

Natural Resources**Courts getting serious about climate**By **Dianne Saxe**

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(August 24, 2020, 2:10 PM EDT) -- A decade ago, when the climate crisis was perceived to threaten only polar bears, future generations and poor countries far away, judges refused to get involved. They saw climate action as a matter of public policy, the exclusive jurisdiction of elected governments. After all, the appropriate role of courts is to interpret and apply law, not to make policy or to allocate budgets.

Today, as the climate crisis grows in urgency and power, it increasingly affects the lives, health, well-being and prospects of people alive in wealthy countries. Many people understand that, for today's children, the best case now is widespread death and suffering while the worst case is humanity on the brink of extinction during their lifetimes.

Financial markets are becoming alarmed, with trillions of dollars already divested from fossil fuels. Meanwhile, many governments have made climate commitments that they only pretend to keep.

In this context, it is not surprising to see courts beginning to recognize climate risks as questions of law.

There are more than 1,000 climate related lawsuits around the world. Some have successfully blocked construction of fossil fuel infrastructure. Others are directed at companies or investors who keep funding fossil fuels and hiding climate risks. For example, a trial will begin in November against the Australia Retail Employees Superannuation Trust, alleging that the pension fund breaks two laws by failing to disclose climate risks to its investments.

Yet other lawsuits are underway by local governments seeking billions of dollars in damages from the carbon majors, the fossil fuel giants whose products cause much of the world's climate damage.

All of these lawsuits matter. But the most important are those that seek to compel government action, because of the overwhelming importance of governments in directing our collective response to the climate crisis. On top of hundreds of cases in the United States, climate cases against other governments include: GHG emissions reduction and trading (121 cases); access to information (12 cases); environmental assessment and permitting (164 cases); human rights (36 cases); and protecting biodiversity and ecosystems (12 cases) (see "Non-U.S. Climate Change Litigation").

Two such cases are pending in Canada (*La Rose v. Her Majesty the Queen* and *Mathur v. Ontario*), both brought by young Canadians who have already suffered from climate damage and rightly fear much more ahead. In both cases, government lawyers are trying to throw the case out of court without a trial.

Will our courts give these young plaintiffs a fair trial? Or toss them out unheard?

Some judges, notably in the U.S., are still saying "not our problem." But courts around the world increasingly recognize that judges can and should decide some climate law cases without unfairly trampling on the proper role of governments. This includes decisions from the High Court in New Zealand, the High Court of Lahore, Pakistan and the Supreme Court of Justice of Colombia.

A Quebec Superior Court ruled that a youth class action (*Environnement Jeunesse c. Procureur*

général du Canada [2019] J.Q. no. 5940) if properly defined, would be properly before the court to claim that Canada's inaction on climate change breaches their Charter rights. The case was dismissed because the class of plaintiffs was not properly defined, but on the central issue, whether climate change was justiciable, the court would have let it proceed.

The tide turned in December 2019, with a powerful and enormously influential decision from the Dutch Supreme Court In *Urgenda et al. v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*, the court ordered the Dutch government to protect its citizens by keeping its commitment to reduce GHG emissions to 25 per cent below 1990 levels by 2020.

The government admitted the commitment, but had ducked the politically difficult steps to achieve it. Only after the court decision did the government order 75 per cent cuts to three new coal-fired plants, put limits on livestock and provide incentives to homeowners.

Now the Irish Supreme Court has added another strong precedent. On July 31, it ordered the Irish government to comply with Ireland's climate law. The law requires the government, with significant national consultation, to adopt a transparent, 30-year plan that "specif[ies]" how the Irish economy will become "low carbon, climate resilient, and environmentally sustainable" by 2050.

The government had pretended to comply with a vague, five-year plan to study options while allowing emissions to rise. The court quashed this as grossly inadequate, stating: "[T]he Plan falls a long way short of the sort of specificity which the statute requires."

Thus, courts have an essential and proper role when governments make climate commitments but only pretend to keep them. That is good news for climate litigators around the world, including the courageous youth plaintiffs in Canada.

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