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Overview of the legal rules on the extent to which ESG factors may/must be taken into account by DB and DC pension plan fiduciaries/trustees in Canada, the UK, and the US[1]

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Part I: Preliminary

A. Introduction

This summary paper provides an overview, as at May 1, 2026, of the legal rules on the extent to which ESG factors may/must be taken into account by DB and DC pension plan fiduciaries/trustees in Canada, the UK and the US. The information in this document is merely a high level summary and does not constitute legal advice.

B. Types of plans covered

1. In the interests of relative simplicity, the pension plans considered in this summary paper have the following attributes:

- unless otherwise stated, they are pension plans established under minimum pension standards legislation generally applicable to pension plans in the jurisdiction in question. In other words they are not established by specific state, provincial, federal or national legislation for a particular group of workers.
- the pension plans are all funded. In other words, they are not direct pension promise (or book reserve) pension plans.
- the pension plans are not set up as insurance or annuity contracts under a contract based pension plan provided by an insurance company.

2. In addition, the pension plans considered in this summary paper are all structured to benefit from tax privileges in the jurisdiction in question whereby (subject certain limits):

2.1 employer and employee contributions are tax deductible, and

2.2 earnings and gains on pension plan assets accumulate free of tax.

C. Explanation of some differences of terminology between jurisdictions on plan fiduciaries and trustees and schemes and plans

To draw out some points of differences in terminology, in this summary paper:

1. Plan fiduciaries and trustees

1.1 for pension plans established in Canada or the US, the person referred to as the "**plan fiduciary**" is the person or persons who have the power to decide on how the pension plan assets are invested (and so are the persons who may or may not have a duty to take account of ESG factors).

1.2 for pension plans established in the UK, the pension plans covered by this summary paper are, with the exception of the Local Government Pension Scheme, all established under irrevocable trusts with the plan assets being held by the trustee (or trustees) of the trust. It is the trustee (or trustees) who have the power to decide how the plan assets are to be invested (and so are the persons who may or may not have a duty to take account of ESG factors). In the Local Government Pension Scheme, in summary, there are a number of different asset pools (c. 89), held separately from other local authority assets, to be used by the administering authority for the statutory purpose of providing retirement benefits for plan members. It is the administering authority that determines how those asset pools are invested.

Note 1: The common form of trustee structure in private sector UK pension plan is for there to be a sole trustee which is a company with its sole purpose being to act as trustee of the pension plan in question. In that case, the trustee would act through its board of directors.

Note 2: Certain features of the Local Government Pension Scheme are included by way of a contrast with private sector UK pension plans, because of the way the Local Government Pension Scheme featured in the *Palestine* case[2] and to help put the UK Supreme Court's obiter dicta on the extent to which non-financial factors can be taken into account when investing Local Government Pension Scheme assets is applicable to private sector UK pension plans.

2. Pension plans and pension schemes

2.1 In the UK, pension plans are referred to as pension schemes. UK legislation relating to pension plans will usually have the word "Pension Schemes" in its title and the defined terms in UK legislation all refer to a "scheme" and not to a "plan".

2.2 In other words, the term "scheme" in the UK does not have the negative connotation that it has in North America.

3. The cost of investment underperformance

3.1 A point to draw out is that both the employer and plan participants have an interest in the successful investment of pension plan assets whether the benefit design is DB or DC.

3.2 In DB plans, positive financial performance results in greater financial security for plan participants and lower cost for employers, particularly where the employer is responsible for funding shortfalls.

[2] *R (on the application of Palestine Solidarity Campaign Ltd and another) (Appellants) v Secretary of State for Housing, Communities and Local Government) (Respondent) [2020] UKSC 16, judgment given on April 29, 2020* https://supremecourt.uk/uploads/R_on_the_application_of_Palestine_Solidarity_Campaign_Ltd_v_SSCLG_445834ab92.pdf .

3.3 In DC plans, successful investment performance means greater retirement income for plan participants and less pressure on employers to improve contribution rates or top up pension accumulations to encourage a transition to retirement; particularly in jurisdictions that do not have "at-will employment" or rules that prevent discrimination at any age.

C. Canada: some additional context and background

1. Tax qualified workplace pension plans in Canada are subject to federal or provincial minimum pension standards legislation, depending on the nature of the workplace as either a federal undertaking (which includes employment in the three territories) or a provincial undertaking, as determined by Canadian constitutional law. As of January 1, 2024 there were 16,259 registered pension plans covering 7,220,609 active members.

2. Canadian pension minimum standards legislation as it relates to investment of pension assets is fairly uniform across all jurisdictions in which it is in place.[3] Such legislation requires pension funds to be managed prudently with certain basic quantitative and qualitative rules applicable to investments, as well as to have a written investment policy (in most jurisdictions called a "Statement of Investment Policies and Procedures").

3. Most provincial pension minimum standards legislation has incorporated by reference the investment rules applicable to federally registered pension plans established under Schedule III of The Pension Benefits Standards Regulations, 1985 (made pursuant to the federal *Pension Benefits Standards Act, 1985*). Those that have not have legislated rules that are in material respects the same.

4. There is broad consensus that consideration of ESG factors for economic purposes – financial risk mitigation or financial opportunity – are within the scope of duties and responsibilities of the plan administrator[4] and therefore need no specific legislated permission to apply. In 2022, the Canadian Association of Pension Supervisory Authorities (CAPSA), an association of Canada's ten pension minimum standards regulators and the Canada Revenue Agency (equivalent to HMRC in the UK or the IRS in the US) validated this position by issuing a non-binding guideline in which it indicated: "Administrators should therefore consider whether any particular ESG factors are relevant to investment performance and take appropriate action based on that determination. Using ESG factors to provide financial insight is consistent with an administrator's fiduciary duty. Conversely, ignoring or failing to consider ESG factors that may be potentially material to the fund's financial performance could be a breach of fiduciary duty."[5]

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[3] No pension minimum standards legislation is in force in Canada's smallest of ten provinces by population, Prince Edward Island.

[4] In Canada, the "administrator" is the ultimate fiduciary entity with overall responsibility for administering the plan and investing its assets. It can be considered a "plan fiduciary" as can many of its delegates and agents.

[5] CAPSA, "CAPSA Guideline: Environmental, Social and Governance Considerations in Pension Plan Management" (June 9, 2022), online: https://www.capsa-acor.org/Documents/View/1914.

5. At the time of writing, only two jurisdictions, the provinces of Manitoba and Ontario, have specific rules relating to the use of ESG factors. The federal government has also announced (originally in its 2022 Budget but subsequently reiterated by the Department of Finance) an intention to amend the *Pension Benefits Standards Act, 1985* (Canada) to require administrators to disclose ESG considerations in pension fund investments, including climate-related risks.

6. **Manitoba:**

6.1 In 2004, Manitoba's pension minimum standards legislation was amended to permit "non-financial factors" (presumably including non-financial ESG factors, although this is ultimately unclear) to be considered as long as the administrator has otherwise complied with its statutory fiduciary standards of care. Subsection 28.1(2.2) of the *Pension Benefits Act* (Manitoba) provides:

Unless a pension plan otherwise provides, an administrator who uses a non-financial criterion to formulate an investment policy or to make an investment decision does not thereby commit a breach of trust or contravene this Act if, in formulating the policy or making the decision, he or she has complied with subsections (2) and (2.1).

6.2 In the author's view, Manitoba's amendments must be read as the legislature's position that an administrator may at least take into account *some* non-financial criteria in *some* circumstances without contravening its fiduciary duty, for if Manitoba legislature's position had been that the fiduciary duty permitted consideration *only* of financial factors and no other non-financial factors, the amendment would have been moot.

6.3 Neither the courts nor the Manitoba pension standards regulator has further interpreted this provision in any subsequent published decision or policy. Of course, to the extent that ESG considerations are framed as a "financial" consideration, they would not fall within the legislation's term "non-financial" and thus not necessitate the additional legislative permission.

7. Ontario:

7.1 In 2016, Ontario introduced a disclosure rule which requires the administrator to indicate in the plan's legislatively required Statement of Investment Policies and Procedures (and in periodic member statements) whether, and, if so, how, ESG factors are taken into account in developing investment policy (see the General Regulation made pursuant to the *Pension Benefits Act* (Ontario), at subsections 40(1)(v), 40.1(1)(s), 40.2(1)(r) and 78(3)). Subsection 78(3) provides as follows:

the statement of investment policies and procedures shall include information as to whether environmental, social and governance factors are incorporated into the plan's investment policies and procedures and, if so, how those factors are incorporated.

7.2 In the author's view, experience with Ontario's disclosure rules has dampened concerns that taking such factors into account may not be consistent with fiduciary duty, again partly on the basis that, if the Ontario government had viewed the taking into account of such factors as *prima facie* a contravention of fiduciary duty, it would have been unlikely to have promulgated regulations requiring disclosure when they are so considered.

D. The UK: some additional context and background

1. The IORP II Directive Article 19 and UK post Brexit retained/assimilated law

1.1 The assets of private sector funded pension plans set up in Member States of the European Union are required to be invested in line with Article 19 of the Directive 2016/2341 (the "**IORP II Directive**"). Article 19(1) sets out the main rules:

"1. Member States shall require IORPs registered or authorised in their territories to invest in accordance with the 'prudent person' rule and in particular in accordance with the following rules:

(a) the assets shall be invested in the best long-term interests of members and beneficiaries as a whole. In the case of a potential conflict of interest, an IORP, or the entity which manages its portfolio, shall ensure that the investment is made in the sole interest of members and beneficiaries;

(b) within the prudent person rule, Member States shall allow IORPs to take into account the potential long-term impact of investment decisions on environmental, social, and governance factors;

(c) the assets shall be invested in such a manner as to ensure the security, quality, liquidity and profitability of the portfolio as a whole;

(d) the assets shall be predominantly invested on regulated markets. Investment in assets which are not admitted to trading on a regulated financial market must in any event be kept to prudent levels;

(e) investment in derivative instruments shall be possible insofar as such instruments contribute to a reduction in investment risks or facilitate efficient portfolio management. They must be valued on a prudent basis, taking into account the underlying asset, and included in the valuation of an IORP's assets. IORPs shall also avoid excessive risk exposure to a single counterparty and to other derivative operations;

(f) the assets shall be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings and accumulations of risk in the portfolio as a whole.

Investments in assets issued by the same issuer or by issuers belonging to the same group shall not expose an IORP to excessive risk concentration;

(g) investment in the sponsoring undertaking shall be no more than 5 % of the portfolio as a whole and, when the sponsoring undertaking belongs to a group, investment in the undertakings belonging to the same group as the sponsoring undertaking shall not be more than 10 % of the portfolio.

Where an IORP is sponsored by a number of undertakings, investment in those sponsoring undertakings shall be made prudently, taking into account the need for proper diversification.

Member States may decide not to apply the requirements referred to in points (f) and (g) to investment in government bonds."

1.2 Article 19(1)(b) permits ESG factors to be taken into account within the prudent person rule.

1.3 Under EU law a Directive is required to be transposed into the domestic law of each EU Member State and to have the same meaning under the laws of each Member State with the European Court of Justice being the final arbiter[6].

1.4 The 'prudent person' rule is not defined further. The UK decided that no specific direct transposition was needed. The prudent person rule applied to investing trust assets, UK private sector funded pension schemes are set up under trust and the Pensions Act 1995, section 33 invalidates exclusion or exemption provisions that dilute the requirements of that common law rule.

1.5 The UK left the European Union on January 31, 2020. However, in general, EU derived law prior to February 1, 2020, with some exceptions, continues in full force as part of UK law by virtue of the European Union (Withdrawal) Act 2018 (as amended) unless and until changed by Parliament or by reinterpretation by the UK courts[7].

[6] Case C-280/04 *Jyske Finans A/S v Skatteministeriet* [2005] EU:C:2005:753, a decision of the ECJ on December 8, 2005, para 31 https://curia.europa.eu/juris/document/document.jsf?text=&docid=56542&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5322681 and more recently in Case C-235/19 *United Biscuits (Pension Trustees) Limited and United Biscuits Pension Investments Limited v Commissioners for Her Majesty's Revenue and Customs* [2020] EU:C:2020:801, a decision of the ECJ on October 8, 2020, para 46 https://curia.europa.eu/juris/document/document.jsf;jsessionid=F7B2A9F534BED37ACF9973B1F464B7D3?text=&docid=232151&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5319366 .

[7] For further discussions see EU Pensions Law: A Commentary and Practitioner's Guide, Editors: Philip Bennett and Hans van Merton, Chapter 3 https://www.e-elgar.com/shop/gbp/eu-pensions-law-9781802200218.html?srsltid=AfmBOoql6BVZ3hiwCzo30cWARurYiiTNa4wfIqQhc2AhfhnCQ5nixDPp.

2. The prudent person rule and pension scheme asset investing

2.1 To provide context, as at September 30, 2025, the assets of private sector funded schemes were £1,662 billion[8] and the number of members (active, deferred and pensioner) was 44.80 million[9].

2.2 The key case on the application of the prudent person rule to investing the assets of a pension scheme held in trust to provide retirement benefits is *Cowan v Scargill[10].* In brief, with an extremely limited carve out that case decided that only financial factors could be taken into account.

2.3 The Law Commission (whose views are persuasive but not binding) proposed a less strict two stage test as to when non-financial factors could be taken into account: (1) there was no risk of significant financial detriment and (2) members (active, deferred and pensioners) were in broad alignment with taking account of the non-financial factor in question.

2.4 The Law Commission's views appeared to obtain judicial approval in the 3:2 decision of the UK Supreme Court in the *Palestine* case here but with a different formulation of the the first test as no significant risk of financial detriment. However, this approval, in a 3:2 decision, was very much obiter dicta. The context the *Palestine* case was about the lawfulness of a the following prohibition :

"However, the Government has made clear that using pension policies to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries are inappropriate, other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government."

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[8] One billion is 1,000,000,000. £1= US$ 1.36 and Can $1.85 at May 5, 2026.
[9] ONS Funded occupational pension schemes in the UK: April to September 2025 released April 2, 2026 – see spreadsheet linked to this survey: https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/fundedoccupationalpensionschemesintheuk/apriltoseptember2025#data-on-funded-occupational-pension-schemes .
[10] 1985] Ch 270 .

in binding statutory guidance here (updated to remove that prohibition from the Secretary of State on disinvesting in companies as it applied to companies which were supplying arms (or components for that went into arms manufacture) to Israel.

2.5 Apart from the boycott passage which was stuck down as ultra vires, the the guidance itself distinguished between:

- **Test 1: investments other than social investments:** *"Although schemes should make the pursuit of a financial return their predominant concern, they may also take purely non-financial considerations into account (1) provided that doing so would not involve significant risk of financial detriment to the scheme (2)and where they have good reason to think that scheme members would support their decision."*
- **Test 2: social investments:** *"Investments that deliver social impact as well as a financial return are often described as "social investments" . In some cases, the social impact is simply in addition to the financial return; for these investments the positive social impact will always be compatible with the prudent approach. In other cases, some part of the financial return may be forgone in order to generate the social impact. These investments will also be compatible with the prudent approach (1) providing administering authorities have good reason to think scheme members share the concern for social impact, and (2) there is no risk of significant financial detriment to the fund."*

[text in red added for ease of communication along with the yellow and blue highlighting]

2.6 However, the views on the Law Commission and the obiter dicta of the UK Supreme Court are ones that many UK pension lawyers consider to be unsafe to rely on; see for example the views of the UK Association of Pension Lawyers Investment and DC Investment sub-committee here .

3. Purpose and powers

The trust deed for a UK private sector pension plan set up under trust will specify the purpose of the trust (to provide retirement benefits) and set out the scope of the power of investment.

For registered (ie tax qualified) pension plans tax exemption on investment income and gains is given on investments held for the purposes of the "registered pension scheme"[11].

[11] Finance Act 2004 sections 186 and 187.

Trustees must exercise their investment powers for the purpose for which they are conferred and act within the scope of their investment powers (more detail in **Part II** below). That said, Section 34 of the Pensions Act confers overriding wide powers of investments subject to any restriction in the trust deed (other than any restriction on investment by reference to the consent of the employer- Section 35 of the Pensions Act 1995).

4. Statutory duty imposed on pension scheme trustees to limit activities to "retirement benefit activities"

In additional Section 255 of the Pensions Act 2004 imposes a statutory duty on pension scheme trustees to limit their activities to "retirement benefit activities".

5. Inference from requirement to disclose whether non-financial factors are taken into account in statement of investment principles

There is the hint of a counter-argument to support one or other of the tests outlined in **2.4** above. The Occupational Pension Schemes (Investment) Regulations 2005, regulation 2, as amended, requires the scheme's statement of investment principles (the "**SIP**") to specify the extent, if at all, to which non-financial matters are taken into account in the SIP. Non -financial matters are defined in regulation 2 as :

""non-financial matters" means the views of the members and beneficiaries including (but not limited to) their ethical views and their views in relation to social and environmental impact and present and future quality of life of the members and beneficiaries of the trust scheme;"

However, the fact that the Government has assumed, when passing secondary legislation that the Law Commission test is the correct test does not make the Law Commission test a correct statement of the law. The correct process for making it good law has not been followed. Parliament has not legislated for it and, in terms of judge made law, the validity of the Law Commission test was not relevant to whether the statutory guidance to the Local Government Pension Scheme was ultra vires in the *Palestine* case.

E. The US: some additional context and background

1. Introduction

There are two major issues facing retirement plans in the US right now: changes to ESG rules (from the Obama and Biden Administrations to the Trump Administrations) and so-called "alternative investment" rule and its accompanying safe harbour would radically expand the investment options available for consideration by plan fiduciaries.

2. Permissive "tiebreaker" or "pecuniary only" and non-financial ESG factors debate

2.1 The basic change in the US is from the permissive "tiebreaker" standard of the Obama and Biden administrations to the current "pecuniary only" standard. As of early 2026, the formal Biden-era rule remains on the books; however, the DOL has stopped defending it and has announced new rule making expected to restore the "pecuniary only" framework. The House passed legislation (H.R. 2988) that would write the "pecuniary only" standard directly into ERISA itself, although the future of that legislation is uncertain. (In October of 2025, the Restoring Integrity in Fiduciary Duty Act (S. 3086) was introduced and would, if passed, require 401(k) and similar plans to consider only pecuniary factors when making investment decisions).

2.2 During the Obama Administration, the DOL issued Interpretive Bulletin 2015-01 which clarified that ESG factors could be considered as part of the risk/return analysis. Specifically, 2015-01 revived the "tiebreaker" doctrine which states that after appropriate due diligence, if a fiduciary concludes that two or more investment alternatives are economically indistinguishable in terms of expected risk and return, the fiduciary may permissibly select among them based on collateral benefits including ESG considerations without breaching the duty of loyalty.

2.3 Under the first Trump Administration, the DOL directed fiduciaries to focus only "on pecuniary (economic) factors" which is thought to have created a "chilling effect" on ESG investing. The regulation said that pension plans could not subordinate the interests of participants and the retirement income to non-pecuniary objectives. The final version of this rule was issued on December 20, 2020.

2.4 In March of 2021, the Biden Administration announced it would not enforce the Trump standard and instead returned to the "tiebreaker" standard. Fiduciaries were allowed to consider ESG factors when relevant to risk and return and as a "tiebreaker" if investments were economically equivalent. The final rule (issued on December 1, 2022, and effective on January 30, 2023) retained the core principle that an ERISA fiduciary's duties of prudence and loyalty require them to focus on relevant risk and return factors and avoid subordinating the interests of participants and beneficiaries to objectives unrelated to plan benefits.

2.5 During the second Trump Administration, the DOL informed the federal courts (specifically the U.S. Court of Appeals for the Fifth Circuit) that it would no longer defend the Biden-era rule and would instead undertake new rule making. A new rule is expected in May 2026, and it is anticipated that it will codify a "pecuniary only" standard similar to the rule in place at the end of Trump's first term.

2.6 For ERISA fiduciaries the through line is that risk/return remains paramount; the only changes are the comfort level associated with the articulation of ESG considerations and non-pecuniary factors. The core duties of loyalty and prudence remain.

2.7 The divide with respect to ESG investments in retirement plans in the US is a core debate about ESG itself:

- are ESG factors ideologically driven, unmoored from wealth creation and therefore inconsistent with fiduciary obligations?
- Or are ESG factors critical to long term wealth creation because they are responsive to investor concerns and material to performance?

2.7 This ongoing debate which shows no signs of resolving in the US at the moment and has led to a deeply divided legal landscape that is unquestionably challenging for fiduciaries to navigate. For example, state ESG policies are arguably just as important as federal policy in this area due to the huge size of public pension and other state-controlled assets.

3. The alternative investments: crypto and other alternative investments- the prudent person's key to a prosperous retirement or fool's gold?

3.1 The ESG adjacent landscape is similarly complicated by political considerations. While not strictly ESG focused, the proposed new rules and accompanying safe harbour are expected to have a huge impact on the way in which fiduciaries evaluate the investment options made available to plan participants.

3.2 During the summer of 2025, President Trump issued Executive Order 14330 encouraging plans to add private equity and other alternative investment options to 401(k) plans. The DOL was tasked with proposing regulations on alternative investments in DC plans and, on March 31, 2026, it proposed a rule that would expand fiduciary discretion to select designated investment alternatives for participant directed DC plans including 401(k)s.

3.3 The DOL rule is purportedly focused on three principles that inform the proposed regulation: (1) process not outcomes guide prudence for a fiduciary; (2) fiduciaries have broad discretion as ERISA does not mandate specific types of investments; and (3) courts should defer to fiduciaries who follow a prudent process. The key innovation here is a proposed process-based safe harbour which, if followed will entitle a fiduciary to a presumption of prudence.

3.4 There are six factors (which if followed) would permit a fiduciary to assert that its judgment was presumptively reasonable. These are:

1. Performance (fiduciary is not required to select the highest return option over short periods of time)
2. Fees (no requirement to select the lowest fee investment)
3. Liquidity (plan need not select fully liquid investments)
4. Valuation (alternative investments must be capable of timely and accurate valuation)
5. Performance benchmarking (new investments are not disfavored simply because they lack long performance histories)
6. Complexity (complexity alone does not make an investment imprudent. Fiduciary or other professionals must understand the investment)

3.5 Some commentators have noted that these are *process* based criteria which would control access to the safe harbour. Additionally, it is unclear how much actual legal protection would be afforded to plan sponsors even if every item on this check list had been addressed.

3.6 Robert Shiller, Alicia Munnell and others (especially in academic circles) have expressed strong skepticism about the appropriateness of permitting fiduciaries to include private and other “alternative” investments as options for 401(k) and similar plans. Shiller (now retired Nobel Prize winner from Yale University) has described investments in crypto as “gambling” and not appropriate for retirement investing. Alicia Munnell of the Center for Retirement Research at Boston College has repeatedly written about her opposition to Bitcoin and other crypto options as well as private equity in retirement plans and described this development as “a terrible idea.” She has quoted Warren Buffet who once said he would not purchase all the bitcoin in the world “for $25.00”.

3.7 In contrast, there is no shortage of financial services and insurance industry consultants who have publicly supported the new alternative investments rule. These include: The Managed Funds Association, The Investment Company Institute, Empower and BlackRock all or whom have been publicly supportive of the proposed new rule.

Part II: A comparison across jurisdictions of legal requirements and constrains on plan fiduciaries and trustees investing plan assets

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
A. Legal form of pension plan			
1. What is the legal form of the pension plan in your jurisdiction?	1.1 Many forms are possible. Outside of unique statutorily-created plans, the two most common are through a trust or an insurance contract. All forms result in a trust-like structure and a fiduciary relationship in which one party (the "administrator") is required to look after the best interest of plan members and beneficiaries. 1.2 There will be a settlor[12] (sponsor) that establishes the plan. The settlor may be a trade union, industry association, employer, or, in some jurisdictions, joint associations or similar organisations respectively representing employee and employer constituencies. The settlor is permitted to act in its own self-interests, including its own financial interests, and usually retains ongoing rights to design, amend, or discontinue the plan, as well as to appoint the "administrator" (the plan fiduciary), which may be itself, except: • In Quebec and Manitoba, where a committee must generally be appointed as the administrator, • In most jurisdictions, a multi-employer plan must be governed by a board of trustees at least 50% of whom are appointed to represent members,	1.1 Irrevocable trust with the terms of the trust set out in the document constituting the trust (usually called its trust deed and rules). However, in the case of the Local Government Pension Scheme, the scheme is established by legislation with a series of separate asset pools where the assets are to be used for the purpose specified in the legislation (to provide, in brief, retirement benefits). For all practical purposes, the managers of these separate asset pools can be viewed as equivalent to the trustees of a UK private sector pension scheme set up under irrevocable trusts. 1.2 The plan sponsor (often referred to as the principal employer), at inception of the trust, is the settlor and has power, at that stage, to design the terms of the plan, including the terms of its trust deed and rules, acting in its own self interest. There are some pensions legislation and tax legislation restrictions on the general freedom of the settlor to design the terms of the plan. Once established, the power to amend and discontinue will depend on the terms of the Trust Deed and Rules. Section 67 of the Pensions Act 1995, as amended, prevents amendments which adversely affect accrued rights.	1.1. The pension fund is a trust with assets held by the trustee(s) for the exclusive benefit of the participants and beneficiaries. Trustees are usually custodial in nature, and are banks, trust companies or IRS approved custodians, though they may be individuals, and assets can also be held in annuity contracts from insurance companies. 29 USC 1103: Establishment of trust 1.2. The plan document is a separate unilateral contract under the common law. For some legal purposes, the plan is treated as an entity. The plan document names the fiduciaries, but parties can become "functional fiduciaries" subject to the fiduciary rules even though not named by exercising discretionary authority or control over administration or investing. Department of Labor Trust Establishment

[12] A term used here for convenience in respect of all Canadian pension plans, even those not constituted as trusts.

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
	• In most jurisdictions, a target benefit plan must be administered by a joint board of trustees. Unless the plan is a multi-employer plan or target benefit plan, the settlor/sponsor cannot amend the plan to reduce or eliminate accrued benefits. 1.3 There must be a fiduciary (known as the "administrator"), who may be the employer, a board of trustees, a pension corporation, or an insurance company. The administrator must act as a trustee for the employer, plan members and other beneficiaries. (The Supreme Court of Canada has recognized the inherent "two-hat" conflict of interest that an employer-settlor will have to manage appropriately where it is also the "administrator".) 1.4 The plan fiduciary appoints a third-party fundholder to hold plan assets, which may be a corporate trust company, insurance company, a statutory pension corporation, or a board of at least three individual trustees. The most common fundholders are corporate trust companies and insurance companies. Individual trustees will also necessarily sub-delegate custody of pension fund assets to a financial institution such as a corporate trust company , since they cannot hold these funds personally. 1.5 The main constitutional documents will be the plan text and the funding agreement (usually, a trust agreement or an insurance contract).	1.3 The trust does not have a separate legal personality but acts through its trustee or trustees. 1.4 Usually the trustee is a company whose only purpose is to act as trustee of the pension plan (and who, by agreeing to become trustee of the plan, has agreed to be bound by the provisions of the trust deed and rules). 1.5 Such a company then acts through its board of directors. 1.6 With certain exceptions, the statutory requirement is that at least one third of the trustee board must comprise member nominated directors. The remainder of the trustee board is, usually, appointed by the sponsoring employer. 1.7 The legal owner of the assets of the pension plan will be the trustee company which will then hold the beneficial ownership of those assets to be applied for the purposes of the trusts of the pension plan. 1.8 In general, the trustee will appoint a custodian to hold the plan investments which comprise shares, stocks, bonds and other securities with those investments being registered in the name of the custodian's nominee company. In other words, there is no separation in the constitutional documents of the pension plan (usually referred to as its trust deed and rules) between: (a) managing trustees, and (b) a custodian trustee.	
B. Legislative requirement to provide retirement benefits from a pension plan			
1. Is there a legislative requirement in your jurisdiction that a pension plan must provide retirement benefits?	1.1 The "primary purpose" of a tax qualified plan must be to provide lifetime retirement income (*Income Tax Regulations* (Canada), subsection 8502(a)). This does not preclude secondary	1.1 A UK registered pension scheme (for the purpose of the Finance Act 2004)'s investment income and investment gains are not subject to UK income or capital gains tax to the extent	1.1. The offering of any employee benefit plan, including pension plans, is voluntary on the part of the employer. Certain limited incidental benefits may be provided in pension

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
	purposes that are not inconsistent with the primary purpose. 1.2 Pension minimum standards legislation and, outside Quebec, long-standing rules of common law (though analogous rules are in place under Quebec civil law), prevent the plan fiduciary from profiting from its fiduciary position other than receiving reasonable fees and expenses. However, a member of a pension plan is not precluded solely by reason of his or her pension entitlements from also acting as a trustee of the same pension plan.	that income or gain derives from investments or deposits held for the **purposes** of the registered pension scheme) (the Finance Act 2004, Sections 186 and 187). 1.2 Article 7 of the IORP II Directive imposes an obligation on member states to require IORPs registered or authorised within their territories to limit their activities to retirement-benefit related operations and activities arising therefrom. 1.3 "Retirement Benefits" are defined in Article 6 of that Directive to mean benefits in the form of payments relating to retirement (but benefits may be provided on an ancillary basis in the form of services in the case of sickness, indigence or death). 1.4 The Article 7 requirement is transposed into UK domestic legislation in the Pensions Act 2004, Section 255 which requires the trustees of the pension plan to secure that the activities of the pension plan are limited to retirement-benefit activities (with a definition of "Retirement Benefit Activities" being linked to the same definition of "Retirement Benefits" set out in Article 6 of the IORP II Directive). 1.5 The Pensions Act 2004, Section 255 applies to the Local Government Pension Scheme.	plans, such as a social security supplements, disability, death payment or life insurance benefits; limited medical benefit funding, and plant shutdown benefits. See: Department of Labor Employment Law Guide 1.2. If a benefit plan is provided, tax (Internal Revenue Code) and labor law (ERISA) rules apply. 1.3. The federal government provides a reasonably generous mandatory pillar 1 plan (Social Security), funded by payroll taxes. For example, the maximum benefit in 2026 would be USD $4,152.00 per month at normal retirement age. See: Social Security Administration
C. Is there an obligation to exercise the powers of investment of the plan assets for a particular purpose?			
1. Is there an obligation in your jurisdiction for the plan fiduciary/trustees to exercise the powers of investment of the plan assets for a particular purpose?	1.1 Pension minimum standards legislation requires the administrator to ensure the pension plan and pension fund are administered in accordance with applicable legislation and the plan terms. The administrator may delegate investment functions to internal and external agents but generally retains overall fiduciary responsibility to monitor these agents (it is possible that delegation may reduce the pension	1.1 The purposes of the pension plan trust are constrained as noted in **B** above. In the case of a UK registered (ie "tax approved" pension plan), the purpose of the trust is to provide retirement benefits which are authorised payments as specified in Part 4 of the Finance Act 2004. 1.2 The trustee must exercise their powers of investment for the purposes of the trust. This follows the general rule that the courts will	1.1. A fiduciary shall discharge his or her duties with respect to a plan solely in the interest of the participants and beneficiaries and— (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii)defraying reasonable expenses of administering the plan;

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
	committee's fiduciary liability in Quebec, but this is an open question). 1.2 As noted above, applicable tax legislation requires the primary purpose of the plan to be to provide lifetime retirement income.	imply a restriction on the power-holder (here, the trustees) limiting the exercise the power to that for a proper purpose – ie, the purpose for which it was envisaged being used (see eg *Cowan v Scargill* [1985] Ch 270 (Sir Robert Megarry VC) *Re Courage Group's Pension Schemes* [1987] 1 All ER 528 (Millett J) and *Hillsdown v The Pensions Ombudsman* [1997] 1 All ER 862 (Knox J), and *British Airways v Airways Pension Scheme Trustee* [2018] EWCA Civ 1533 – there is an extensive discussion in this case of the extent to which the purpose of the trust imposes a limit on powers conferred on the trustees albeit that the Court of Appeal had differing views as to whether, on the facts of that case, the power (here a power of amendment) was being exercised for an improper purpose).	(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (C) by diversifying the investments of the plan so as to minimise the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent [See: Fiduciary Responsibilities; 29 CFR § 2550.404a-1 - Investment duties]
D. The power of investment of the plan assets			
1. Where do the powers of investment to invest the plan assets come from?	1.1 Pension standards legislation requires the administrator to invest the assets and to ensure investments are selected in accordance with criteria set out in that legislation and, where applicable and the plan is a trust, provincial trust legislation. 1.2 Pension standards legislation imposes a prudent person approach to investment and generally requires plan assets to be invested in accordance with minimum federal pension standards, as modified by provincial pension standards (or solely in accordance with minimum provincial pension standards for those provinces that have not adopted the federal rules). Federal tax legislation also imposes some investment restrictions that the administrator must observe to maintain the pension plan's tax qualification.	1.1 Section 34(1) of the Pensions Act 1995 confers the same powers to invest the plan assets on the trustee as the trustee would have if it were absolutely entitled to the assets of the trusts subject to any restrictions (see **3** below) in the plan's trust deed and rules (ie the constitutional documents of the pension plan) and certain additional restrictions imposed via Section 36 of the Pensions Act 1995 and the Occupational Pension Schemes (Scheme Investment) Regulations 2005, Regulation 4. 1.2 A different set of regulations applies to the Local Government Pension Scheme. (See the Local Government Pension Scheme (Management and Investment Funds) Regulations 2016 and note in the context of the *Palestine* case that the directions, the	1.1 The plan and trust documents. 1.2 But those must be in accordance with ERISA, including its fiduciary duties. See: Fiduciary Responsibilities

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
	1.3 A plan text or funding agreement may impose additional restrictions. 1.4 All jurisdictions require a plan to have a written investment policy (in most jurisdictions called a "Statement of Investment Policies and Procedures") in respect of a plan's portfolio of investments and loans that contains prescribed information. Ontario pension standards requires the investment policy to "include information as to whether ESG factors are incorporated and, if so, how."	subject of that case, were given by the Secretary of State under Regulation 7 of those regulations.	
2. What are the main constraints or prohibitions imposed by legislation as to the types of investments that can be held by the pension plan?	2.1 The main constraints are set out in Schedule III of the Regulations made under the *Pension Benefits Standards Act, 1985* (Canada), which most provinces have adopted by reference, are as follows: • **The "10% Rule"**. This limits investment in one entity (or one or more affiliated or similarly associated entities) to no more than 10% of the market value of the plan assets. There are exceptions for certain government securities, certain index funds, and certain mutual or pooled funds that themselves comply with the restrictions applicable to pension fund investments. • **The "30% Rule"**. The administrator may not directly or indirectly, invest the moneys of the plan in securities to which are attached more than 30% of the votes that may be cast to elect the directors of the corporation. There are exceptions for certain types of investment holding corporations if certain undertakings are filed with the pension standards regulator. • "**Related party" restrictions**. The administrator may not cause the pension plan to enter into "transactions" (a term that is defined to include, but is not limited	2.1 Section 40 of the Pensions Act 1995 prohibits or restricts investments in the sponsoring employer or persons connected or associated with the sponsoring employer. 2.2 Investments in shares in the sponsoring employer or connected or associated persons may not exceed 5% of the plan assets. 2.3 Investments in loans to the sponsoring employer or connected or associated persons are prohibited. 2.4 The Occupational Pension Schemes (Scheme Investment) Regulations 2005, Regulation 4 and Regulation 5 (which reflect the transposition of the IORP I Directive Article 18 (now the IORP II Directive Article 19) into UK domestic legislation) impose the following restrictions: • scheme assets must be invested in the best interests of scheme beneficiaries, • power of investment must be exercised in the manner calculated to ensure the security, quality, liquidity and profitability of the portfolio of the whole, • DB scheme assets held to cover the scheme's DB obligations must be invested in a manner appropriate to the nature and duration of those retirement benefits;	2.1 Related party transactions are prohibited per se ("prohibited transactions") under ERISA, and subject to substantial penalties. Applications for exemptions may be made, and there are some class exemptions for common transactions. See: Prohibited Transactions 2.2 The Internal Revenue Code separately forbids non-arms' length transactions with related parties – this separate rule thus applies when a plan is not subject to ERISA (e.g., a governmental plan). See: Internal Revenue Code section 4975

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
	to, investments) with a party "related" to, among others, a participating employer, a pension plan member or other beneficiary, or any person with responsibility for investing the pension fund's assets. Exceptions exist for non-investment transactions on market or better terms and investment transactions if they are "nominal" or "immaterial" to the overall pension fund. Federal tax legislation also imposes independent restrictions on related-party investments.	• scheme assets must consist predominantly of investments admitted to trading on regulated markets, • scheme assets must be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings and so as to avoid accumulations of risk in the portfolio as a whole, • investment in derivative instruments may remain only in so far as they contribute to a reduction of risk or facilitation efficient portfolio management. **Note 1:** There are look through provisions where the investment is in a collective investment scheme or in unit linked insurance policies. **Note 2:** A different set of regulations applies to the Local Government Pension Scheme. (See the Local Government Pension Scheme (Management and Investment Funds) Regulations 2016 and note in the context of the *Palestine* case that the directions, the subject of that case, were given by the Secretary of State under Regulation 7 of those regulations.	
3. Can any constraints be imposed by the constitutional documents of the pension plan?	3.1 The settlor could impose constraints or authorizations in the constitutional documents (plan text or funding agreement) provided pension minimum standards are not contravened and the "primary purpose" condition for tax qualification (providing retirement income on account of employment) is not compromised.	3.1 With one exception (see **3.2** below), it is, in general, permissible to restrict, in the trust deed and rules of the pension plan, the wide powers of investment conferred by Section 34(1) of the Pensions Act 1995. 3.2 However, a restriction by reference to the agreement or consent of an employer in relation to the pension plan is overridden by Section 35 of the Pensions Act 1995.	3.1. Generally, no. Any investments must be done in accordance with ERISA, and fiduciary duties override contrary plan terms. (Plans not subject to ERISA, such as governmental or church plans, might have such constraints.) See: Fiduciary Responsibilities

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
		3.3 Examples of restrictions that could be included in the pension plan's trust deed include: • no investment in tobacco companies, • no investment in oil companies, • no investment in gambling, • no investment in alcohol, • no investment in companies making cluster munitions, and • no investment in companies operating private prisons.	
		3.4 Restrictions of the type referred to in **3.3** above will be particularly relevant to pension plans established by sponsoring employers with particular reputational requirements. For example, a cancer research charity's pension plan trust deed might well be expected to include a prohibition on investing in tobacco companies. 3.5 These plan design decisions are settlor/employer decisions which are non fiduciary (albeit prima facie constrained by an implied duty of good faith and potentially a duty of care to employees in tort). 3.6 In relation to DC pension plans (or the DC section of a DB pension plan), the trustee may be required, by the powers conferred on it by the trust deed and rules, to offer a limited menu of investment options. But that limited menu could expressly require, for example, the offering of: (a) a low carbon/green investment option, or (b) a Catholic values or Sharia compliant investment option. 3.7 Note that the Secretary of State has power to direct how the assets of the Local Government Pension Scheme are invested in accordance with the Local Government	

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
		Pension Scheme (Management and Investment of Funds) Regulations 2016, Regulation 7. That guidance can be found in the Local Government Pension Scheme (Guidance on Preparing and Maintaining an Investment Strategy Statement), as revised following the *Palestine* case[13].	
E. Requirement to delegate day to day investment management decision to an authorised investment manager			
1. Is there a requirement in your jurisdiction that the day-to-day investment management decisions must be delegated to an investment manager authorised by the relevant financial services legislation in your jurisdiction (unless the trustee itself is so authorised)	1.1 There is no specific requirement, but the administrator's fiduciary duty requires it to retain appropriate expert advice and service providers (which may include internal staff of the administrator) where the administrator does not itself possess the requisite expertise. The investment of a modern pension fund is generally understood to be so complex as to require some degree of investment professional involvement. 1.2 Pension minimum standards legislation requires the fiduciary to exercise the standard of care of a reasonable person caring for the property of another person. If experts are engaged as agents (this would include many investment management mandates), the experts are held to the same standard of care. 1.3 An administrator with special knowledge and skill (such as an investment professional who sits as a member of the pension plan's board of trustees) will be held to an expert standard of fiduciary care rather than the person of "ordinary" prudence. 1.4 The administrator remains ultimately responsible for overall oversight (including of investment professionals) and governance.	1.1 In broad terms, Section 47 of the Pensions Act 1995, requires the trustee to appoint an investment manager authorised under the Financial Services and Markets Act 2000 to undertake day to day investment management decisions of investments within the scope of the Financial Services and Markets Act 2000. This would cover shares, stocks, bonds and other securities. However, it would not include a direct investment in land and buildings.	1.1. No, but investment managers may be and often are appointed by plan fiduciaries (as defined by ERISA § 3(38) for plans under ERISA), because the prudent expert rule requires that the fiduciary act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity *and familiar with such matters* would use in the conduct of an enterprise of a like character and with like aims. See: Fiduciary Responsibilities 1.2 Fiduciaries are still required prudently to hire and monitor the investment manager.

[13] *See https://assets.publishing.service.gov.uk/media/5a820140e5274a2e87dc0a44/Guidance_on_preparing_and_maintaining_an_investment_strategy_statement.pdf.*

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
F. Allocation of risk/reward of the unsuccessful/successful investment of plan assets			
1. Who bears the risk/reward of the unsuccessful/successful investment of plan assets?	1.1 DB plans: Primarily the employer, who must fund deficits (although in an employer bankruptcy or insolvency, the members will ultimately bear the risk of any underfunding). 1.2 DC and "target benefit" plans: the plan members and other beneficiaries.	1.1 In a DB plan (or the DB section of a plan which also provides DC benefits), every pound of investment under performance adds £1.00 to the obligations of the employer to fund the plan's deficit. 1.2 Conversely, every pound of successful investment performance reduces by £1.00 the cost to the employer of funding the plan. 1.3 There are limited circumstances in which investment performance may impact member benefits in a DB plan: • the award of discretionary increases/ augmentations to member benefits. These are now rare other than where a plan winds-up with a funding surplus. • in the event of employer insolvency member benefits may be scaled back based on the overall level of underfunding in the scheme (although the Pension Protection Fund provides compensation to a base level of benefit). 1.4 In a DC plan (or the DC section of a DB plan), the member's retirement account will be reduced by each pound, net of charges, of investment under performance (or charges) and will be increased by each pound of investment performance.	1.1. For DB plans, the plan sponsor(s) and its controlled group. See: Participant Directed Accounts. 1.2 For DC plans, the participant bears the risk/reward.
G. Legislative definitions of "financial factors" and of "non-financial factors" or "ESG factors"			
1. Is there a legislative definition of "financial factors" and of "non-financial factors" or "ESG factors" or equivalent concepts in your jurisdiction?	1.1 No definitions. 1.2 The pension minimum standards regulators have collectively issued non-binding guidelines. See: • CAPSA Guideline: Environmental, Social and Governance Considerations in Pension Plan Management (2022) The Ontario pension regulator has also issued specific guidance in respect of Ontario's unique	1.1 "**Financially material considerations**" are defined to include (but are not limited to) *"environmental, social and governance considerations (including but not limited to climate change) which the trustees of the trust scheme consider financially material*". 1.2 "**Non-financial matters**" are defined to mean "*the views of the members and beneficiaries including (but not limited to) their*	1.1 A new DOL "Prudence and Loyalty" regulation eliminates the prior "pecuniary/non-pecuniary" distinction and the "pecuniary only" requirement and instead provides that decisions should be made: "based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis and that such factors may include the economic effects of climate change and other

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
	requirement that administrators disclose whether and, if so, how, ESG factors are considered. See: • Guidance No. PE0146ORG Financial Services Regulatory Authority of Ontario (2016) 1.3 Securities regulators in Canada have also developed guidelines that may be of assistance to pension administrators in devising investment policy, engagement strategies and communication around ESG factor integration. See for example: • CSA Guidance note on Climate Change (2019)	*ethical views and their views in relation to social and environmental impact and present and future quality of life of the members and beneficiaries of the trust scheme"*. 1.3 There is no definition, as such, of "ESG factors". **Note:** See the Occupational Pension Schemes (Investment) Regulations 2005, Regulation 2 (as amended). This relates to the required content to be disclosed in a plan's "Statement of Investment Principles" (see below).	environmental, social, or governance factors on the particular investment or investment course of action." 1.2 Other factors are nonpecuniary. 1.3 There is no definition, but the relevant factors for the fiduciary to consider include "the economic effects of climate change and other environmental, social, or governance factors…" 1.4 State law updates can be found here.
H. Requirement to have a statement of investment policies or principles and a requirement for plan assets to be invested in a manner consistent with the policies or principles set out in such a document			
1. Is there a requirement to produce a statement of investment policies or principles and for the plan assets to be invested in a manner consistent with those policies or principles?	1.1 Yes. 1.2 All provincial and federal pension standards regulations require a written investment policy (in most jurisdictions this is called the "Statement of Investments Policies and Procedures") (collectively, SIPPs) to be reviewed at least annually. 1.3 In some jurisdictions, SIPPs must be filed with the regulator. The SIPP must be available for plan member and other beneficiary (as well as trade union, if applicable) inspection. 1.4 The federal requirement for a SIPP is set out at subsection 7.1 of Schedule III of the Regulations made pursuant to the *Pension Benefits Standards Act, 1985* (Canada), which most provincial pension minimum standards legislation incorporates by reference. The other provinces provide for the minimum contents of the required investment policy directly in their pension minimum standards legislation.	1.1 Yes – under Section 35 of the Pensions Act 1995 and Regulation 2 of the Occupational Pension Schemes (Investment) Regulations 2005. 1.2 There is a requirement for the trustee (or investment manager to whom the trustee has delegated investment functions) to exercise the powers of investment with a view to giving effect to the principles contained in the Statement of Investment Principles so far as reasonable practicable (the Pensions Act 1995, Section 36(5)). 1.3 The statement of investment principles is required, among other things, to include: (a) the trustee's policies in relation to **financially material considerations** over the appropriate time horizon of the investments, including how those considerations are taken into account in the selection, retention and realisation of investments, and (b) the extent, if at all, to which **non-financial matters** are taken into account in the	1.1 Not technically, but engaging in "procedural prudence" – a prudent investment process - is strongly emphasized, and so written IPS's are common, as is memorialization of investment decisions, fiduciary committee charters and the like.

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
		selection, retention and realisation of investments, and (c) their policy in relation to: (i) the exercise of the rights (including voting rights) attaching to investments, and (ii) undertaking engagement activities in respect of the investments (including the methods by which, and the circumstances under which, the trustees would monitor and engage with **relevant persons** about **relevant matters**). (d) "**Relevant persons**" are defined to include an issuer of debt or equity, an investment manager or other stakeholder or another holder of debt or equity. (e) "**Relevant matters**" are defined to include matters concerning the issuer of debt or equity, including their performance, strategy, capital structure and management of actual or potential conflicts of interest, risks, social and environmental impact and corporate governance. 1.4 For the Local Government Pension Scheme see the Local Government Pension Scheme (Management and Investment of Funds) Regulation 2016, Regulation 7.	
I. The prudent person rule			
1. Does the prudent person rule apply to the investment of plan assets in your jurisdiction?	Yes.	Yes	Yes
2. How is that prudent person rule defined?	There are variations in each jurisdiction's pension minimum standards legislation. The following summary from the federal pension standards regulator, the Office of the Superintendent of Financial Institutions, is reproduced as an example:	2.1 Article 19 (dealing with investment matters) of the IORP II Directive (previously Article 18 of the IORP I Directive) requires plan assets to be invested in accordance with the prudent person rule. Article 19 was required to be transposed into UK domestic legislation before Brexit (January 31, 2020).	2.1. See **C.1** above. Note that it is more of a "prudent expert" rule than a "prudent person" rule under ERISA 404(a)(1)(B).

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
	Subsection 8(4.1) of the PBSA sets out a "prudent person" standard, which requires the administrator of a pension plan to invest the assets of the pension fund in accordance with the Pension Benefits Standards Regulations, 1985 (PBSR) and in a manner that a reasonable and prudent person would apply in respect of a portfolio of investments of a pension fund. The PBSA also provides that, in carrying out its legislative responsibilities to administer the pension plan and fund, the plan administrator must use all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.[14]	2.2 In fact the UK assumed that UK trust law would already impose a prudent person duty on the trustees of a UK pension plan (so there is no specific reference to the prudent person rule in UK legislation regulating pension plan investment). 2.3 *Cowan v Scargill* (a High Court decision on April 4, 1984) is the starting point for a summary of the trust law rules on investing pension plan assets (including referencing the prudent person rule and the various steps that the pension plan trustee must take when investing the pension plan assets (see **J** below for non-financial factors)).	
J. Non-financial factors and investing pension plan assets			
1. To what extent can non-financial factors be taken into account by the pension plan trustee/plan fiduciary when deciding on how pension plan assets should be invested?	1.1 It is a contextual question of relevance and materiality. The rules in Canada appear to be driven by ordinary principles of fiduciary duty, primarily relating to the duties of prudence and loyalty developed under the common law. Canadian courts may find the reasoning of courts in other common law jurisdictions persuasive on this point. 1.2 Non-financial factors that demonstrably affect an investment but cannot be quantified, such as potential environmental effects, political stability, social and business relationships, governance ability, past performance, reputation of business leaders, and other non-financial factors, are routinely considered in investment decision-making. They are not and should not be precluded if they provide a rationale for fiduciary decision-making that advances the purpose of providing lifetime retirement income.	1.1 The most recent consideration of this issue by the Law Commission was in Law Commission Report no 374 "Pension Funds and Social Investment" published on June 22, 2017. 1.2 This report draw on 2 cases: • *Cowan v Scargill*, and • *Harries, Bishop of Oxford v The Church Commissioners*, both decisions of the High Court. 1.3 The Report concluded: *"5.56 If the trustees make an investment, they must consider the financial risks to that investment. In the case of equities, this may include risks arising from unsustainable business practices and unsound corporate governance.* *5.57 In some limited circumstances, the trustees may go further than this. They may*	1.1. Under a recent DOL regulation, fiduciaries may use ESG factors to make investment decisions under the risk and return analysis and can consider collateral benefits in circumstances when they "equally serve the financial interests of the plan over the appropriate time horizon." (I.e., a "tie-breaker".)

[14] Office of the Superintendent of Financial Institutions Guideline, "Derivatives Sound Practices for Federally Regulated Private Pension Plans" (2018), online: https://www.osfi-bsif.gc.ca/en/print/pdf/node/1487

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
	1.3 Non-financial factors that are applied without connection, or with only ancillary connection, to providing lifetime retirement income and have as their purpose instead moral or philosophical aims are much less likely to be supported if challenged, and their consideration could ultimately be found to be a breach of fiduciary duty even if no demonstrable losses result.	*favour investments with a positive impact or avoid investments of a negative impact. Trustees are permitted to do this for default funds [for DC plans] as well as for other funds. However, trustees would need good reason to think that the members should hold values justifying this concern. They would need to bear in mind that many values are contested, and that tensions exist between different conceptions of the social good.* *5.58 Furthermore, the decision should not in any event risk **significant financial detriment**. Investment in a default fund should not provide a **significantly lower** risk–adjusted return than one available elsewhere.* 1.4 This test obtained some approval (although of the *obiter dicta* variety) in *Palestine Solidarity Campaign v. The Secretary of State for Housing, Communities and Local Government* a decision of the UK Supreme Court on April 29, 2020. **Note**: Notably, however, the Court (possibly inadvertently) articulated the test as not involving "**significant risk** of financial detriment", while the Law Commission's test was "…not involve a risk of **significant financial detriment**". 1.5 An important point to draw out is that the guidance given by the Secretary of State to the LGPS distinguished between "social investments" where the test was the same as the Law Commission's test "no risk of **significant** financial detriment" and other investments where the test was not involving "**significant** risk of financial detriment". In other words, the drafter of the guidance was	

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
		choosing their words carefully by making this distinction. 1.6. However, this *obiter dicta* and the conclusion of the Law Commission, to the extent that it permitted a financial detriment (albeit not a significant financial detriment), does not appear to be a correct statement of the law (at least as understood by many UK pension lawyers). Furthermore practical difficulties may make such a test inoperable in any event. 1.7 This topic was considered further by the Financial Markets Law Committee in its paper "Pension Fund Trustees and Fiduciary Duties: Decision-making in the context of Sustainability and the subject of Climate Change" (February 6, 2024)[15]. 1.8 There have been two subsequent cases under English law on this topic. 1.9 The first involves exercising investment powers of a charitable trust, *Butler-Sloss v The Charity Commission for London & Wales* [2022] EWHC 974 (Ch)[16]. Here the Court permitted the trustees to adopt an investment policy which excluded investment in companies which were not in alignment with the goals of the Paris Climate Agreement of April 22, 2016 under the United Nations Convention on Climate Change. Note: In summary, given this is a charitable trust, and given the purposes of the charitable trust, the judge approved this particular investment strategy.	

[15] Available here https://fmlc.org/wp-content/uploads/2024/02/Paper-Pension-Fund-Trustees-and-Fiduciary-Duties-Decision-making-in-the-context-of-Sustainability-and-the-subject-of-Climate-Change-6-February-2024.pdf Paragraph 4.5 records the Association of Pension Lawyers Investment & DC Sub-Committee, see para 4.4 and footnote 30. That note is available here https://www.traverssmith.com/media/6515/jonathan-gilmour-apl-talk-on-non-financial-factors-in-pensions-investment-decision-making.pdf.

[16] *See https://www.bailii.org/ew/cases/EWHC/Ch/2022/974.html.*

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
		1.10 The second case is *McGaughey v Universities Superannuation Scheme* [2023] EWCA Civ 873, a judgment of the Court of Appeal on July 21, 2023. In brief the complainant, a member of the Universities Superannuation Scheme, asserted that the directors of the scheme's trustee company had breached their fiduciary duties by not planning to disinvest from fossil fuel investment. This case was dismissed. However, the way in which the claim was framed (suing the directors of the trustee company personally rather than suing the trustee company for breach of trust) means that this case needs to be read with care (and the case was dismissed both in the High Court and the Court of Appeal).	
K. Reporting obligations on account taken of ESG factors (whether financial or non-financial)			
1. To what extent is there a legal requirement to report on the extent the pension plan trustee/fiduciary has taken into account ESG factors (whether financial or non-financial)?	1.1 As noted above, there must be a written investment policy, and in Ontario that policy must indicate whether, and if so how, ESG factors are taken into account. Ontario legislation also requires whether ESG factors are taken into account in annual statements to active members and in biennial statements to retirees and former members with deferred entitlements.	1.1 The UK has implemented Directive (EU) 2017/828, in turn amending Directive (EU) 2007/36/EU regarding the encouragement of long-term shareholder engagement by IORPs. 1.2 In part, this is done through the requirement to include additional information in the statement of investment principles. 1.3 There are additional obligations under the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013, as amended, Regulation 29A and Schedule 3, paragraph 30, to disclose publicly on a website: (a) the plan's statement of investment principles (thereby disclosing the plan's engagement policy), and (b) an engagement policy implementation statement. **Note 1:** These requirements, in the main, came into force in part on October 1, 2019 and, in part, on October 1,, 2020.	1.1. None, though some financial information (generally by class) is provided in the annual information return (Form 5500), which is publicly available.

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
		Note 2: In particular, the disclosure of the engagement policy and the engagement policy implementation statement is required to include the voting behaviour by or on behalf of the plan trustee, including the most significant votes, cast by or on behalf of the plan trustee during the year and state any use of the services of a proxy voter during that year.	
L. Legal requirement to take account of ESG factors			
1. Is there any legal requirement to take account of ESG factors in your jurisdiction?	1.1 In the author's opinion, all factors relevant to the pension fund's financial performance are relevant considerations for the administrator, and there is a general consensus that the administrator should consider "relevant" factors in its decision making. As a result, ESG factors that are relevant to financial performance should be considered. With that said, Canadian courts routinely evaluate a fiduciary's reasons for a decision rather than the particular decision, and so if a financial factor, including an ESG-related factor, is considered with a motive or for purposes that are other than financial, the administrator could still invite liability for breach of fiduciary duty.	1.1 To the extent that ESG factors are financially material, then, under the prudent person rule, those factors are required to be taken into account. 1.2 To the extent that the ESG factors are non-financial factors, then they may only be taken into account so long as there is no increase in risk or reduction in return (established ex ante).	1.1 No. A recent DOL regulation permits trustees/fiduciaries to consider ESG factors under the risk and return analysis but does not require consideration. This replaces the prior "pecuniary/non-pecuniary" factors consideration.
M. Voluntary codes of practice on ESG factors			
1. Is there a voluntary code of practice (or equivalent) on the extent to which pension plan trustees/plan fiduciaries should take account of ESG factors (whether financial or non-financial)?	1.1 As noted above both pension standards regulators and securities regulators in Canada have published guidance notes. 1.2 Many pension plan administrators have made commitments to adhere to local, national, and transnational covenants or principles, such as the Principles of Responsible Investment developed by the United Nations ("**UN PRI**").	1.1 The Financial Reporting Council ("**FRC**") has published an updated Stewardship Code which took effect on January 1, 2026 (replacing the 2020 Stewardship Code): https://media.frc.org.uk/documents/UK_Stewardship_Code_2026.pdf 1.2 The updated Code's purpose is: "*is to establish the core Principles of effective stewardship and to set a high standard of transparency for asset owners and asset managers, and for the service providers that support them.*"	1.1. No, these factors are permitted to be considered only under a risk and return analysis.

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
		1.3 *"To become a signatory, all organisations (asset owners, asset managers and service providers) are required to submit a Policy and Context Disclosure, as well as an Activities and Outcomes Report. The Policy and Context Disclosure asks for factual information, which provides important background information for an organisation's Activities and Outcomes Report. The Activities and Outcomes Report, which is updated annually, explains how organisations have applied the Principles of the Code over a 12-month period."* 1.4 In similar manner the United Nations supported 6 Principles for Responsible Investment (the "**PRI**") are implemented through the PRI Association which lays down minimum requirements for PRI membership for investors. 1.5 Existing and future asset owner and investment manager signatories, who fail to meet these requirements over a two-year period, following extensive engagement with the PRI, will be delisted. 1.6 It is compulsory for PRI signatories to report on their responsible investment activities annually.	
2. Are there legal risks in your jurisdiction in a pension plan trustee /plan fiduciary signing up to such a code of practice?	2.1 Guidance notes articulate best practices and the views of the regulator. They are not binding, do not amount to a legal opinion, and do not require "signing up." 2.2 Many pension fund fiduciaries, financial institutions, fund managers, and other financial intermediaries have signed on to the UN PRI. By doing so, they may be creating a self-imposed fiduciary obligation to monitor performance consistent with the principles or explain/approve any deviation, which they otherwise would not have at law.	2.1 A pension plan trustee signing up to the Stewardship Code or the PRI needs to proceed with care. 2.2 It is easy to sign up to the principles in the Code or to the PRI. 2.3 However, it then becomes necessary to make sure that the scheme's investments are managed in a manner consistent with the Code or PRI to which the plan trustee has signed up to. 2.4 Failure to do so may amount, prima facie, to a self admitted breach of a trust.	2.1 A fiduciary is personally liable for any investment losses resulting from a breach of their fiduciary duties. Co-fiduciaries may be liable for the breaches of others if the fiduciary knowingly participates in and/or conceals or otherwise enables another fiduciary's breach; or knowing of the breach, fails to make reasonable efforts to remedy the breach. 2.2 Fiduciary regulation limits when certain factors may be considered in the risk and return analysis for investing.

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	2.3 It should be noted that while pension plans are long-term investment vehicles, and the UN PRI focuses on the long-term, there may be fiduciary risk in not also prudently balancing short- and medium-term considerations. 2.4 These commitments are generally viewed as non-binding legally but could be adduced as evidence in support of legal claims relating to ESG disclosures or investment failures.		2.3 The US has a robust plaintiffs' bar, and litigation against plan fiduciaries over investments and fees is common.
N. Recent important collateral developments for pension plan asset investment			
1. Are there any recent important collateral developments for pension plan asset investment?	Recent litigation has commenced[17] against the Canada Pension Plan Investment Board, the entity statutorily responsible for investment of the Canada Pension Plan's assets (this is the national, contributory pension plan for nearly all Canadian income-earners between age 18-65 outside Quebec) alleging a breach of fiduciary duty in respect of failing to prudently identify, assess or manage climate-related financial risks. While this proceeding is in preliminary stages only and has not been tested on its merits, and while it relates to Canada's national, public pension plan rather than a private occupational pension plan that are the focus of this document, the litigation, which is similar to proceedings recently seen in the Netherlands, could be a harbinger of future claims.	1.1 The Pension Schemes Act 2026, which received Royal Assent on April 29, 2026, contains, after a fierce battle through Parliament between the "more mandation" Government proposals and the "no mandation" opposition, powers, in Section 40, for the Government to make secondary legislation to mandate some DC pension plans (**in scope master trusts** and **in scope group personal pension schemes**) to invest 10% of the assets backing their respective **main default investment options** in **private market assets** of which 5% of those must be in **UK private market assets** to give statutory effect to the Mansion House Accord: https://www.abi.org.uk/news/news-articles/2025/5/pension-industry-unites-on-mansion-house-accord/ **Master trusts** are pension plans with a DC Section (or pure DC plans) set up under irrevocable trusts in which non-associated employers participate. They are subject to additional regulatory requirements to reflect	1.1 In an EO, the US Government proposes to ease access to asset funds involving "alternative assets," including digital assets specifically for DC plans. 1.2 Prior administrations, including the Biden Administration, emphasised safeguards against investing in digital assets, warning against potential scams. The Trump Administration seeks to reverse those sentiments and encourage investment in cryptocurrencies/digital assets. 1.3 The language of the EO suggests that the US Government plans to allow plan asset investment in digital assets. This comes alongside an interpretation issued by the SEC of how federal securities laws should apply to digital assets. 2.2 A proposed safe harbour for the plan's fiduciary duty of prudence in "selecting designated investment alternatives" is also included in EO 14330.

[17] *Hirji* et al. *v. Canada Pension Plan Investment Board*, ONSC file no. CV-25-00754169-0000. Notice of Application online: https://ecojustice.ca/wp-content/uploads/2025/10/Application-Document-Form-14E_-Notice-of-Application.pdf.

Issue	Position in selected provinces of Canada (see Part I, Section C)	Position in the UK	Position in the US
		that they are usually set up by a financial services company as a commercial vehicle. **Group personal pension plans** are usually contract based unit linked insurance contracts providing DC benefits set up by insurance companies and to which employers have agreed to pay contributions in respect of their eligible employees. An **in scope master trust** or **in scope group personal pension plan** is, in summary, a master trust or group personal pension with at least £25 billion of assets allocated to the **main default investment option**. The **main default investment option**, in summary, is the one for plan members who do not choose their own investment option off the plan's menu of investment options. **Private markets assets** (or "qualifying assets") mean direct or indirect holdings in (a) private equity, (b) venture capital, (c) private credit, (d) interests in land, (e) infrastructure, and (f) any unlisted equities not otherwise within (a)-(f). The regulations will provide more detail. **UK private market assets** mean holdings in **private market assets** where the underlying assets are located in the UK or meet a specified condition that links them to economic activity in the UK. The regulations will provide more detail. **Comment:** The stated ambition is (1) to improve the return for these pension plan members, and (2) to increase UK growth.	

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		The cynic might say that (1) this is a way to increase fees for assets managers, (2) provide an exit strategy for investors in private equity and other funds who have not had cash returned because of the lack of IPOs or trade sales of the shares in companies held in those funds and (3) provide a further opportunity for the UK Government to demonstrate that its invest for growth skills are limited. 1.2 However, before any regulations are made under section 40 to mandate the private market asset requirements an assessment must first be made as to how members' financial interests would be affected. 1.3 An in scope master trust or in scope group personal pension plan can also apply to the specified Regulatory Authority to be exempt for a period from the private market asset allocation requirements where the trustee or manager concludes that it is likely not to be in the best interests of plan members. The Regulatory Authority must grant that exemption if the Authority is of the view that it is reasonable for that trustee or manager to reach that conclusion. 1.4 The power to make these regulations may only be exercised once (and they may not come into force before January 1, 2028). They must also be reviewed within 5 years of coming into force. Furthermore the power to make the regulations is "sunsetted" at the end of 2035.	