selective manner to advance the author's argument. We close the paper with some reflections on why this particular case matters.

Keywords

Greenhouse Gas Pollution Pricing Act, responsible scholarship, Dwight Newman

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Introduction

Professor Dwight Newman recently published an article on the constitutionality of the federal government’s national carbon pricing legislation and the Saskatchewan and Ontario court decisions upholding the law.⁴ The article was part of a rapidly growing academic literature on Canadian governments’ powers to combat climate change. The vast majority of this literature respects the norms of rigorous and fair inquiry that enable constructive scholarly debate. It is important for legal scholars to uphold these norms, especially in times of crisis such as the current climate emergency. Unfortunately, the article in question did not, and the consequences for Supreme Court’s resolution of the carbon pricing reference cases could be significant.

In this short article we start by emphasizing the importance of responsible scholarship during times of crisis (Part 1). We then discuss norms for responsible conduct of scholarly inquiry applicable to Canadian legal academics (Part 2), with a focus on standards that demand scrupulous fairness to other scholars and to the materials one is analyzing. In Part 3 we argue that the article by Professor Newman does not live up to these standards in two ways. First, it is unfair to other scholars by distorting their scholarly work and lumping them into derogatory, unsubstantiated general types. Second, it is unfair to the relevant legal materials by portraying the relevant case law in an unduly selective manner to advance the author’s argument. We close the article with some reflections on why this particular case matters.

1. The importance of responsible scholarship during a crisis

The Canadian federal government’s enactment in 2018 of legislation to put a national price on carbon emissions⁵ unleashed a storm of controversy. Three provinces challenged the law in court. Two Courts of Appeal—in Saskatchewan and Ontario—upheld the legislation as *intra vires* the federal government,⁶ while that of Alberta declared it unconstitutional.⁷ The Supreme Court of Canada was scheduled to hear appeals from the Saskatchewan and

⁴ Dwight Newman, “Federalism, Subsidiarity, and Carbon Taxes” (2019) 82 *Sask L Rev* 187.

⁵ *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12 [GGPPA].

⁶ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [Saskatchewan Carbon Pricing Reference]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [Ontario Carbon Pricing Reference].

⁷ *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 [Alberta Carbon Pricing Reference].

Ontario decisions in March, 2020 when the COVID-19 pandemic intervened. Appeals from all three decisions are now tentatively scheduled to be heard together in September, 2020.⁸

These legal developments are unfolding in the context of an unprecedented crisis. Human activity, primarily in the form of burning fossil fuels, is disrupting the climate system.⁹ Atmospheric concentrations of carbon dioxide were last this high more than three million years ago, at a time when sea levels and global average surface temperatures were much higher than they are now.¹⁰ Climate change has already begun to damage ecosystems, species, people and economies.¹¹ The window of opportunity to avoid catastrophic climate change is shrinking rapidly.¹² There is a growing consensus amongst governments and climate experts that humanity is facing a climate emergency.¹³ The climate emergency intersects with other crises including biodiversity loss, poverty, human migration, and racist and colonial violence, not to mention the current public health crisis of COVID-19.

Crises can devastate communities and disrupt individual lives,¹⁴ causing competing worldviews, ideologies and interests to come into conflict.¹⁵ In some crises, entrenched privileges, ingrained habits and received wisdom are upended; in others, they are reinforced.¹⁶ Profits and livelihoods are jeopardized for some, enriched for others.¹⁷ Both

⁸ *Saskatchewan (AG) v Canada (AG)*, SCC Docket No 38663; *Ontario (AG) v Canada (AG)*, SCC Docket No 38781; *British Columbia (AG) v Alberta (AG)*, SCC Docket No 39116.

⁹ See, eg, World Meteorological Organization et al, *United In Science: High-level Synthesis Report of Latest Climate Science Information Convened by the Science Advisory Group of the UN Climate Action Summit 2019* (Geneva: WMO, 2019); Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Geneva: IPCC, 2014).

¹⁰ AM Haywood et al, "Large-Scale Features of Pliocene Climate: Results From the Pliocene Model Intercomparison Project" (2013) 9 *Climate of the Past* 191 at 192; KD Burke et al, "Pliocene and Eocene Provide Best Analogs for Near-Future Climates" (2018) 115:52 *Proc Nat Acad Sci* 13288 at 13289.

¹¹ See, eg, Intergovernmental Panel on Climate Change, *Summary for Policymakers, in Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge and New York: Cambridge, 2014); FJ Warren and DS Lemmen, eds, *Canada in a Changing Climate: Sector Perspectives on Impacts and Adaptation* (Ottawa: Government of Canada, 2014).

¹² See, eg, Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (Geneva: IPCC, 2018); Jonathan Watts, "We Have 12 Years to Limit Climate Change Catastrophe, Warns UN," *The Guardian* (8 October 2018), online: <https://www.theguardian.com/environment/2018/oct/08/global-warming-must-not-exceed-15c-warns-landmark-un-report>.

¹³ As of July 24, 2020, 1755 jurisdictions and local governments representing more than 820 million people had declared a climate emergency. Anon, "Climate emergency declarations in 1,755 jurisdictions and local governments cover 820 million citizens," online: <https://climateemergencydeclaration.org/climate-emergency-declarations-cover-15-million-citizens/>.

¹⁴ Stefanie Haeffele and Virgil Henry Storr, "Introduction," in Stefanie Haeffele and Virgil Henry Storr, eds, *Government Responses to Crisis* (Cham, Switzerland: Palgrave MacMillan, 2020) 1 at 1.

¹⁵ See, eg, Christian Lahusen and Maria T Grasso, eds, *Solidarity in Europe: Citizens' Responses in Times of Crisis* (Cham, Switzerland: Palgrave MacMillan, 2018).

¹⁶ See, eg, Dorothea Hilhorst, "Disaster, Conflict and Society: Everyday Politics of Crisis Response," in Dorothea Hilhorst, ed, *Disaster, Conflict and Society in Crises: Everyday Politics of Crisis Response* (London: Routledge, 2013) 1 at 5-7.

those who benefit most from and those who are harmed most by the status quo sometimes resort to extreme measures. Politics and public discourse can get nasty, with social media amplifying extremism and misinformation.¹⁸

Academic researchers are not immune to these pressures. Nor should we be. Scholars should and do contribute to public debate, influence public policy, support their preferred movements and oppose others—in short, engage fully in political and civic life. They have as much right as anyone to feel and act upon the emotions elicited in a crisis.¹⁹ But when they engage in scholarly research and writing, they should not relax the standards of rigour and fairness that normally apply to these undertakings. They should resist allowing the nastiness and distortion that have infected contemporary social media and populist political rhetoric to infect scholarly discourse. Why? Because adherence to these norms of rigour and fairness is a big part of what gives academic research its authority and legitimacy in a crisis.²⁰

Actors in government, civil society and business often appeal to academic expertise to diagnose and resolve crises. They often rely on academic scholarship to inform crucial decisions and rules, as we have seen with many governments' COVID-19 response measures²¹ and climate change policies.²²

This willingness to rely on scholarly expertise is based in large part on scholars' adherence to norms of responsible research conduct. Misplaced reliance on such adherence can have real consequences. A leading text on research ethics observes that people rely on research results “to form social policy and to address practical problems” and that researchers therefore “must strive to earn the public's support and trust.”²³ The authors continue:

If research results are erroneous or unreliable, then people may be killed or harmed, the environment may be degraded, money and resources may be misused or wasted, and misguided laws or policies may be enacted.²⁴

¹⁷ See, eg, Tatiana Beliaeva et al, “Benefiting from Economic Crisis? Strategic Orientation Effects, Trade-Offs, and Configurations with Resource Availability on SME Performance” (2020) 16:165 *Int'l Entrepreneurial Mgmt J* 165.

¹⁸ See, eg, Thomas T Hills, “The Dark Side of Information Proliferation” (2019) 14:3 *Perspectives Psych Sci* 323.

¹⁹ On the importance of emotions in a crisis, see Hyo J Kim and Glen T Cameron, “Emotions Matter in Crisis: The Role of Anger and Sadness in the Publics' Response to Crisis News Framing and Corporate Crisis Response” (2011) 38:6 *Communication Research* 826.

²⁰ See, eg, David B Resnik, *Scientific Research and the Public Trust* (2011) 17 *Sci & Engineering Ethics* 399 (2011).

²¹ See, eg, John Dupré, “Following the Science' in the COVID-19 Pandemic,” *Nuffield Council on Bioethics Blog* (29 April 2020), online: <https://www.nuffieldbioethics.org/blog/following-the-science-in-the-covid-19-pandemic>.

²² See, eg, *Paris Agreement*, 12 Dec 2015, UN Doc FCCC/CP/2015/L.9/Rev.1 Annex; Edward A Morgan and Gabriela Marques Di Giulio, “Science and Evidence-Based Climate Change Policy: Collaborative Approaches to Improve the Science–Policy Interface,” in Silvia Serrao-Neumann et al, eds, *Communicating Climate Change Information for Decision-Making* (Cham, Switzerland: Springer) 13.

²³ Adil E Shamoo and David B Resnik, *Responsible Conduct of Research*, 2nd ed (New York: Oxford, 2009) at 6.

²⁴ *Ibid* at 6-7. While these observations were directed at scientific research, we believe they apply to all research that is used to form social policy and address practical problems.

A contemporary example will illustrate. In the spring of 2020, the World Health Organization and several countries halted trials of hydroxychloroquine for COVID-19 treatment after a study was published in a leading medical journal reporting an elevated risk of heart disease and death. The journal retracted the article²⁵ after doubts were raised about the data and the authors were unable to vouch for its accuracy. The journal editor called this “a shocking example of research misconduct in the middle of a global health emergency.”²⁶ This misplaced reliance on academic research delayed the search for a COVID-19 treatment and could undermine public trust in science.²⁷

This example illustrates the double downside of reliance on research that fails to live up to norms for responsible scholarship. If the failure is exposed, public trust in scholarship can be eroded; and if it is not exposed, people can make decisions based on bad information.²⁸

2. Norms of responsible scholarship

The core values of responsible scholarship are honesty, fairness, trust, accountability and openness.²⁹ Scholars have “duties of honest and thoughtful inquiry, rigorous analysis ... and adherence to the use of professional standards.”³⁰ Canada’s three main research funding agencies require researchers to “strive to follow the best research practices honestly, accountably, openly and fairly in the search for and in the dissemination of knowledge” and “follow the requirements of applicable institutional policies and professional or disciplinary standards.”³¹ At a minimum, this includes scholarly and scientific rigour in

²⁵ Mandeep R Mehra, Frank Ruschitzka Amit N Patel, “Retraction--Hydroxychloroquine or chloroquine with or without a macrolide for treatment of COVID-19: a multinational registry analysis,” *The Lancet* (4 June 2020), online: [https://doi.org/10.1016/S0140-6736\(20\)31324-6](https://doi.org/10.1016/S0140-6736(20)31324-6), retracting Mandeep R Mehra et al, “Hydroxychloroquine or chloroquine with or without a macrolide for treatment of COVID-19: a multinational registry analysis,” *The Lancet* (22 May 2020), online: [https://doi.org/10.1016/S0140-6736\(20\)31180-6](https://doi.org/10.1016/S0140-6736(20)31180-6); see also The Lancet Editors, “Expression of concern: Hydroxychloroquine or chloroquine with or without a macrolide for treatment of COVID-19: a multinational registry analysis,” *The Lancet* (3 June 2020), online: [https://doi.org/10.1016/S0140-6736\(20\)31290-3](https://doi.org/10.1016/S0140-6736(20)31290-3). The authors also retracted an article in the *New England Journal of Medicine* after similar expressions of concern: Mandeep R Mehra et al, “Retraction: Cardiovascular Disease, Drug Therapy, and Mortality in Covid-19,” *New England Journal of Medicine* (4 June 2020), online: <https://doi.org/10.1056/NEJMc2021225>.

²⁶ Sarah Boseley and Melissa Davey, “COVID-19: *Lancet* retracts paper that halted hydroxychloroquine trials,” *The Guardian* (4 June 2020), online: <https://www.theguardian.com/world/2020/jun/04/covid-19-lancet-retracts-paper-that-halted-hydroxychloroquine-trials>.

²⁷ Melissa Davey, “Retracted studies may have damaged public trust in science, top researchers fear,” *The Guardian* (5 June 2020), online: <https://www.theguardian.com/science/2020/jun/06/retracted-studies-may-have-damaged-public-trust-in-science-top-researchers-fear>.

²⁸ *Ibid*, quoting Professor Sharon Lewin, director of a research organization that suspended hydroxychloroquine trials in reliance on the retracted study.

²⁹ Council of Canadian Academies, *Honesty, Accountability and Trust: Fostering Research Integrity in Canada—The Expert Panel on Research Integrity* (Ottawa: Council of Canadian Academies, 2010) at 38.

³⁰ Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada & Social Sciences and Humanities Research Council of Canada, *Tri-Agency Framework: Responsible Conduct of Research* (Ottawa: Secretariat on Responsible Conduct of Research, 2016), s 1.1 [*Tri-Agency Framework*].

³¹ *Ibid*, s 2.1.2.

proposing, conducting and publishing research, and accurate referencing of sources, theories, concepts, methodologies, data and findings.³²

University-level policies flesh out these norms. The Responsible Conduct of Research Policy of the University of Saskatchewan, where the author and publisher of the article discussed here are based, provides that the “research, scholarly and artistic work of members of the University of Saskatchewan must be held in the highest regard and be seen as rigorous and scrupulously honest.”³³ Members of the university are responsible for “conducting their research, scholarly, and artistic work according to the highest standards of research integrity,” “[e]xercising scholarly and scientific rigour and integrity in recording, analyzing and interpreting data, and in reporting and publishing data and findings.”³⁴

Departures from these norms cover a spectrum, from minor to egregious. The article we are considering here is not egregious, but it departs enough from applicable norms to warrant a response.

Norms of responsible scholarship cover not just outright fabrication and falsification, but also distortion of research materials or other scholars’ work that leads to inaccurate findings or conclusions.³⁵ Responsible research demands the “highest levels of exactitude” when “analyzing, interpreting, reporting, publishing, and archiving research data and findings.”³⁶ Similarly, while slander and libel of other researchers represent another extreme example of misconduct, belittlement and *ad hominem* attacks against other researchers are also inconsistent with the principles that everyone “directly affected or involved in research ... should be treated fairly and with respect”³⁷ and that “evaluation of the work of others” should be done “in a manner that reflects the highest scholarly, professional, and scientific standards of fairness.”³⁸

These norms arguably apply to a heightened degree to legal scholars, who study and are more often than not members of a self-regulating profession that has a mandate to serve the public interest.³⁹

3. A Case in Point

Professor Dwight Newman’s article “Federalism, Subsidiarity and Carbon Taxes”⁴⁰ departs from these norms of rigour and fairness in two ways: first, by distorting the published work of scholars with whom he disagrees, and portraying them in derogatory terms (Part 3.A);

³² *Ibid.*

³³ University of Saskatchewan, *Responsible Conduct of Research Policy* (effective July 1, 2013), s 2.0, online: https://policies.usask.ca/documents/Responsible_Conduct_Research_Policy_Procedures.pdf [*U of S RCR Policy*].

³⁴ *Ibid.*, s 4.1.

³⁵ *Ibid.*, s 5.0(b); *Tri-Agency Framework*, supra note 30, s 3.1.1.

³⁶ Council of Canadian Academies, supra note 29 at 39.

³⁷ *Ibid.* at 40.

³⁸ *Ibid.* at 39. While this principle applies mainly to formal peer review processes, we believe fairness is also expected when evaluating others’ work in the context of scholarly publications.

³⁹ While we focus on ethical responsibilities of legal scholars, practising lawyers’ reliance on questionable academic research might implicate their professional responsibilities to clients, courts and the public. Consideration of this issue is beyond the scope of this article. See, eg, Michael J Saks and Charles H Baron, eds, *The Use/Nonuse/Misuse of Applied Social Research in the Courts* (Cambridge, Mass: Abt Books, 1980).

⁴⁰ Newman, supra note 4.

and second, by selectively presenting the relevant case law to suit his purposes (Part 3.B). These failures undermine the credibility of the article and have potential consequences for the adjudication of the legality of the federal carbon pricing legislation. The article was cited six times, all favourably, in the Alberta Court of Appeal's decision on the legislation.⁴¹ At the Supreme Court, the Attorneys General of Alberta and Quebec cite the article favourably four times in their interveners' facts in the Saskatchewan and Ontario appeals. Given the article's multiple citations by the Alberta Court of Appeal, it seems likely that it will be cited by parties and interveners in the appeal from that decision as well.⁴²

Whatever the Supreme Court decides in the carbon pricing appeals, it will likely consider this article. Parties, interveners and the Court—not to mention legal scholars and interested practitioners—should be aware of the article's shortcomings before the Supreme Court hears oral argument this fall.

Let us be clear: We take no issue here with the substance of Professor Newman's criticism of the Saskatchewan and Ontario GHG pricing reference decisions, nor with his advocacy for the principle of subsidiarity in Canadian constitutional interpretation. We do not intend to enter the substantive debate about carbon pricing or the federal division of powers in this short article. Our concern instead is with how Professor Newman chose to make his argument and the implications of this choice for legal scholarship and informed public debate.

A. Fair treatment of other scholars and their work

Professor Newman's article treats the scholars with whom he disagrees unfairly by distorting their scholarly publications and using unsubstantiated generalizations to discredit them. In particular, he distorts the work of environmental law scholars Nathalie Chalifour and Jason MacLean. He accuses Professor Chalifour of wishing that the problem of climate change would change the Constitution. He supports this characterization by citing the title of one of her articles, "Making Federalism Work for Climate Change," and claiming that her "recent focus has simply been to explicitly urge judicial adaptation of the Constitution to ensure the implementation of climate change policies."⁴³

This is a distortion of Professor Chalifour's work. Newman fails to engage at all, let alone in a rigorous or careful way, with the argument in "Making Federalism Work," merely mentioning its title as if it were proof of a wish to change the Constitution. In fact, in this and her other articles impugned by Professor Newman, Professor Chalifour relies on careful analysis of past constitutional decisions to argue that regulation of GHG emissions falls within existing federal jurisdiction.⁴⁴ To claim that she simply wishes to "change the Constitution" is a serious distortion.

In the same passage, Professor Newman suggests that Professor Chalifour's work is incoherent insofar as it both criticizes carbon taxes from a feminist perspective and

⁴¹ *Alberta Carbon Pricing Reference*, *supra* note 7.

⁴² As of the date of writing the only factum filed in the Alberta appeal was that of the appellant Attorney General of BC. That factum does not mention the article, but it is just the first of many to be filed in that case.

⁴³ Newman, *supra* note 4 at 189 n 9 and accompanying text, citing Nathalie J Chalifour, "Making Federalism Work for Climate Change: Canada's Division of Powers over Carbon Taxes" (2008) 22:2 *Nat J Con L* 119.

⁴⁴ See, eg, Chalifour, *ibid*; Nathalie J Chalifour, "Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's Greenhouse Gas Pollution Pricing Act" (2019) 50 *Ottawa L Rev* 197.

defends the federal government's constitutional power to enact one. Newman complains that he has "not identified in her later work any explanation of why she now exempts the Trudeau government's carbon tax policies from her prior demands for gender analysis."⁴⁵

There is no contradiction here. It is perfectly coherent to criticize a law on its merits while endorsing its constitutionality.⁴⁶ Professor Chalifour endorses a federal carbon tax even as she cautions that it must be designed carefully to avoid placing an unfair burden on vulnerable groups.

In another passage, Professor Newman asserts that Professor Chalifour has questioned the exclusivity of federal jurisdiction under the Peace, Order and Good Government (POGG) clause "[f]or reasons that are not wholly discernible."⁴⁷ On the contrary, a careful and fair reading of Professor Chalifour's work would have revealed that she explicates her reasoning fully in an article in which she argues that her interpretation is consistent with the Supreme Court's recent tendency to prefer overlapping rather than exclusive jurisdiction.⁴⁸ One may disagree with her interpretation, but it is misleading to suggest that her reasoning is not wholly discernible. To imply that a scholar's reasons are obscure when they are not is to impugn unfairly the scholar's intellectual rigour.

Newman's treatment of the work of Professor Jason MacLean, his junior untenured colleague at the University of Saskatchewan, is even more problematic. He begins by claiming that Chalifour and MacLean have "a tendency to write in overly narrow ways as if their central policy concerns ... must be the central object of legal planning at the expense of all other policy considerations, principles, and human values."⁴⁹ This characterization is unfair and inaccurate. The only support Newman provides for it is a footnote that claims:

Thus, authors like MacLean develop arguments in which every institution is corrupt and then the conclusion is that a party of academics must guide all Canadian policy [...]. That the implication embodies strong-form elitism appears to generate no concern for someone focused entirely on particular policy concerns over others. MacLean, of course, thinks that his approaches are actually quite democratic, in so far as he regards Canada as a "carbon democracy"—a sort of non-tropical form of banana republic—and thinks that he offers a different democratic pathway [...]. But the readiness to condemn all Canadian institutions just manifests a similar refusal to consider working from within the wisdom of long-established institutions and principles.⁵⁰

This is an unfair characterization of MacLean's published work, which cannot reasonably be interpreted as suggesting that every institution is corrupt or that Canadian environmental law should be steered by a cabal of academics. MacLean argues that

⁴⁵ Newman, *supra* note 4 at 189 n 9, citing Nathalie J Chalifour, "A Feminist Perspective on Carbon Taxes" (2010) 21(2) *Can J Women & L* 169.

⁴⁶ See, eg, Guy Régimbald and Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis, 2017) at 188-90 (§§5.35-5.41).

⁴⁷ Newman, *supra* note 4 at 196.

⁴⁸ Chalifour, "Jurisdictional Wrangling," *supra* note 44.

⁴⁹ Newman, *supra* note 4 at 189.

⁵⁰ *Ibid* at 189 n 12, citing Jason MacLean, "Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture" (2016) 29 *J Envtl L & Prac* 111; and Jason MacLean, "Paris and Pipelines? Canada's Climate Policy Puzzle" (2018) 32 *J Envtl L & Prac* 47.

regulatory capture by industry is the root problem underlying Canadian environmental law and policy.⁵¹ This proposition follows a long line of theoretical and empirical literature,⁵² and he supports it with evidence.⁵³

In the second article impugned by Newman, Professor MacLean argues that Canada's inconsistent embrace of both the Paris climate change accord and continued fossil fuel development can be explained by viewing Canada as a "carbon democracy."⁵⁴ This argument is tailored to the conditions of advanced industrial democracies, grounded in scholarly literature⁵⁵ and supported by evidence.⁵⁶ To characterize it as treating Canada as a "non-tropical form of banana republic" is inaccurate and unfairly dismissive.

To portray MacLean as arguing that "a party of academics must guide all Canadian policy" is also unfair and inaccurate. MacLean writes:

Scholars across relevant disciplines must ... collaborate on and effectively communicate concrete alternative pathways, political-economy trajectories away from oil and gas development towards sustainability. ... A particularly promising approach is to identify and communicate the tangible co-benefits of addressing

⁵¹ MacLean, "Striking at the Root Problem," *ibid*; Jason MacLean, "Regulatory Capture and the Role of Academics in Public Policymaking: Lessons from Canada's Environmental Regulatory Review Process" (2019) 52:2 *UBC L Rev* 479.

⁵² See, eg, George Stigler, "The Theory of Economic Regulation" (1971) 2:1 *Bell J Econ & Mgmt Sci* 3; Michael E Levine and Jennifer L Forrence, "Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis" (1990) 6 *JL Econ & Org* 167; Ian Ayres and John Braithwaite, "Tripartism: Regulatory Capture and Empowerment" (1991) 16:3 *L & Soc Inquiry* 435; Jean-Jacques Laffont and Jean Tirole, "The Politics of Government Decision-Making: A Theory of Regulatory Capture" (1991) 106:4 *QJ Econ* 1089; David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 251-6; Ernesto Dal Bó, "Regulatory Capture: A Review" (2006) 22:2 *Oxford Rev Econ Pol'y* 203; Daniel Carpenter and David A Moss, eds, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (New York: Cambridge, 2014). In the context of environmental regulation, see, eg, Sara Singleton, "Co-operation or Capture? The Paradox of Co-Management and Community Participation in Natural Resource Management and Environmental Policy-Making" (2000) 9:2 *Env't'l Pol* 1; David B Spence, "The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law" (2001) 89:4 *Cal L Rev* 917; Matthew D Zinn, "Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits" (2002) 21 *Stan Env't'l LJ* 81; Mark Winfield, "An Unimaginative People: Instrument Choice in Canadian Law and Policy" (2008) 71 *Sask L Rev* 79 at 85-86; Michelle C Pautz, "Next-Generation Environmental Policy and the Implications for Environmental Inspectors: Are Fears of Regulatory Capture Warranted?" (2010) 12:3 *Env't'l Prac* 247; Stepan Wood, Georgia Tanner & Benjamin J Richardson, "Whatever Happened to Canadian Environmental Law?" (2010) 37:4 *Ecology LQ* 981 at 988, 1013; David R Boyd, *Cleaner, Greener, Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies* (Vancouver: UBC Press, 2015) at 202-07; Bruce Campbell, "Preconditions, Regulatory Failure, and Corporate Negligence Behind the Lac-Mégantic Disaster" (2018) 48 *RGD* 95.

⁵³ MacLean, "Striking at the Root Problem," *supra* note 50 at 121-4.

⁵⁴ MacLean, "Paris and Pipelines," *supra* note 50.

⁵⁵ The concept of "carbon democracy" was developed by political theorist Timothy Mitchell to explain how leading industrialized states' dependence on oil shapes their political dynamics. Timothy Mitchell, "Carbon Democracy" (2009) 38:3 *Econ & Soc'y* 399; Timothy Mitchell, *Carbon Democracy: Political Power in the Age of Oil* (New York: Verso, 2011).

⁵⁶ In addition to marshalling his own evidence, MacLean cites Laurie Adkin's work on the dynamics of "carbon democracy" in a Canadian context: see, eg, Laurie Adkin, ed, *First World Petro-Politics: The Political Ecology and Governance of Alberta* (Toronto and Buffalo: University of Toronto Press, 2016).

climate change—including economic development and enhanced community resilience.⁵⁷

Far from advancing an undemocratic position, Professor MacLean links engaged scholarship with an agenda for democratic renewal:

Communicating the co-benefits of addressing climate change can encourage greater public attention and action, and thereby influence government action Importantly, ... climate and sustainability policy actions that clearly embody co-benefits ... are capable of attracting broad public support, which is the critical ingredient of a countervailing democratic movement capable of displacing the outsized influence of the oil and gas industry on policymaking in contemporary carbon democracies like Canada.⁵⁸

MacLean then argues that the “very same mechanisms that created and reproduced Alberta’s ‘petro-politics’—i.e. lobbying and industry-government partnerships, media campaigns, community engagement initiatives, and not least, academic research—may be deployed to help create a political economy based on renewable energy and community resilience.”⁵⁹ “Accordingly,” he concludes, “sustainability advocates and scholars must do more to show how a post-carbon democracy can work in practice.”⁶⁰ MacLean’s argument is consistent with widely accepted approaches to the mobilization of scholarly knowledge.⁶¹ It is unfair to portray it as undemocratic and embodying “strong-form elitism.”⁶²

Professor Newman also distorts statements made by Professors Chalifour and MacLean in popular media. He claims, for example, that an article they wrote in *Policy Options* refers to litigation challenging climate change policies as “bicker[ing] and navel-gaz[ing].”⁶³ On the contrary, their reference to “bicker[ing] and navel-gaz[ing]” was a collective self-critique directed at all Canadians, not at litigants opposing a carbon tax, as Newman implies.⁶⁴

These numerous distortions of his opponents’ published work exhibit unfair treatment of other scholars and their work, and a lack of scholarly care and rigour. Professor Newman’s article also resorts to unsubstantiated generalizations to discredit his interlocutors. The article disparages his perceived opponents as “these sorts of environmental law academics,”⁶⁵ “environmental advocates like Chalifour and MacLean,”⁶⁶

⁵⁷ MacLean, “Paris and Pipelines,” *supra* note 50 at 72.

⁵⁸ *Ibid* at 73.

⁵⁹ *Ibid* at 73-4.

⁶⁰ *Ibid* at 74.

⁶¹ See, eg, Social Sciences and Humanities Research Council of Canada, “Guidelines for Effective Knowledge Mobilization,” online: https://www.sshrc-crsh.gc.ca/funding-financement/policies-politiques/knowledge_mobilisation-mobilisation_des_connaissances-eng.aspx.

⁶² Newman, *supra* note 4 at 189 n 12.

⁶³ *Ibid* at 187.

⁶⁴ Nathalie Chalifour and Jason MacLean, “Courts Should Not Have to Decide Climate Change Policy,” *Policy Options* (21 December 2018), online: <https://policyoptions.irpp.org/magazines/december-2018/courts-not-decide-climate-change-policy/>.

⁶⁵ Newman, *supra* note 4 at 188.

⁶⁶ *Ibid* at 189.

“authors like MacLean,”⁶⁷ and people who “are inclined to mock” Saskatchewan’s decision to challenge the federal carbon price and who “neglect deep underlying values that have shaped the Canadian Constitution and the life of human communities that the Constitution has enabled.”⁶⁸ These casual generalizations are examples of sloppy research, insofar as Newman fails to identify anyone other than Chalifour and MacLean who allegedly falls into these categories. They also compound the article’s unfair treatment of these scholars and their work.

B. Fair treatment of the relevant case law

Professor Newman bolsters his attack on Professors Chalifour and MacLean with a selective and self-serving portrayal of the case law at the centre of the dispute. He does this in two ways: by exaggerating the degree of division amongst the judges in the Saskatchewan and Ontario reference cases, and by presenting a blinkered view of the case law on the POGG power.

First, he writes that the seven judges in the Ontario and Saskatchewan reference cases who would uphold the federal legislation “are split among three different—and not entirely consistent—explanations of the legal basis for federal jurisdiction, meaning there is as strong a combined vote for the unconstitutionality of the legislation as for any single explanation of its constitutionality.”⁶⁹

There are two problems with this claim: it exaggerates the disagreement amongst the judges and it compares apples and oranges. Professor Newman is correct that the three-judge majority of the Ontario Court of Appeal characterized the pith and substance of the legislation as “establishing minimum national standards to reduce GHG emissions,” whereas the three-judge majority of the Saskatchewan Court of Appeal characterized it as “establishing minimum national standards of price stringency for GHG emissions” and the concurring judge in Ontario characterized it as “establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions.”⁷⁰ Professor Newman asserts that “there are differing levels of breadth” and “even explicit clashes” between these three characterizations and promises to “return later in the article to consider these distinctions further.”⁷¹

The article does later discuss several of the characterizations proffered by parties and interveners, but nowhere does it directly compare the characterizations offered by these seven judges. The “pith and substance” characterizations of the Saskatchewan three-judge majority and one Ontario concurring judge, in particular, amount to the same thing: setting minimum national GHG price standards. Any distinction between “establishing minimum national standards of price stringency for GHG emissions” and “establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions” is fine if there is one at all. And while the difference between setting minimum national GHG pricing standards and the Ontario majority’s “minimum national standards for GHG emissions reductions” is real, these seven judges were not far apart on this point

⁶⁷ *Ibid* at 189 n 12.

⁶⁸ *Ibid* at 190.

⁶⁹ *Ibid* at 188.

⁷⁰ *Ibid* at 188 n 6.

⁷¹ *Ibid*.

compared to the wide range of characterizations proffered by parties and interveners, and they all agreed that the legislation was a valid exercise of the national concern branch of the POGG power. If anything, Professor Newman acknowledges the similarity amongst these opinions when he writes “the majority judges have ended up accepting characterizations focused on the setting of a national minimum price” on carbon emissions.⁷²

Our point is not to pick apart the fine points of these cases or of Professor Newman’s argument. Rather, it is that by asserting that these opinions present three different and partly inconsistent explanations of the constitutionality of federal carbon pricing legislation without actually comparing and contrasting those explanations, the article is not fair to the judicial decisions under consideration.

The second problem with the claim that there is “as strong a combined vote for unconstitutionality as for any single explanation of its constitutionality” is that it conflates apples with oranges. Votes for unconstitutionality are votes for a particular conclusion. Votes for explanations of constitutionality are votes for a particular path to a conclusion. A conclusion and a path to a conclusion are different things. The multiplicity of judges on appellate courts means that the number of paths is likely to exceed the number of conclusions. The reverse is impossible if the conclusion in question is a binary choice, as it is here (constitutional or unconstitutional). In such a case the number of conclusions can equal but not exceed the number of explanations. Therefore, to compare the number of votes for or against a law’s constitutionality with the number of votes for any particular explanation of its constitutionality or unconstitutionality is not very informative and risks giving a false impression of the strength of opposition to the federal carbon pricing legislation in these two decisions.

Another way in which the article is not scrupulously fair to the legal materials is by presenting a partial and blinkered account of the POGG case law. Professor Newman claims that “the case law does not support the three-branch description of [the POGG power] often cheerily offered by those who would centralize the federation.”⁷³ He is right that the courts have construed this branch narrowly and have rarely invoked it to uphold federal legislation. He may even be right to suggest that the Supreme Court’s consideration of the federal carbon price references will be “an occasion to sort out what branches actually exist on the POGG power,” and that “there are real arguments for considering [the national concern branch’s] legal status suspect.”⁷⁴ But he supports the latter claim by painting a selective picture of the national concern jurisprudence.

First, Professor Newman suggests that the national concern branch has only been used to uphold federal legislation once, in *Crown Zellerbach*,⁷⁵ and that the judges in that case created it “out of whole cloth” merely because they “thought they needed it.”⁷⁶ This claim is not substantiated. First, Newman gives no reason for rejecting the two other Supreme Court decisions that are commonly cited as upholding federal legislation under

⁷² *Ibid* at 198-99.

⁷³ Newman, *supra* note 4 at 201.

⁷⁴ *Ibid* at 196 n 47.

⁷⁵ *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401.

⁷⁶ Newman, *supra* note 4 at 196 n 47 and accompanying text.

the national concern branch,⁷⁷ other than to allege that some unidentified scholars consider them to fall under the “gap” branch.⁷⁸

Second, his criterion for judging the doctrine’s existence is unduly demanding: the number of cases in which federal legislation has been upheld by the Supreme Court solely and explicitly on this basis. He does not acknowledge that the branch’s existence might also be determined by the number of cases in which the Supreme Court and other courts have classified matters as falling within the national concern branch even if they did not uphold federal legislation on this basis;⁷⁹ and cases in which courts have said the branch exists.⁸⁰ These cases date back at least to 1946,⁸¹ and possibly much earlier. To claim that the Supreme Court invented the branch “out of whole cloth” in *Crown Zellerbach*, and that “the case law does not support the three-branch description of the POGG power,”⁸² unfairly downplays this judicial history.

The existence of the three branches of the POGG power is accepted by Canadian courts and commentators. Professor Newman’s own co-authored constitutional law treatise makes no suggestion that the national concern branch does not exist, nor that it was invented in 1988.⁸³ As the late doyen of Canadian constitutional law, Peter Hogg, wrote, “The national concern branch of p.o.g.g. has been recognized in many cases since 1946” and “The cumulative effect of these cases is to establish firmly the national concern branch of p.o.g.g.”⁸⁴

We have no problem with Professor Newman claiming that the national concern branch does not exist; what we object to is his doing so without giving fair consideration to the decades of case law and scholarly commentary that point in the opposite direction.

4. So what?

Professor Newman’s article is not an egregious case, but in our view it crosses a line that separates distortion and disparagement from constructive scholarly debate. The problems we have documented are serious enough to cast doubt on the article as a whole, not just the portions we identify as problematic. These problems deserve to be aired so that parties and courts do not misplace their reliance on the article in making decisions about the carbon pricing reference cases.

⁷⁷ Chalifour, “Making Federalism Work,” *supra* note 43 at 179, citing *Johannesson v West St Paul (Rural Municipality)*, [1952] 1 SCR 292 (aeronautics); *Munro v National Capital Commission*, [1966] SCR 663 (National Capital Region).

⁷⁸ Newman, *supra* note 4 at 196 n 47.

⁷⁹ *Eg Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327; *Pronto Uranium Mines Ltd v Ontario (Labour Relations Board)*, [1956] OR 862, 5 DLR (2d) 342 (atomic energy).

⁸⁰ Examples from the Supreme Court include *Reference Re Anti-Inflation Act, 1975*, [1976] 2 SCR 373; *Labatt Breweries v Canada (AG)*, [1980] 1 SCR 914; *Schneider v British Columbia*, [1982] 2 SCR 112; *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311; *RJR-MacDonald Inc v Canada*, [1995] 3 SCR 199; *R v Hydro-Quebec*, [1997] 3 SCR 213; *R v Malmo-Levine*, [2003] 3 SCR 571.

⁸¹ *Ontario (AG) v Canada Temperance Federation*, [1946] AC 193, [1946] 2 DLR 1 (PC).

⁸² Newman, *supra* note 4 at 196 n 47 and 201.

⁸³ Régimbald and Newman, *supra* note 46 at 232-38 (§§6.15-6.30).

⁸⁴ Peter W Hogg, *Constitutional Law of Canada*, 2017 student ed (Toronto: Thomson Reuters, 2017) at 17.11 and 17.12 (§17.3(a)).

A rigorous peer review process would normally catch most problems like the ones we have identified with this article.⁸⁵ Journal editors may feel pressure to dispense with or rush review processes to maximize the relevance and exposure of articles addressing time-sensitive issues like the carbon pricing references or the COVID-19 pandemic. The retracted hydroxychloroquine article we mentioned earlier was published around a month after submission, impeding thorough peer review. Journals should certainly strive to make timely contributions to discourse on pressing public issues, but not at the expense of norms of responsible scholarship.

Vigorous debate and disagreement are the lifeblood of academic discourse and the engine for advancement of knowledge. To insist on rigour and fairness in such debate is not to impose “political correctness” on scholars who espouse unpopular views. Nor is it a manifestation of the fragility of a liberal academic establishment unable to handle controversial perspectives. It is necessary to enable constructive scholarly debate and to maintain public trust in academic expertise.

We have no doubt that constructive scholarly debate on climate change, carbon pricing, division of powers, the national concern branch, subsidiarity, regulatory capture and the role of academics in a democracy is possible. To be clear, our purpose in this article is not to take a position in that debate. This article is intended neither as a critique of the substance of Professor Newman’s position on those issues, nor as a defence of those of Professors Chalifour and MacLean. If we defend their work here, it is only to the extent necessary to substantiate our claim that Professor Newman’s article does not uphold standards of scrupulous fairness in scholarly research. We offer this article as a reminder of mutual expectations for responsible scholarship and look forward to the continuation of vigorous, constructive and publicly beneficial scholarly debate on these important issues.

⁸⁵ The Saskatchewan Law Review failed to reply to inquiries in December, 2019, June, 2020 and July, 2020, whether Professor Newman’s article was peer reviewed.