

# Climate litigation comes for directors

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On February 9, 2023, ClientEarth, an environmental NGO headquartered in London, [filed a derivative action](#) in the High Court of England and Wales against the board of directors of Shell plc (Shell) alleging that Shell's climate strategy is unreasonable — a global first.

## Action challenges Shell's climate strategy

A year ago, ClientEarth sent a pre-action letter to Shell, notifying the company of its pending claim against the company's board. It is now seeking the permission of the High Court of England and Wales to bring its claim. ClientEarth alleges that Shell's directors breached their duty under the U.K. *Companies Act* to promote the success of Shell for the benefit of its members as a whole and to act with reasonable care, skill and diligence by allegedly failing to adopt and implement a climate strategy that is consistent with the Paris Agreement.

Shell denies the allegations, stating that its climate strategy (approved by 80% of its shareholders) includes a net-zero emissions plan with a 2050 target that is consistent with the Paris Agreement's goal of limiting global warming to 1.5°C.

ClientEarth brought the action as a derivative action in its capacity as a (token) shareholder of Shell. However, the lawsuit is also being supported by a number of institutional investors with over 12 million shares in the company, including U.K. pension funds Nest and London CIV, Swedish national pension fund AP3, French asset manager Sanso IS, Belgian asset manager Degroof Petercam Asset Management (DPAM) and Danish asset manager Danske Bank Asset Management, as well as pension funds Danica Pension and AP Pension.

In the last two years, Shell has faced several climate-related lawsuits from around the world. In May 2021, the Hague District Court ordered Shell to cut its greenhouse gas emissions from its oil and gas products by 45% by 2030, relative to its 2019 levels. Earlier this month, another non-profit group lodged a greenwashing complaint against Shell with the U.S. Securities and Exchange Commission, alleging that the company had overstated how much it is spending on renewable energy. In 2021, Greenpeace Canada submitted a complaint against Shell to the Competition Bureau of Canada alleging that the company's "drive carbon neutral" products claim makes false and/or misleading representations to the public in contravention of the federal *Competition Act*.

However, this is the first lawsuit against any company where its directors are being personally sued based on a company's climate strategy.

## Climate litigation in Canada

Corporate climate litigation is still in its infancy in Canada. Although climate lawsuits are not new in Canada, most lawsuits to date have targeted governments and governmental actors. It remains to be seen whether any copycat suits along the lines of ClientEarth's case will be commenced in Canada. Canada's corporate statutes require Canadian directors to act honestly and in good faith with a view to the best interests of the corporation and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances — similar duties to the ones relied on by ClientEarth in its claim against Shell. The Supreme Court of Canada has stated that when determining what is in the best interests of a corporation, Canadian directors may consider, among other things, the environment, something that has now been expressly added to the *Canada Business Corporations Act*.

Also in February, the federal government announced its intent to modernize the *Canadian Environmental Protection Act, 1999* and recognize a right to a healthy environment, as has been recognized recently on the international stage. If passed, query whether the recognition of such a right will play any role in corporate climate litigation going forward. Osler continues to stay abreast of these developments and is ready to advise clients operating in this space.

It is too early to tell what impact this case will have on Canadian businesses or businesses operating in Canada. However, given the potential precedent-setting implications of the claim, the lawsuit should be followed closely as it works its way through the court.