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Climate Change Considerations for Pension Fund Fiduciaries

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Greenhouse Gas Pollution Pricing Act,
Supreme Court of Canada, 2021 SCC 11

[2] The essential factual backdrop to these appeals is uncontested. Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future. The only way to address the threat of climate change is to reduce greenhouse gas emissions.





Canada Climate Law Initiative: Climate Change, Legal Implications for Pension Fiduciaries and Policy- Makers

May 26, 2021

Conclusion:

“Unlike other ESG matters, as far as climate change is concerned, the legal question is not whether fiduciaries are permitted to take climate change into account when managing plan assets, but rather, in view of the consensus evidence of the materiality of climate-related risks and opportunities, whether they can ever be excused for not taking those risks and opportunities into account when investing and managing plan assets ... and for not reasonably disclosing what they are doing about it. And the process involves reviewing and critically assessing the evidence, separating fact from exaggeration or understatement, and then devising and executing logical financial strategies.”

Canadian Legal Landscape – Pension Fund vs. Other Institutions

Pension Funds

- **Must be About Value, Not Values**
 - **Common-law fiduciary duty:** prudence and loyalty to plan purpose – i.e., to provide lifetime pensions – a financial purpose
 - **Tax legislation:** “primary purpose” of tax qualified plan must be to provide lifetime retirement income – a financial purpose
- **Pension Standards Legislation**
 - Ontario and Federal: must disclose whether ESG factors are considered, and if so, how?
- **Regulatory Guidance**
 - Canadian Association of Pension Supervisory Authorities draft Risk Management Guideline dated September, 2023
- **Systemic Risks:**
 - Climate change
 - Cyber-Security
 - Leverage
 - Demographic
 - Geopolitical

Other Institutions

- **Can be about value and/or values**
 - E.g., corporate director’s and officer’s duty of care requires they “act honestly and in good faith with a view to the best interests of the corporation” ...
- **Supreme Court of Canada (since the 1990s):**
 - does not mean the best interests of shareholders; may consider other factors and other stakeholders
- **Ss. 122(1.1) Business Corporations Act (Canada):**
 - **June (2019) amended to add:**
 - ...may consider, but are not limited to...:
 - (a) the interests of
 - (i) shareholders,
 - (ii) employees,
 - (iii) retirees and pensioners,
 - (iv) creditors,
 - (v) consumers, and
 - (vi) governments;
 - (b) the environment; and
 - (c) the long-term interests of the corporation.



Discussion Questions

- Is it ever about achieving impacts? / Is it only about financial returns?
- Are the views of plan beneficiaries relevant? / Useful?
- To what extent are guidelines from other jurisdictions or other financial sectors, such as banking, insurance or securities regulation useful?
- Should or must the reporting and analytic recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) be adopted? / Other options?
- What about proper fiduciary oversight of service providers, such as investment managers or consultants who may be investing on behalf of non-pension clients?
- Should minimum pension standards legislation impose ESG or climate change rules, and if so, what rules?
- What is the right perspective and fit for Caribbean pension fund fiduciaries?



Additional Reading

Bauslaugh, Randy, *ESG and Climate Change: Pension Fund Dos and Don'ts*, C.D. Howe Institute E-Brief, November 8, 2022, Canada and 36 Trust Law International 167-175, 2023, United Kingdom (available at https://www.cdhowe.org/sites/default/files/2022-11/E-Brief_335.pdf)

Bauslaugh, Randy, *Climate Change: Legal Implications for Canadian Pension Plan Fiduciaries and Policy-Makers*, a legal opinion released by the Canada Climate Law Initiative, May 26, 2021 (available at: [https://ccli.ubc.ca/considering-climate-change-is-part-of-pension-trustees-legal-responsibilities-a-new-analysis-reveals/#:~:text=26%20May%202021%2C%20Vancouver%20%E2%80%93%20The,part%20of%20their%20fiduciary%20dut y.\)](https://ccli.ubc.ca/considering-climate-change-is-part-of-pension-trustees-legal-responsibilities-a-new-analysis-reveals/#:~:text=26%20May%202021%2C%20Vancouver%20%E2%80%93%20The,part%20of%20their%20fiduciary%20dut y.)))

Columbia Law School, Climate Change Litigation Database, available at: <http://climatecasechart.com/>. It tracks climate litigation in more than 40 countries using a data base that can be searched in different ways by jurisdiction, or types of defendants. See also, the data base maintained by the London School of Economics, Grantham Research Institute on Climate Change and the Environment, available at: <http://climate-laws.org> and Joana Setzer and Catherine Higham, *Global trends in climate change litigation: 2022 snapshot*, Grantham Institute Policy Report, June 2022. available at <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf>

Canadian Association of Pension Supervisory Authorities, Final Draft Guideline: *Pension Plan Risk Management*, May 24, 2023, available at <https://www.capsa-acor.org/Documents/View/2055> pp. 13-39.



Thank You!

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