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

Stepan Wood

Allard School of Law at the University of British Columbia

Meinhard Doelle

Dalhousie University, Schulich School of Law

Dayna N. Scott

Osgoode Hall Law School of York University

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Stepan Wood*
Meinhard Doelle**
Dayna Nadine Scott***

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

This article offers a critical review of a paper Professor Dwight Newman recently published on the constitutionality of the federal government's national carbon pricing legislation and the Saskatchewan and Ontario court decisions upholding the law. Rather than engage with the substance of Professor Newman's article, the authors consider whether it respects the norms of rigorous and fair inquiry that enable constructive scholarly debate. The authors conclude that it does not, and that the consequences for the Supreme Court's resolution of the carbon pricing reference cases could be significant.

Le présent article propose une analyse critique d'un texte publié récemment par le professeur Dwight Newman sur la constitutionnalité de la loi du gouvernement fédéral relative à la tarification du carbone et des décisions des tribunaux de la Saskatchewan et de l'Ontario confirmant la loi. Plutôt que de s'engager sur le fond de l'article du professeur Newman, les auteurs examinent s'il respecte les normes d'une enquête rigoureuse et équitable qui permettent un débat scientifique constructif. Les auteurs concluent que ce n'est pas le cas, et que les conséquences pour la résolution par la Cour suprême des affaires relatives au renvoi sur la tarification du carbone pourraient être importantes.

* Professor, Canada Research Chair in Law, Society & Sustainability and Director, Centre for Law & the Environment, Allard School of Law, University of British Columbia, wood@allard.ubc.ca. The authors are grateful to the editors and anonymous reviewers of the Dalhousie Law Journal for their valuable input to this article.

** Professor of Law, Schulich School of Law, Dalhousie University; Chair, Marine Environmental Protection, World Maritime University, Malmö, Sweden.

*** Associate Professor; York Research Chair in Environmental Law & Justice in the Green Economy, Osgoode Hall Law School and Faculty of Environmental and Urban Change, York University.

Introduction

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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.¹ The article was part of a rapidly growing academic literature on the powers of Canadian governments 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 the Supreme Court's resolution of the carbon pricing reference cases could be significant.

In Part I of this article we emphasize the importance of responsible scholarship during times of crisis. We then discuss norms for responsible conduct of scholarly inquiry applicable to Canadian legal academics in Part II, with a focus on standards that demand scrupulous fairness to other scholars and to the materials one is analyzing. In Part III we argue that Professor Newman's article does not live up to these standards in two ways. First, it is unfair to other scholars because it distorts their work and lumps them into derogatory, unsubstantiated general types. Second, it is unfair to the legal materials because it portrays the relevant case law in an unduly selective manner to advance the author's argument. We conclude with some reflections on why this particular case matters.

1. Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask L Rev 187.

I. *The importance of responsible scholarship during a crisis*

The Canadian federal government's enactment of legislation to put a national price on carbon emissions² 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,³ while that of Alberta declared it unconstitutional.⁴ The Supreme Court of Canada was scheduled to hear appeals from the Saskatchewan and Ontario decisions in March, 2020 when the COVID-19 pandemic intervened. Appeals from all three decisions were heard together in September 2020.⁵

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.⁶ 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.⁷ Climate change has already begun to damage ecosystems, species, people and economies.⁸ The window of opportunity to avoid catastrophic climate change is shrinking rapidly.⁹

2. *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12.

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

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

5. *Saskatchewan (AG) v Canada (AG)*, SCC Docket No 38663 [SK (AG)]; *Ontario (AG) v Canada (AG)*, SCC Docket No 38781 [ON (AG)]; *British Columbia (AG) v Alberta (AG)*, SCC Docket No 39116 [BC (AG)].

6. 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).

7. AM Haywood et al, "Large-Scale Features of Pliocene Climate: Results from the Pliocene Model Intercomparison Project" (2013) 9:1 *Climate of the Past* 191 at 192; KD Burke et al, "Pliocene and Eocene Provide Best Analogs for Near-Future Climates" (2018) 115:52 *Proceedings of the National Academy of Sciences* 13288 at 13289.

8. 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 & DS Lemmen, eds, *Canada in a Changing Climate: Sector Perspectives on Impacts and Adaptation* (Ottawa: Government of Canada, 2014).

9. 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>> [<https://perma.cc/W7Y9-6K9F>].

There is a growing consensus amongst governments and climate experts that humanity is facing a climate emergency.¹⁰

The climate crisis intersects with other crises including biodiversity loss, poverty, human migration, racist and colonial violence, and the current public health crisis of COVID-19.

Crises can devastate communities and disrupt individual lives,¹¹ causing competing worldviews, ideologies and interests to come into conflict.¹² In some crises, entrenched privileges, ingrained habits and received wisdom are upended; in others, they are reinforced.¹³ Profits and livelihoods are jeopardized for some, enriched for others.¹⁴ Both 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.¹⁵

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.¹⁶ But when they engage in scholarly research and writing, they should not relax the standards of rigour and fairness that apply to these undertakings. They should resist allowing the meanness 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.¹⁷

10. As of 24 July 2020, 1,755 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/>> [<https://perma.cc/2XE4-RQ4U>].

11. Stefanie Haeffele & Virgil Henry Storr, “Introduction” in Stefanie Haeffele & Virgil Henry Storr, eds, *Government Responses to Crisis* (Cham, Switzerland: Palgrave MacMillan, 2020) 1 at 1.

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

13. 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.

14. 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 *Intl Entrepreneurship & Management J* 165.

15. See eg Thomas T Hills, “The Dark Side of Information Proliferation” (2019) 14:3 *Perspectives on Psychological Science* 323.

16. On the importance of emotions in a crisis, see Hyo J Kim & 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.

17. See eg David B Resnik, “Scientific Research and the Public Trust” (2011) 17:3 *Science &*

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 measures¹⁸ and climate change policies.¹⁹

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."²⁰ 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."²¹

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 article²² after doubts were raised about the data and the authors were unable to vouch for its accuracy. The

Engineering Ethics 399.

18. See eg John Dupré, "'Following the Science' in the COVID-19 Pandemic," *Nuffield Council on Bioethics* (29 April 2020), online (blog): <<https://www.nuffieldbioethics.org/blog/following-the-science-in-the-covid-19-pandemic/>> [<https://perma.cc/9J5L-ZFNF>].

19. See eg *Paris Agreement*, 12 Dec 2015, UN Doc FCCC/CP/2015/L.9/Rev.1 Annex; Edward A Morgan & Gabriela Marques Di Giulio, "Science and Evidence-Based Climate Change Policy: Collaborative Approaches to Improve the Science–Policy Interface" in Silvia Serrao-Neumann, Anne Coudrain & Liese Coulter, eds, *Communicating Climate Change Information for Decision-Making* (Cham, Switzerland: Springer, 2018) 13.

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

21. *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.

22. 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)> [<https://perma.cc/B6WN-Y58T>], 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)> [<https://perma.cc/8F2A-BXK2>]; 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)> [<https://perma.cc/9QDB-5STN>]. 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" (2020) 382:25 *New England Journal of Medicine*, online: <<https://doi.org/10.1056/NEJMc2021225>> [<https://perma.cc/X2EQ-K67T>].

journal editor called this “a shocking example of research misconduct in the middle of a global health emergency.”²³ This misplaced reliance on academic research delayed the search for a COVID-19 treatment and could undermine public trust in science.²⁴

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.²⁵

II. *Norms of responsible scholarship*

The core values of responsible scholarship are honesty, fairness, trust, accountability and openness.²⁶ Scholars have “duties of honest and thoughtful inquiry, rigorous analysis...and adherence to the use of professional standards.”²⁷ 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.”²⁸ At a minimum, this includes scholarly and scientific rigour in proposing, conducting and publishing research, and accurate referencing of sources, theories, concepts, methodologies, data and findings.²⁹

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

23. Sarah Boseley & 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>> [<https://perma.cc/KT82-FCJJ>].

24. 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>>.

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

26. 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.

27. 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*].

28. *Ibid.*, s 2.1.2.

29. *Ibid.*

and scrupulously honest.”³⁰ 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.”³¹

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.³² Responsible research demands the “highest levels of exactitude” when “analyzing, interpreting, reporting, publishing, and archiving research data and findings.”³³ 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”³⁴ 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.”³⁵

These norms arguably apply to a heightened degree to legal scholars, who are more often than not members of a self-regulating profession that has a mandate to serve the public interest.³⁶

III. *A case in point*

Professor Dwight Newman’s article, “Federalism, Subsidiarity and Carbon Taxes”³⁷ departs from the 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 (see below, Part III-

30. University of Saskatchewan, *Responsible Conduct of Research Policy* (effective 1 July 2013), s 2.0, online (pdf): <https://policies.usask.ca/documents/Responsible_Conduct_Research_Policy_Procedures.pdf> [<https://perma.cc/V6KV-L6DU>].

31. *Ibid*, s 4.1, 4.1(d).

32. *Ibid*, s 5.0(b); *Tri-Agency Framework*, *supra* note 27, s 3.1.1.

33. Council of Canadian Academies, *supra* note 26 at 40.

34. *Ibid*.

35. *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.

36. 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 & Charles H Baron, eds, *The Use/Nonuse/Misuse of Applied Social Research in the Courts* (Cambridge, Mass: Abt Books, 1980).

37. Newman, *supra* note 1.

1); and second, by selectively presenting the relevant case law to suit his purposes (see below, Part III-2). 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.³⁸ At the Supreme Court, the Attorney General of Alberta, the Attorney General of Quebec and the Canadian Taxpayers Federation cited the article favourably seven times in their facts.³⁹

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

Let us be clear: we take no issue here with the substance of Professor Newman's criticism of the Saskatchewan and Ontario greenhouse gas (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. Instead, our concern is with how Professor Newman chose to make his argument and the implications of this choice for legal scholarship and informed public debate.

1. *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."⁴⁰ 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." He merely mentions 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

38. *Alberta Reference*, *supra* note 4.

39. *SK (AG)*, *supra* note 5; *ON (AG)*, *supra* note 5; *BC(AG)*, *supra* note 5.

40. Newman, *supra* note 1 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 NJCL 119 [Chalifour, "Making Federalism Work"].

relies on careful analysis of past constitutional decisions to argue that regulation of GHG emissions falls within existing federal jurisdiction.⁴¹ 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 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 analyses.”⁴²

There is no contradiction here. It is perfectly coherent to criticize a law on its merits while endorsing its constitutionality.⁴³ 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.”⁴⁴ 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.⁴⁵ 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.”⁴⁶ This

41. See eg *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) 50:2 Ottawa L Rev 197 [Chalifour, “Jurisdictional Wrangling”].

42. Newman, *supra* note 1 at 189, n 9, citing Nathalie J Chalifour, “A Feminist Perspective on Carbon Taxes” (2010) 21:1 CJWL 169.

43. See eg Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis, 2017) at 188-190 (§§5.35-5.41).

44. Newman, *supra* note 1 at 196.

45. Chalifour, “Jurisdictional Wrangling,” *supra* note 41.

46. Newman, *supra* note 1 at 189.

characterization is unfair and inaccurate. The only support Newman provides for it is found in a footnote:

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.⁴⁷

This passage 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 regulatory capture by industry is the root problem underlying Canadian environmental law and policy.⁴⁸ This

47. *Ibid*, 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 [MacLean, “Striking at the Root Problem”]; and Jason MacLean, “Paris and Pipelines? Canada’s Climate Policy Puzzle” (2018) 32:1 J Envtl L & Prac 47 [MacLean, “Paris and Pipelines”].

48. MacLean, “Striking at the Root Problem,” *supra* note 47; 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.

proposition follows a long line of theoretical and empirical literature,⁴⁹ and he supports it with evidence.⁵⁰

In the second article impugned by Newman, Professor MacLean argues that Canada's inconsistent embrace of both the Paris Agreement and continued fossil fuel development can be explained by viewing Canada as a "carbon democracy."⁵¹ This argument is tailored to the conditions of advanced industrial democracies, grounded in scholarly literature⁵² and supported by evidence.⁵³ 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

49. See eg George Stigler, "The Theory of Economic Regulation" (1971) 2:1 Bell J Economics & Management Sci 3; Michael E Levine & Jennifer L Forrence, "Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis" (1990) 6 JL Economics & Organization 167; Ian Ayres & John Braithwaite, "Tripartism: Regulatory Capture and Empowerment" (1991) 16:3 L & Soc Inquiry 435; Jean-Jacques Laffont & Jean Tirole, "The Politics of Government Decision-Making: A Theory of Regulatory Capture" (1991) 106:4 QJ Economics 1089; David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 251-256; Ernesto Dal Bó, "Regulatory Capture: A Review" (2006) 22:2 Oxford Rev Economic Policy 203; Daniel Carpenter & David A Moss, eds, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (New York: Cambridge University Press, 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 Environmental Politics 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) 21:1 Stan Envtl LJ 81; Mark S Winfield, "An Unimaginative People: Instrument Choice in Canadian Law and Policy" (2008) 71:1 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 Environmental Practice 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 202-207; Bruce Campbell, "Preconditions, Regulatory Failure, and Corporate Negligence Behind the Lac-Mégantic Disaster" (2018) 48 RGD 95.

50. MacLean, "Striking at the Root Problem," *supra* note 47 at 121-124.

51. MacLean, "Paris and Pipelines," *supra* note 47.

52. 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 Economy & Society 399; Timothy Mitchell, *Carbon Democracy: Political Power in the Age of Oil* (New York: Verso, 2011).

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

communicate the tangible co-benefits of addressing climate change—including economic development and enhanced community resilience.⁵⁴

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.⁵⁵

MacLean 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.”⁵⁶ “Accordingly,” he concludes, “sustainability advocates and scholars must do more to show how a post-carbon democracy can work in practice.”⁵⁷ MacLean’s argument is consistent with widely accepted approaches to the mobilization of scholarly knowledge.⁵⁸ It is unfair to portray it as undemocratic and embodying “strong-form elitism.”⁵⁹

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].”⁶⁰ 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.⁶¹

54. MacLean, “Paris and Pipelines,” *supra* note 47 at 72.

55. *Ibid* at 73.

56. *Ibid* at 73-74.

57. *Ibid* at 74.

58. See eg Social Sciences and Humanities Research Council of Canada, “Guidelines for Effective Knowledge Mobilization” (last modified 17 June 2019), online: *Government of Canada* <https://www.sshrc-crsh.gc.ca/funding-financement/policies-politiques/knowledge_mobilisation-mobilisation_des_connaissances-eng.aspx> [<https://perma.cc/LH6D-292T>].

59. Newman, *supra* note 1 at 189, n 12.

60. *Ibid* at 187.

61. Nathalie Chalifour & 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/>> [<https://perma.cc/47XE-WHWT>].

These 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,"⁶² "environmental advocates like Chalifour and MacLean,"⁶³ "authors like MacLean,"⁶⁴ 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."⁶⁵ 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.

2. *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."⁶⁶

There are two problems with this claim: it exaggerates the disagreement amongst the judges and it compares apples and oranges. 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."⁶⁷ The three-judge majority of the Saskatchewan Court of Appeal characterized it as "establishing minimum national standards of price stringency for GHG emissions,"⁶⁸ while the concurring judge in

62. Newman, *supra* note 1 at 188.

63. *Ibid* at 189.

64. *Ibid* at 189, n 12.

65. *Ibid* at 190.

66. *Ibid* at 188.

67. *Ontario Reference*, *supra* note 3 at para 114, Strathy CJO.

68. *Saskatchewan Reference*, *supra* note 3 at para 158, Richards CJS.

Ontario characterized it as “establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions.”⁶⁹ 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.”⁷⁰

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 amount to the same thing: setting minimum national GHG pricing 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 compared to the wide range of characterizations proffered by parties and interveners. Moreover, all seven 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.⁷¹

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 fact that cases before appellate courts are heard by multiple judges

69. *Ontario Reference*, *supra* note 3 at para 114, Hoy ACJO.

70. Newman, *supra* note 1 at 188, n 6.

71. *Ibid* at 198-199.

means that the number of paths can 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 that it presents 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.”⁷² He is right that the courts have construed this branch narrowly and have rarely invoked it to uphold federal legislation. He may 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.”⁷³ 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*,⁷⁴ and that the judges in that case created it “out of whole cloth” merely because they “thought they needed it.”⁷⁵ 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 the national concern branch,⁷⁶ other than to allege that some unidentified scholars consider them to fall under the “gap” branch.⁷⁷

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

72. *Ibid* at 201.

73. *Ibid* at 196, n 47.

74. *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161.

75. Newman, *supra* note 1 at 196, n 47 and accompanying text.

76. See eg Chalifour, “Making Federalism Work,” *supra* note 41 at 179, citing *Johannesson v West St Paul (Rural Municipality)*, [1952] 1 SCR 292, [1951] 4 DLR 609 (aeronautics); *Munro v National Capital Commission*, [1966] SCR 663, 57 DLR (2d) 753 (National Capital Region).

77. Newman, *supra* note 1 at 196, n 47.

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;⁷⁸ and cases in which courts have said the branch exists.⁷⁹ These cases date back at least to 1946,⁸⁰ 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,”⁸¹ 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 1988.⁸² 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.”⁸³

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.

Conclusion

Professor Newman’s article is not an egregious case, but it crosses a line that separates distortion and disparagement from constructive scholarly debate. The problems we have documented 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.

A rigorous peer review process would normally catch most problems like the ones we have identified with this article.⁸⁴ Journal editors may

78. See eg *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327, 107 DLR (4th) 457; *Pronto Uranium Mines Ltd v Ontario (Labour Relations Board)*, [1956] OR 862, 5 DLR (2d) 342 (atomic energy).

79. Examples from the Supreme Court include *Reference Re Anti-Inflation Act, 1975*, [1976] 2 SCR 373, 68 DLR (3d) 452; *Labatt Breweries v Canada (AG)*, [1980] 1 SCR 914, 110 DLR (3d) 594; *Schneider v British Columbia*, [1982] 2 SCR 112, 139 DLR (3d) 417; *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311, 111 DLR (4th) 385; *RJR-MacDonald Inc v Canada*, [1995] 3 SCR 199, 127 DLR (4th) 1; *R v Hydro-Quebec*, [1997] 3 SCR 213, 151 DLR (4th) 32; *R v Malmö-Levine*, [2003] 3 SCR 571, 233 DLR (4th) 415.

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

81. Newman, *supra* note 1 at 196, n 47 and 201.

82. Régimbald & Newman, *supra* note 43 at 232-238 (§§6.15-6.30).

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

84. In December 2019 and again in June and July 2020, we asked the Saskatchewan Law Review if

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 approximately one month after submission, a very short time to complete a thorough peer review. Journals should 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 those debates. 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.

