Climate Change

Legal Implications for Canadian Pension Plan Fiduciaries and Policy-Makers

Table of Contents

This opinion was written in response to the Canada Climate Law Initiative asking Mr. Bauslaugh for his professional assessment of the legal obligations of Canadian pension fiduciaries regarding climate risk.

Climate Change

Legal Implications for Canadian Pension Plan Fiduciaries and Policy-Makers

Author: Randy Bauslaugh

1. Introduction

In recent years, investment industry leaders, financial services regulators and scientific researchers have produced a rapidly increasing body of research, commentary, recommendations and regulatory guidelines relating to financial and economic risks and opportunities that climate change presents to financial markets. Even though there is broad consensus that the climate is warming, and that the warming is largely due to human activity, informed skeptics point to the wide disagreement about how much warming will occur and when. Skeptics have also raised common sense concerns about the actual effects of climate change and how to deal with it. What does all of this mean legally and practically for those responsible for administering workplace pension plans?[1] Must they consider climate change risks and opportunities? Are there best practices? Should pension standards legislation or regulators play a role in responding?

As explained in this paper, pension fund fiduciaries have a duty to take into account financial risks and opportunities when managing plan assets. In view of widely accepted evidence of climate change and its financial implications, including evidence recently accepted by the Supreme Court of Canada,[2] pension fund fiduciaries ignore at their peril, the financial risks climate change poses to the investments they have a duty to manage. Indeed, that decision, along with other mainstream scientific and financial evidence identified in this paper, makes it easy to conclude that pension fund fiduciaries who fail to consider or manage climate-related financial risks and opportunities, may find themselves personally liable for economic, reputational or organizational loss resulting from that failure. Pension fiduciaries may also have an obligation to disclose how they manage climate change financial risks and opportunities on an ongoing basis.

There are almost 17,000 registered pension plans in Canada and they all vary dramatically in size and type.[3] The vast majority of Canadian pension fund fiduciaries do not have in-house investment expertise, but rely on a wide variety of external providers to help establish investment policy, communicate investment policy and respond to investment inquiries from plan beneficiaries. External providers include actuaries, accountants, pension plan consultants, investment managers, mutual fund companies, trust companies, life insurance companies, third-party

---

1 This paper focuses on registered pension plans (“**RPP**s); but in the opinion of the author, the fiduciary analysis may be equally applicable to registered retirement savings plans (“**RRSP**s”) offered in workplaces on a group basis.

2 *Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 2 (the “**GHG Reference**”). The federal government and every province agreed that “Climate change is real … caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity’s future”.

3 Statistics Canada maintains a data base that can be mined for an impressive combination of variable relating to size, type, membership, industry and geographic location: StatsCan, Pension Plans in Canada, Variables for January 1, 2019, https://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvVariableList&Id=1285661. This data indicate that as of January 1, 2019 there were 16,608 pension plans registered in Canada with over $2 trillion in assets, consisting of contributory and non-contributory defined benefit, defined contribution, and hybrid varieties. It indicates they vary dramatically in size: about 1/3rd are single member plans, more than 50% have fewer than 10 members and under 20% have more than 100 members. Only 32 large plans account for more than 50% of all plan membership. More than 85% of all plans have total assets of less than $25 million and 57 plans have assets exceeding $5 billion in assets.

administrators and lawyers. In most cases, it is simply not known whether the vast majority of pension fund fiduciaries even deal with climate change or any other environmental, social or governance (**ESG**) issues, and if they do, how they do it. Where it is known, the legal and practical approaches to governance of climate change risks and opportunities vary widely based on specific facts and circumstances, including the expertise of the administrator. It also appears to be a rapidly evolving environment with no globally accepted taxonomy[4], no common rules for disclosure of climate-related metrics, and no one size fits all approach. The only common factors appear to be: an acknowledgement that climate change is an urgent issue, that it poses business risks that tend to be more long-term and complex than other business risks, that it creates investment opportunities, and that there is inconsistency in legal and financial understanding and management of those risks and opportunities.[5]

Accordingly, the first part of this opinion identifies the legal responsibilities of pension plan fiduciaries to take climate change factors into account when investing plan assets. It then reviews the economic and relevant scientific evidence and applies basic principles, statutory requirements and recent case law to support the conclusion that they must consider the financial implications of climate change on fund performance. It goes on to offer very practical advice suitable for a broad range of pension fund fiduciaries to identify effective governance actions they can take to ensure they are fulfilling their obligations to plan beneficiaries, namely employers, employees, former employees and others entitled to benefits under the plan. Part of this practical advice derives from research conducted by the CD Howe Institute over the summer of 2020 into the publicly disclosed practices of 40 of Canada's largest pension plans and the anecdotal experience of the author as a pensions lawyer who has reviewed Statements of Investment Policy and plan member communications for a broad range of pension plans representing some of Canada's largest to many of its smallest.

This review of the law, the practices of large plans and the reality of so many small plans inform a recommendation that pension standards legislation should be revised to require some sort of disclosure. An achievable goal would be the type of disclosure rules the Ontario Government introduced for consideration of ESG factors[6]; namely, that plans be required to indicate whether they take ESG factors into account, and if so how. But those rules should be modified to include express reference to climate change because of its apparent financial urgency and materiality. Even though this opinion concludes that pension plan fiduciaries clearly have an obligation to take climate change into account and may have disclosure obligations without creating a new statutory imperative, a simple disclosure rule can at least direct fiduciary attention in a way that may avoid future legal and financial failures.

Finally, it should be emphasized that the legal opinions expressed in this paper do not arise from any ethical, moral, environmental, cultural or social desire to address climate change, or to save the planet. They arise out of a basic application of fiduciary obligation imposed by minimum pension standards legislation, the common law and civil law, to widely accepted evidence of the economic consequences of climate change. Importantly, for purposes of this paper, that evidence includes evidence that not only is climate change real and a serious threat to the planet and to people, but that it presents material risks to investment performance and the stewardship role fiduciaries play in the investment of pension plan assets. The conclusions, and the approach recommended to

---

4 In June 2020, the European Union adopted a taxonomy regulation to apply from January 1, 2023: Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

5 See generally, Geraldine Ang and Hannah Copeland, 'Integrating Climate Change-related Factors in Institutional Investment', OECD Round Table on sustainable Development, (February 2018), pp 12-14, *available at*: https://www.oecd.org/sd-roundtable/papersandpublications/Integrating%20Climate%20Change-related%20Factors%20in%20Institutional%20Investment.pdf.

6 RRO 1990, Reg. 909: General, under Ontario *Pension Benefits Act*, RSO 1990, c P-8, ("***PBA***") as amended, requires the disclosure to be included in each plan's statement of investment policies (s 78(3), and in statements required to be given to members (s 40(1)(v)(ii)), former members (s 40.1(1)(s)(i)), and retirees (s 40.2(r)(ii)).

plan fiduciaries and legislators in this paper is driven by the financial imperative climate change imposes to manage financial risk and opportunity, regardless of whether that brings about positive social or environmental change.

2. Legal Responsibilities of Plan Fiduciaries

It is well-established that pension plan administrators are fiduciaries. Fiduciary duty is often referred to as the highest duty known to the law and is perhaps the one legal duty that comes closest to imposing ethical conduct because of legal requirements to act in good faith and avoid conflicts of interest.[7] Fiduciary duty arises from centuries of common and civil law developments that recognize certain "special relationships", such as parent-child, doctor-patient, director/officer-corporation and trustee-beneficiary as fiduciary relationships.[8] It emerges in any relationship in which one party can reasonably be expected to rely on another to protect its interests, and in contexts in which one party has power or influence over the economic, legal or practical interests of other persons. It does not matter that the fiduciary undertaking is gratuitous;[9] it does not arise out of contract, it arises from the relationship.[10] But it can also be imposed by statute as it is in pension standards legislation[11] and legislation governing corporations.[12]

---

7 The roots go back to Roman law. *Keech v Sandford* [1726] EWHC J76 is a foundational common-law case that has affected the development of director and officer duties in company law in Canada, the UK and the U.S. It holds that a fiduciary owes a strict duty of loyalty so that there can never be a possibility of any conflict of interest. In Canada, see *Burke v Hudson's Bay* Co, 2010 SCC 34, [2010] 2 S.C.R. 273 at paras 39-41; *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377, at 408. There appears to be a common conceptual approach in both common law and civil traditions in Canada, see for example, *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc*. [1977] 2 S.C.R. 67. In Canada the duty has both proscriptive (negative) and prescriptive (positive) obligations. *McInerney v MacDonald,* 1992 CanLII 57, [1992] 2 SCR 138, Supreme Court of Canada.

8 M M Litman, 'Law of Fiduciary Obligation', *The Canadian Encyclopedia* (February 11, 2021) provides a useful overview. The leading cases include the Supreme Court of Canada's classic "special relationship" commentary in decisions such as *Hodgkinson v. Simms* [1994] 3 SCR 377 (financial adviser-client); or *Lac Minerals Ltd. v. International Corona Resources Ltd*. [1989] 2 SCR 574 (potential commercial partners).

9 A W Scott, 'The Fiduciary Principle' (1949) 37 Cal L Rev 539 at 540.

10 That is not to say it could not arise out of a contractual obligation to provide a pension; in Canadian civil law jurisdictions, such as Québec, there is an overarching principle for parties to all contracts, including employment contracts, to act in good faith, see Civil Code of Québec, S.Q. 1991, c. 64, as amended 2020. There are 80 provisions in the Civil Code that impose good faith obligations; see for example, articles 6, 7, 317, 1362 and 1375.

11 For example, subsection 8(3) of the *Pension Benefits Standards Act* RSC 1985, c 32 (2nd Supp) ("***PBSA***") makes it clear to whom the fiduciary duty is owed. It states, "the administrator shall administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits under the plan". See also, *Supplemental Pension Plans Act*, CQLR c R-15.1 ss. 150, which requires the administer, a pension committee, to "act in the capacity of a trustee", although the duty appears to be directed to members and human beneficiaries. See also, British Columbia *Pension Benefits Standards Act,* SBC 2012, c 30, as amended, s 35, in which the administrator must "(a) act honestly, in good faith and in the best interests of (i) the members, and (ii) others entitled to benefits, and (b) exercise the care, diligence and skill that a person of ordinary prudence would exercise when dealing with the property of another person." See also Alberta *Employment Pension Plans Act,* SA, 2012 C E-8.1, as amended, s 35(3), with an identical provision. The Federal government and all provinces have pension standards legislation, pension standards legislation in the Province of Prince Edward Island has never been proclaimed in force. It is also acknowledged that there may not be as much clarity as there is in the federal legislation to indicate that fiduciary duty extends to having regard to the interests of the employer as well as the human beneficiaries, which may mean the scope of the duty will be shaped by the intended structure of the plan – trust or contract – and the terms of the pension plan's constituent documents, the "plan text" and funding agreement (*Schmidt v. Air Products Canada Ltd*., [1994] 2 S.C.R. 611) and not the relationship *per se*.

12 See for example, *Canada Business Corporation Act*, RSC, 1985, c C-44, as amended, section 122 ("***CBCA***"). The CBCA requires every officer and director to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. It requires directors and officers to make sufficient inquiries to inform themselves and consider all material information available to them prior to acting. While the Act requires officers and directors to act "in the best interests of a corporation", it does not mean only acting in the best interests of shareholders. Where the corporation is a going concern, it requires a contextual evaluation of long-term corporate interests that may require consideration of "the interests of, [among other

Aside from pension standards, there is no doubt that administrators and their service providers responsible for investment of pension funds are fiduciaries under the common-law and civil law in Canada as well. The Supreme Court of Canada has expressly held that there are circumstances in which a pension plan administrator has fiduciary obligations to plan members both at common law and under statute.[13]

Employers and participants rely on plan administrators to successfully invest plan assets whether the design is defined benefit (DB), defined contribution (DC) or a hybrid. In DB plans, positive financial performance results in greater financial security for plan participants and lower cost for employers, because the employer is directly responsible for funding shortfalls. 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.[14] Similar interests are evident in the context of hybrid plans, including contingent defined benefit, shared risk and target benefit plans.

While many forms of pension structures are permitted in Canada -- including trust, insurance contract, pension corporation, and statutory entity -- all forms impose both general common- or civil-law fiduciary duty, and more onerous statutory fiduciary duties. The discretionary power to invest plan assets in a DB context or to choose the funds available for investment by plan participants in a member-choice DC context, engages these duties. In all jurisdictions in Canada with pension standards legislation in force,[15] it is clear that no matter what structure is employed, the administrator must “administer the pension plan and pension fund as a trustee for the employer, the members of the pension plan, former members, and any other persons entitled to pension benefits under the plan.”[16]

Fiduciary duty has two main components relevant to the investment of pension funds and climate change considerations: a duty of care and a duty of loyalty.

The standard of care applicable to a fiduciary under the common- and civil law, is somewhat higher than the reasonable person standard applied to negligence or contract cases. "The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider, the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide."[17] The implication being that a person would take more care with someone else’s property than his or her own. This elevated standard is reflected in minimum pension standards legislation.[18] This standard also applies to employees, agents and other delegates of the administrator.[19] Where a

things], shareholders, employees, creditors, consumers, governments and the environment to inform their decisions.” Moreover, “everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way.” (*BCE v 1976 Debentureholders, 2008 SCC 69*)

13 *Burke v Hudson’s Bay Co*, 2010 SCC 34, [2010] 2 SCR 273, at paras 417-48.

14 In setting reasonable provisions for a normal or voluntary early retirement date a pension plan may continue to make age-based distinctions that might otherwise violate human or Charter rights, where the distinctions are based on actuarial considerations. Nonetheless, an employee can no longer be compelled to retire at age 65, the usual age established under registered pension plans for “normal retirement”.

15 Only Prince Edward Island has pension legislation that has not be proclaimed in force.

16 The language is from the *PBSA*, *supra* note 12, subsection 8(3). This makes specific reference to giving consideration to the interests of employers. That employers also have beneficial interests may be less clear in other Canadian jurisdictions. However, unlike the U.S., there is no Canadian pension standards that imposes an “exclusive benefit rule” of the type which requires U.S. administrators to act solely in the best interests of the human beneficiaries of a pension plan.

17 L J Lindley, *Re Whiteley* (1886) 33 Ch D 347,355; See also, Financial Services Commission of Ontario, Investment of Pension Funds - Policy I400-600, published May, 1990 which describes the history and application of the prudence standard.

18 For examples see *PBSA*, *supra* note 12, s 8(4); or *PBA*, *supra* note 7, ss 22(1) and 22(8).

19 For example, *PBA*, *supra* note 7 s 22(8).

pension administrator or its delegate has special skill or expertise, they will be held to a higher, expert, standard of care.[20]

The duty of loyalty imposes standards of honesty, good faith and impartiality. This duty does not mean loyalty to the social, moral, ethical, political, cultural or environmental interests of the employer or plan participants. It does mean either avoiding or properly managing[21] conflicts of interest between the interests of beneficiaries of the plan and potentially opposing interests of the administrator or any other party. It also means fidelity and devotion to the terms of the plan, including the purposes of the plan.[22] Finally, it means remaining neutral, impartial and even-handed among the different classes or types of beneficiaries, including employers, employee members accruing benefits, retirees, former members with deferred entitlements, and survivors in receipt of benefits.

In Canadian case law, the duty of impartiality has occasionally received attention in the context of ensuring similar treatment within the same class of plan beneficiaries in the administration of pension benefits;[23] but while not yet explicitly dealt with by our courts, it should also invoke consideration of intergenerational equity that is directly relevant to maintaining a longer term perspective on investment management and impartiality between generations of plan participants:

> "The duty of impartiality assumes competence with respect to long-term value creation and risk mitigation. To be clear, the issue is not that a short-term outlook is wrong but, rather, that a deliberate balance should be struck between mission and risk-adjusted returns, including related opportunity costs. Fiduciaries must ensure that their decision-making processes balance allocation of capital between near-term needs and future wealth creation and consider the potential transfer of risks between participant generations. Intergenerational wealth maximization requires active consideration of a range of factors beyond narrow financial criteria."[24]

Pension plan fiduciaries must recognize and balance current and future intergenerational risk and return considerations over periods that potentially exceed human lifetimes. The evidence reviewed below indicates that

---

20 For example, *PBSA*, *supra* note 12, s 8(5); or *PBA*, *supra* note 7, ss 22(1) and 22(8).

21 Pension standards legislation expressly permits an apparent perpetual conflict of interest to exist because it allows the settlor (or sponsor) of a plan to be the plan fiduciary (or administrator). In *Sun Indalex Finance, LLC v. United Steelworkers* [2013] 1 SCR 271, a majority of the Supreme Court of Canada found that an administrator-sponsor who finds itself n an actual conflict must manage the conflict essentially by ensuring the plan has an opportunity to be represented as if there were an independent administrator.

22 Sometimes referred to as a duty to obey the trust instrument. David J Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton Law of Trusts and Trustees* (18th ed, London: Butterworths, 2010) at 43.2; Trustees must act prudently in their selection of investments, having regard to the terms of the trust and the interests of the beneficiaries, Donovan Waters, Mark Gillen and Lionel Smith, *Waters' Law of trusts in Canada* (3d ed, Toronto: Carswell, 2005) at 940-41. *Cowan v Scargill* [1985] Ch 270 remains an important authority that appears to be largely misunderstood. The case involved a jointly trusteed pension plan in which the trustees were deadlocked because the union trustees wanted to impose restrictions on "overseas investments" and "investments which directly competed with coal" regardless of financial result. As a "starting point" for analysis the Court held that "when the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case [in a pension trust], the best interests of the beneficiaries are normally their best financial interests". The Court went on to find that the proposed restrictions did not meet the trustees' investment duties. The case has been misinterpreted as raising doubts over environmental, social or ethical investments. However. a close reading of the decision refutes this: "…I am not asserting that the benefit of the beneficiaries which a trustee must make his paramount concern inevitably and solely means their financial benefit, even if the only object of the trust is to provide financial benefits." The real problem was the fact that Mr. Scargill was adamant about his "total opposition" to overseas and competing investments, even if a better financial result could be obtained, simply because that was the policy of his union in which he was a leader. For a discussion of *Cowan v Scargill*, see also J Sarra, 'Fiduciary Obligations in Business and Investment: Implications of Climate Change' (CCLI, 2018), at 55-58, *available at*: https://law-ccli-2019.sites.olt.ubc.ca/files/2019/08/Janis-Sarra-Fiduciary-Obligation-in-Business-and-Investment.pdf.

23 *Boe v. Alexander ((1987), 15 B.C.L.R. (2d) 106 (B.C.C.A.))*; *Neville v. Wynne* (2006 BCCA 460).

24 James Hawley, Keith Johnson and Ed Waitzer, 'Reclaiming Fiduciary Duty Balance' (2011) 4(2) Rotman International Journal of Pension Management, at 8.

climate change gives rise to both immediate and long term economic and portfolio risk exposures and opportunities, and as a result, triggers a multi-generational oversight approach that unavoidably engages the duty of impartiality.

The duty of plan fiduciaries to exercise their investment powers in the best interests of plan beneficiaries must take place within the legal parameters dictated by the plan terms.[25] In Canada it is a condition of tax qualification that the "primary purpose" of a "registered pension plan" ("**RPP**") "is to provide periodic payments to individuals after retirement and until death in respect of their service as employees."[26] This primary purpose is clearly financial. As a result, fiduciary powers must be exercised fairly and honestly to achieve that primary financial purpose.

This primary financial purpose does not preclude other secondary considerations such as the environment or ethical considerations in very specific circumstances;[27] but in the case of climate change the acknowledged fact of climate change in the *GHG Reference,* coupled with the sheer weight of consensus evidence, makes any reference to secondary considerations entirely unnecessary. In other words, such secondary considerations might be relevant to other ESG considerations, but they are not needed to support fiduciary attention to climate change. This is because the overwhelming consensus evidence is that not only is climate change a serious threat to the planet and to people, but it seems to be the biggest short and long term threat to national and transnational economies.[28]

3. The Financial Relevance of Climate Change to Fiduciary Investment Responsibilities

In the *GHG Reference*, the Supreme Court of Canada acknowledged "that all parties to this proceeding agree that climate change is an existential challenge",[29] that it is "a threat of the highest order to the country, and indeed to the world"[30] and that carbon pricing is of significant importance in national and international efforts to reduce

25 *Schmidt v. Air Products, supra* note 12. Almost 30 years ago the Supreme Court of Canada clearly indicated that whether a trust exists or not, all legal obligations flow from the structure of the arrangement and require a careful analysis of the words used to document it.

26 Regulation 8502(a), made pursuant to the *Income Tax Act*, RSC 1985 c. 1 (5th Supp), as amended, Government of Canada, Chapter 8 - 8502 – Conditions Applicable to all Pension Plans - Canada.ca

27 Randy Bauslaugh and Dr Hendrick Garz, 'Pension Fund Investment: Managing Environmental, Social and Governance (ESG) Factor Integration' (2019) 32(4) Trust Law International, at 264-278.

28 As noted below, there is a substantial body of academic literature about the short and long term economic effects of climate change. Some are positive, such as short term benefits from carbon dioxide fertilization of crops and reduced demand for heating, but many more are negative, if not devastating, including long term effects on global agricultural. Short-term economic losses of climate change include losses directly attributable to more extreme weather events. Accountants, insurers and other financial entities are concerned. The following papers provide useful overviews; Patricia Buckley, Tom Simmons, Dr Michela Coppola, Craig Alexander, and Michael Wolf, 'Facing the Heat: Economic Implications of Climate Inaction' (*Deloitte Insights*, 2021), *available at*: Climate change and carbon tax impact on the economy | Deloitte Insights; Irene Lauro, 'What's the Short-Term Economic Impact of Climate Change' (*Schroders*, 2020), *available at*: https://www.schroders.com/en/au/institutions/insights/investment-insights/whats-the-short-term-economic-impact-of-climate-change/; Ryan Nunn, Jimmy O'Donnell, Jay Shambaugh, Lawrence H Goulder, Charles D Kolstad, and Xianling Long, 'Ten Facts About the Economics of Climate Change and Climate Policy' (Brookings Institute: A joint report from The Hamilton Project and the Stanford Institute for Economic Policy Research, 2019), *available at*: https://www.brookings.edu/research/ten-facts-about-the-economics-of-climate-change-and-climate-policy/.

29 *GHG Reference*, *supra* note 3, para 167.

30 *Ibid.*

greenhouse gas emissions to address climate change.[31] This appears to be consistent with years of warnings from the scientific community that climate change will be transformative; that tackling it is "urgent" …"the defining issue of our time" and even more dangerous than COVID-19.[32] The only legitimate scientific debate appears to be around how devastating the effects will be and when.

Science cannot predict the future with certainty, but current scientific consensus appears to be that "a warming greater than 1.5 °C is … not geophysically unavoidable"[33]. Even if all carbon emissions were reduced to zero today, widely accepted scientific predictions are that the committed effect of carbon already in the atmosphere will increase sea levels by 1.3 to 1.9 metres, not to mention that we appear to be adding about 0.32 metres per decade to the total.[34] At current levels of increase, after taking into account current abatement efforts, average temperatures are expected to increase, compared to pre-industrial levels, by an additional 1.4–5.8 °C by the year 2100, and even if the minimum predicted increase takes place, it will be larger than any century-long trend in the last 10,000 years.[35] Very recent studies by various reputable organizations, from NASA to the Potsdam Institute, to the United Kingdom's Meteorological Office, indicate we may already be committed to a 2 °C increase,[36] the maximum increase 196 nations agreed not to exceed under the Paris Agreement in 2015.[37] According to one commentator, "2 °C implies a long-term commitment for 4.8 m of mean global sea-level rise. It is claimed that this increase is nearly twice the height of hurricane Sandy's peak storm surge at The Battery in New York City and exceeds the average elevations of major coastal cities across the globe."[38]

Whether some of this is hyperbole or not, and recognizing that there is considerable debate about how Canada should address climate change, it is not inconsistent with the view that climate change poses an existential threat, as acknowledged by the Supreme Court in the *GHG Reference*, and in the reports of many different expert national and international bodies and asset owners that are more specific about the urgent and material economic and financial implications that flow from that threat.[39]

---

31 *Ibid.*, para 169 -170.

32 Group Vattenfall, 'The Conversation on Climate Change and its Impact on Human Behaviour', *available at*: https://group.vattenfall.com/what-we-do/climate-conversation.

33 Intergovernmental Panel on Climate Change (**IPCC**), 'Intergovernmental Panel on Climate Change, Special Report: Global warming of 1.5 °C' (2018) c 1, 4th paragraph of Executive Summary, *available at*: Global Warming of 1.5 ºC — (ipcc.ch) (IPCC Special Report).

34 Benjamin H Straus, 'Rapid Accumulation of Committed Sea-level Rise from Global Warming' (2013) 110(34) Proc Natl Acad Sci USA (PNAS) 13699-13700, at para 1, *available at*: https://doi.org/10.1073/pnas.1312464110; see also, U.S. Department of Commerce, National Oceanic and Atmospheric Administration, 'Is Sea Level Rising?' (February 26, 2021), which among other things notes that storm surges and nuisance flooding is estimated to be from 300 percent to 900 percent more frequent along U.S. coastal communities than it was just 50 years ago. See also, IPCC, 'Special Report on the Ocean and Cryosphere in a Changing Climate' (2019), *available at*: Special Report on the Ocean and Cryosphere in a Changing Climate — (ipcc.ch).

35 World Health Organization and United Nations Environmental Program, the Health and Environment Linkages Initiative (HELI), *available at*: https://www.who.int/heli/risks/climate/climatechange/en/.

36 Tim Radford, 'Earth is Now Committed to a 2°C Hotter Future' (*Climate News Network*, January 12, 2021) *available at*: https://climatenewsnetwork.net/earth-is-now-committed-to-a-2c-hotter-future/.

37 The Paris Agreement is a landmark environmental accord that was adopted at a convention of 196 countries in 2015 to address climate change and its negative impacts. Its goal is to substantially reduce global greenhouse gas emissions in an effort to limit global temperature increases in this century to 2 degrees Celsius above preindustrial levels, while pursuing means to limit the increase to 1.5 degrees. The agreement includes commitments from all major emitting countries to reduce climate-altering pollution and to strengthen those commitments over time. The pact provides a pathway for developed nations to assist developing nations in their climate mitigation and adaptation efforts, and it creates a framework for the transparent monitoring, reporting, and ratcheting up of national and international climate goals.

38 *Ibid*., Straus, *Supra* Note 35; see also, A Levermann, *et al*, 'The multimillennial sea-level commitment of global warming' (2013), 110(34) Proc Natl Acad Sci USA, 13745–13750, *available at*: https://doi.org/10.1073/pnas.1219414110.

39 This includes United Nations organizations, such as the United Nations Environment Program Finance Initiative (UNEP FI) and the UN-supported network of investors, The Principles for Responsible Investment (PRI Group) which themselves provide ongoing programing for asset owners as well as research papers that reference the urgency and materiality of climate change,

The Intergovernmental Panel on Climate Change (**IPCC**) was established in 1988 by the General Assembly of the United Nations as an expert international body to review, consolidate and report on the state of knowledge of the science of climate change, its social and economic impacts, and potential response strategies. Its most recent report, is among other things, a catalogue of physical, economic and social threats to livelihoods and assets, including global monetary damage, across many different geographies and sectors of economic and financial activity.[40]

The Task Force on Climate-Related Financial Disclosures (**TCFD**) was established in 2015 by former Bank of England Governor Mark Carney to help identify information needed by investors, lenders and insurance underwriters to appropriately assess and price climate-related risks and opportunities. Its members consist of 29 representatives from various organizations, including major banks, insurance companies, asset managers, pension funds, and large accounting and consulting firms as well as credit rating agencies. It has published reports on climate-related risk analysis, metrics and disclosure practices, as well as recommendations for improvement.[41] This too is likely important information for pension fiduciaries to be aware of. As noted in more detail below, the TCFD recommendations were also adopted in pension standards legislation tabled by the United Kingdom in January, 2021.

The financial relevance of a changing climate has also been accepted by others in the financial services sector, including bankers, actuaries, accountants, insurers, investment managers, securities regulators, academics, and public sector organizations. All of these bodies implicitly or explicitly acknowledge the reality, the urgency and the financial materiality wrought by climate change. This is evidenced in the works they produce on a regular basis to provide guidance or rules to help or require their constituencies to appropriately quantify, disclose or manage the financial implications of climate change in their specific domains.[42] And that is supplemented by a broad cluster of commentary by other actors in the financial services space.[43]

Fiduciaries should also be aware of consensus scientific and economic opinion that climate change has, and will continue to have, a cascading effect of inter-related and accelerating events. The scientific and economic concern is that rapid and profound changes will continue to result in more frequent and intense wildfires, longer periods of drought, heavier precipitation, more cyclones and hurricanes, increases in the number, duration and intensity of storms, species extinction, population displacement as well as adverse impacts on freshwater ecosystems, food

---

such as 'The Inevitable Policy Response 2021: Policy Forecasts, The Investor Brief' (PRI, March 2021), a*vailable at*: The Inevitable Policy Response 2021: Policy Forecasts | Articles | PRI (unpri.org).

40 IPCC Special Report, *supra* note 34, c 1, at A.1, B.4, B.5. This report identifies the affects of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emissions related to climate change, sustainable development, and efforts to eradicate poverty.

41 Taskforce on Climate-related Financial Disclosures, 'Final Report, Recommendations of the Task Force on Climate-related Financial Disclosures' (2017), *available at:* https://www.fsb-tcfd.org/publications/ (hereafter TCFD Final Report).

42 See for example, Bank of Canada, 'Climate Change is a big issue for central banks'*;* Chartered Professional Accountants Canada (CPA), 'Climate Change Resources for CPAs'; CPA, 'Accounting for Sustainability' (February 23, 2021); Canadian Institute of Actuaries, 'Time to Act: Facing the Risks of a Changing Climate', as well as other resources and guidance material; Matt Orsagh, 'Climate Change Analysis in the Investment Process' (CFA Institute, September 21, 2020); Canadian Securities Administrators, 'Reporting of Climate Change-related Risks' (CSA Staff Notice 51-358, August 1, 2019).

43 See for example, E Bush, and D S Lemmen (eds), *Canada's Changing Climate Report* (Government of Canada, Ottawa, ON, 2019), 444. The digital interactive version of the report is *available at:* www.ChangingClimate.ca/CCCR2019; the report is also *available at*: www.adaptation.nrcan.gc.ca; See also United Nations Office for Disaster Risk Reduction, 'Economic Losses, Poverty & Disasters: 1998-2017' (2018) at 3, *available at*: PreventionWeb [UNISDR]; P Espinosa and M Mizutori, 'Climate Change Is a Major Multiplier of Disaster Losses', (UNFCCC United Nations Climate Change Editorial, October 12, 2018), *available at*: Climate Change Is a Major Multiplier of Disaster Losses | UNFCCC. World Economic Forum, 'How to Set Up Effective Climate Governance on Corporate Boards: Guiding principles and questions' (2019), *available at*: How to Set Up Effective Climate Governance on Corporate Boards: Guiding principles and questions | World Economic Forum (weforum.org); UN PRI, 'The Inevitable Policy Response 2021: Policy Forecasts' *(The Investor Brief,* March 2021), *available at*: The Inevitable Policy Response 2021: Policy Forecasts | Articles | PRI (unpri.org).

security, water supply, and economic growth. Increases in temperature and sea levels are already having observable adverse affects on human health and mortality. Rising sea levels pose threats to many small island states and for the world's most developed coastal cities, like New York, London, Singapore and Vancouver.[44] The evidence indicates that even though the extent of climate-related risks depends on the rate, peak and duration of warming, many effects will be long-lasting or irreversible and the expectation is that human and economic consequences could be devastating.[45] Again, whether or not some of this is exaggeration, the baseline consensus scientific evidence along with the economic analysis is still relevant to identifying and assessing potential investments and formulating investment strategies.

An important point to highlight is that not all is doom and gloom. According to consensus statements from a diverse array of private, public and representative organizations like Credit-Suisse, Morgan Stanley, Blackrock, the G20, the International Monetary Fund and the World Meteorological Society, there are opportunities as well as risks. "Adaptation policies aimed at enhancing resilience to a changing climate, such as investing in disaster-proof infrastructure and early warning systems, risk sharing through financial markets, and the development of social safety nets, can limit the impact of weather-related shocks and help the economy recover faster".[46] Indeed there appears to be common sense optimism that an urgent response could more positively affect the economy by moving capital and credit from harmful or problematic sectors or geographies, to products, infrastructure, geographies and technologies positioned to benefit from the climate transition.

4. Must Plan Fiduciaries Consider Implications of Climate Change?

So what does this legal backdrop and the evidence of climate change mean for fiduciaries and their delegates who are responsible for pension fund investments? What does it mean for a pension industry as diverse as the Canadian pension industry – one in which there are almost 17,000 registered pension plans, more than 50% of which have fewer than 10 members?[47]

It means no matter how big or how small, plan fiduciaries (and their delegates) are ultimately responsible for any failure to properly take climate change risks and opportunities into account. This responsibility could manifest itself in many different ways or combinations of ways, since courts have much more discretion in fiduciary cases, and compensation for breach of fiduciary duty can be much more generous than under contract or tort law. As a result, a fiduciary might face: (a) removal; (b) court ordered disclosure of information relating to climate change financial risks, (c) fines and penalties under pension standards legislation; and (d) personal financial responsibility for investment underperformance or loss resulting from failure to properly manage climate change risks and opportunities, including equitable compensation or exemplary damages.

---

44 IPCC Special Report, s*upra* note 34, Chapter B deals with 'Projected Climate Change, Potential Impacts and Associated Risks', *available at*: https://www.ipcc.ch/sr15/chapter/spm/.

45 Paris Agreement targets will not change this reality or the urgency; but it may ameliorate matters, if it doesn't turn out to be too little too late.

46 World Meteorological Organization, 'State of the Global Climate 2020', (Press Release 19042021, April 19, 2021), *available at*: https://public.wmo.int/en/media/press-release/climate-change-indicators-and-impacts-worsened-2020.

47 Registered pension plans are established, or in legal terms, "settled", by employers, unions and associations. They come in all shapes and sizes. There are almost 17,000 pension plans registered in Canada with over $2 trillion in assets and 50% of have fewer than 10 members. More than half of all pension fund assets are held by only 31 large plans, with 30,000 or more members, and which account for more than one half of all plan membership. *Available at*: https://www150.statcan.gc.ca/n1/daily-quotidien/190619/dq190619f-eng.htm.

Plan fiduciaries might also face reputational or organizational risks for failing to address climate change issues, or failing to engage on climate change issues in a manner consistent with the primary financial purpose of a registered pension plan.

Maziar Peihani of the Peter A. Allard School of Law at the University of British Columbia and the Centre for International Governance Innovation has observed that those with oversight responsibility must be informed skeptics:

> As fiduciaries, the boards of directors have a duty to evaluate the risks caused by climate change to change their portfolios. This requires going beyond just passive receipt of information and instead establishing a robust process to oversee and verify their funds' progress in tackling climate change. Similar to financial statements that are subject to significant scrutiny by directors and auditors, the measurement and management of climate risks must also undergo adequate vetting and verification. As a prerequisite for effective oversight, boards need to acquire a thorough knowledge of how relevant and significant climate change is to their organizations' investment strategy, financial performance, and asset allocation.[48]

In Australia, a recent legal opinion by distinguished legal counsel Noel Hutley and James Mack notes:

> … the likelihood of the financial risk being a material risk to investments managed by a superannuation trustee is such that a trustee is obliged to undertake a two-step exercise (if they have not already) in order to comply with obligations under superannuation law. The first step is to understand the risk posed by climate change to investments. The second step is to manage any identified risk. The degree and nature of the financial risk will be determined during the first step. The action required in order to respond to the degree and nature of the financial risk will be determined during the second step…
>
> …a board is required to ensure that the structures and processes of the trustees are capable of understanding and then managing the financial risk posed by climate change. In order to act prudently and in the best interests of members, it is the board who must have set in place processes that enable it to understand and manage the financial risk posed by climate change.[49]

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.

48 Maziar Peihani, 'Pension Fiduciaries and Climate Change: A Canadian Perspective' (2021) 46(1) Queen's Law Journal, at 12.

49 N C Hutley and J E Mack, 'Memorandum of Opinion: Superannuation Trustee Duties and Climate Change' (Equity Generation Lawyers, February 16, 2021) at 5-6, *available at:* Microsoft Word - 210216 Final Advice for Hutley - Superannuation Trustee Duties and Climate Change.docx (equitygenerationlawyers.com).

5. Climate-Related Risks and Opportunities Relevant to Fiduciary Management

What are the climate-related risks and opportunities relevant to portfolio management by plan fiduciaries? What does it mean for pension fund governance and the responsibility of investee entities?

In a 2015 speech, the Governor of the Bank of England and Chair of the Financial Stability Board at Lloyd's of London, Mark Carney, articulated three broad types of climate-related risks that could have profound implications for insurers, financial stability and the economy: (1) *physical risks* -- adverse impact on insurance liabilities and the value of financial assets arising from climate- and weather-related events or longer-term changes in land use or water levels; (2) *liability risks* -- the obligation to compensate parties who have suffered climate-related loss or damage, and (3) *transition* risks -- failure to take into account or reassess the value of assets due to changes in policy, technology and known physical risks.[50] These categories appear to be generally accepted.[51]

While plan fiduciaries have a duty to manage identifiable and well documented physical, liability and transition risks associated with climate change, they should also be identifying and managing financial opportunities. Those opportunities may be profit-making or simply part of a portfolio allocation or transition strategy to protect against loss or disruption due to climate change. Examples might include investment in: (a) commercial construction of dams or more resilient building projects better able to withstand extreme weather events; (b) renewable energy sources, such as wind, wave or solar energy; (c) companies with sound sustainability and productivity goals; (d) sustainable agriculture; (e) more climate resilient supply chains; and (f) "green bonds", which finance a broad range of environmentally friendly projects, often come with tax incentives, and have seen a dramatic increase in recent months.[52]

6. Recent Climate Change Case-Law

As noted above, in the *GHG Reference*, the Supreme Court of Canada observed that climate change is real and "poses grave threats."[53] It went on to acknowledge that the effects of climate change have been and will be particularly severe and devastating in Canada, including temperatures rising at double the global average rate of increase, extreme weather events like floods and forest fires, degradation of soil and water resources, increased frequency and severity of heat waves, sea level rise, and the spread of potentially life-threatening vector-borne

---

50 Mark Carney, Governor of the Bank of England and Chairman of the Financial Stability Board, 'Breaking the Tragedy of the Horizon – Climate Change and Financial Stability', (Speech at Lloyd's of London, London, September 29, 2015), at 4, *available at*: Mark Carney: Breaking the tragedy of the horizon - climate change and financial stability (bis.org).

51 See for example, Bank of England, 'Climate Change: what are the risks to financial stability' (2019), *available at:* Climate change: what are the risks to financial stability? | Bank of England; Shift, 'Canada's Pension Funds and Climate Risk: A Baseline for Engagement' (June 2019), at 4, *available at*: https://static1.squarespace.com/static/5b9a9754d274cbec1ca7f8f8/t/5d1fc1400b9e9c00016b6bee/15623621782; TCFD, '2020 Status Report: Task Force on Climate-related Financial Disclosures' (October 2020), *available at:* 2020 Status Report: Task Force on Climate-related Financial Disclosures - Financial Stability Board (fsb.org) (TCFD 2020 Status Report).

52 Green bonds are debt instruments that are used to finance a broad range of sustainable projects, primarily projects aimed at climate change mitigation or adaption. Green bonds have dramatically increased in demand since 2014, exceeding $1 trillion in October, 2020. See, Tom Freke, 'Bonds Aimed at Heavy Corporate Emitters Set to Roll Out in 2021', *Bloomberg News* (November 30, 2020), *available at*: https://www.bnnbloomberg.ca/bonds-aimed-at-heavy-corporate-emitters-set-to-roll-out-in-2021-1.1529319; and Tim Quinson, 'ESG Market Is Causing Bubble Anxiety', *Financial Post* (October 7, 2020), *available at*: https://financialpost.com/pmn/business-pmn/esg-market-record-is-causing-bubble-anxiety.

53 *GHG Reference*, *supra* note 3, para. 167.

diseases like Lyme disease and West Nile virus.[54] It discussed the need for businesses to change their behaviour so as to make more environmentally sustainable purchasing and consumption choices, to redirect their financial investments, and to reduce their greenhouse gas (**GHG**) emissions by substituting carbon-intensive goods for low-GHG alternatives.[55]

That case was not a pension case. It dealt with the constitutional legitimacy of the federal government to enact and impose the *Greenhouse Gas Pollution Pricing Act*[56] on provincial undertakings. But statements made by the Court in this case, like others under securities and corporate law,[57] may serve as a useful signpost for pension plan fiduciaries. It is certainly possible that beneficiaries or pension standards regulators, or both, could commence legal proceedings alleging breaches of fiduciary duties of prudence or loyalty relating to failures to consider climate change risks or opportunities. These actions could be based on authorizing, permitting or acquiescing in the making of investments without properly considering climate risks; failure to consider climate-related financial opportunities; failure to take climate risks and opportunities into account in setting investment policy for the short and long term, including intergenerational considerations. Whether successful or not, such challenges or criticisms could pose reputational risks that may simply defeat the purpose of the plan as an employer compensation tool, adversely affect confidence in the plan, adversely affect the sponsor's business or, in some union contexts, adversely affect confidence in trustees elected to oversee the plan.

There are no Canadian pension cases at the moment. However, complaints made by Canadian plan stakeholders about ongoing fund management or asset performance issues, or about specific losses or missed opportunities that are alleged to have a causal connection to climate change as a substantial contributing factor may result in regulatory intervention or concurrent or separate court proceedings.[58] Fiduciaries should appreciate that in the *GHG Reference* every government in Canada agreed that climate change is real and poses existential threats, so, as a practical matter, it must be assumed that government pension regulators will be prepared to investigate in response to a stakeholder complaint, without the stakeholder incurring any legal expense.

A recently settled case in the Federal Court of Australia, *McVeigh v. Retail Employees Superannuation Trust* 2018 NSD1333/2018 ("**McVeigh**") is likely a harbinger of climate change related legal proceedings to come in a pension context, but it may also serve as a warning and a roadmap for proper fiduciary conduct and legislative development.[59]

---

54 *Ibid* at para 10.

55 *Ibid* at para 16.

56 S.C. 2018, c.12. ("**GPPA")**. It appears that Parliament enacted the GGPPA as part of the country's effort to implement its commitment under the *Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add.1, December 12, 2015.

57 For instance, in *Oklahoma Firefighters Pension and Retirement Sys. v. Chew et al. (P G & E),* 18-cv-04698-RS (N.D. Cal. Dec. 20, 2018), a fiduciary duty claim was brought against electric utility PG&E after its transmission lines sparked historic fires in California in 2017. Plaintiffs alleged that the defendant directors knew about safety issues due to drought conditions and hotter temperatures brought about by climate change as a substantial contributing factor which they failed to do address, thereby breaching their duty of loyalty. The case settled for $90 million, which is a small fraction of the ultimate costs to PG&E caused by its inadequate safety culture, and which ultimately led to it filing for bankruptcy, and pleading guilty to involuntary manslaughter for the deaths of 84 people. *See* Priya Cherian Huskins, 'Five Types of Derivative Suits with Massive Settlements', (Woodruff Sawyer, 2020), *available at*: https://woodruffsawyer.com/do-notebook/five-derivative-suits-types-massive-settlements/.

58 Canadian courts have appellate jurisdiction in pension standards regulatory disputes. They also have concurrent or separate jurisdiction in pension matters where it is determined that a regulator or regulatory tribunal lacks jurisdiction to address all issues raised in a dispute, such as the application of trust law, the awarding of compensatory damages or the implementation of a settlement. See for example, *Emmons et al v. Ontario* (CEO of FSRA), 2021 ONFST 1; *Montreal Trust Company of Canada v. Ontario (Superintendent Financial Services*), 2009 ONFST 4, *Imperial Oil Limited v. Ontario (Superintendent Financial Services),* 2010 ONFST 16.

59 *Mark McVeigh v Retail Employees Superannuation Pty Limited* ACN 001 987 739, NSD 1333 of 2018, Concise Statement filed September 21, 2019, *available at*: http://www.envirojustice.org.au/wp-content/uploads/2018/10/180921-Amended-

In 2018, Mr. McVeigh, a member of the Retail Employees Superannuation Trust ("**REST"**), a defined contribution arrangement with more than $50 billion in assets,[60] commenced court proceedings to obtain disclosure of information relating to how the fund administrator was (or was not) dealing with climate change. He later amended his claim to add violations of the *Superannuation Industry (Supervision) Act 1993* (**SIS Act**),[61] on grounds that REST's trustees failed to act with care, skill and diligence, and failed to act in his best interests, by not properly considering or disclosing the risks climate change poses to the fund's investments.

It is important to note that McVeigh was represented by Environmental Justice Australia, a leading public interest legal organisation that acts on behalf of individuals and community organisations "to safeguard health; to protect magnificent forests, rivers and wildlife; and to tackle climate change."[62] It is also noteworthy that in 2019, McVeigh and his team were successful in obtaining a court order allowing him to limit his legal costs in the proceedings on the grounds that his case "was in the public interest."[63] Both signal a leveling of the economic (and psychological) imbalance that climate change litigants may face in taking action or mounting a challenge.

Just days before the scheduled hearing in November, 2020, the case settled[64] when REST's trustees acknowledged that "climate change could lead to catastrophic economic and social consequences and is an important concern of REST's members", and that it is "important to actively identify and manage" that risk.[65] As part of the settlement, the trustees also agreed to implement a number of climate-change initiatives, consistent with the TCFD recommendations on disclosure and risk assessment, including stress-testing investment portfolios based on a world that limits warming to well below 2 °C, in line with the Paris Agreement, a long-term objective to hit net-zero carbon footprint by 2050, to require its investment managers to take active steps to consider climate change, to measure and manage financial risks posed by climate change and other ESG-related risks and to improve its climate change and ESG-related disclosures.[66]

This case is not the only benefit plan lawsuit dealing with this issue; but there have not been many that have been resolved to date. In September 2019, Greenpeace Luxembourg brought an action in administrative court against the Luxembourg Minister of Social Security on grounds that the Minister failed to respond to an August letter asking for information regarding how Luxembourg's sovereign pension fund planned to align its investments with

---

Concise-Statement-STAMPED.pdf. The pleadings can be found here: http://climatecasechart.com/non-us-case/mcveigh-v-retail-employees-superannuation-trust/.

60 Retail Employees Superannuation Trustee (REST), '2020 Annual Report' (December 11, 2020) *available at*: https://cdn.rest.com.au/rest_web/media/documents/why-rest/about-rest/corporate-governance/annual-reports/annual-report-2020-rest.pdf?_ga=2.109094917.1681738175.1617632400-664755437.1615754121. The 2020 Annual Report indicates defined contribution assets in excess of $A55 billion.

61 Australia *Superannuation Industry (Supervision) Act 1993,* as amended (Cth) ("***SIS Act***").

62 Environmental Justice Australia, 'Who We Are', *available at*: https://www.envirojustice.org.au/who-we-are/.

63 The Federal Court of Australia found that "the case appears to raise a socially significant issue about the role of superannuation trusts and trustees in the current public controversy about climate change. It is legitimate to describe the Applicant's litigation as being of a public interest nature." *McVeigh v Retail Employees Superannuation Pty Ltd* [2019] FCA 14 (Fed CA) at para 9.

64 REST, 'Rest reaches settlement with Mark McVeigh' (November Settlement Statement, November 2, 2020), available at: Rest reaches settlement with Mark McVeigh - News | Rest Super; see also Court File, *available at:* https://www.comcourts.gov.au/file/Federal/P/NSD1333/2018/actions.

65 Travers Smith, 'Pension fund agrees to settle in landmark Australian climate change case, McVeigh v Rest' (Sustainability Briefing, January 20, 2021), *available at*: https://www.traverssmith.com/knowledge/knowledge-container/pension-fund-agrees-settlement-in-landmark-australian-climate-change-case-mcveigh-v-rest/.

66 *Ibid*.

the objectives of the Paris Agreement, and information on the climate-related financial risks associated with the fund's investments.[67] That case remains ongoing.

There have also been climate change related class actions by plan members against an employer-administrator relating to a pension plan holding coal stocks, but that action was discontinued when the company went bankrupt.[68] Class members did not appear to pursue the individuals responsible for investment management, personally.

A 2017 case relating to a coal company's stock purchase plan failed, largely because the litigating participants continued to buy stock.[69]

It appears that pension and benefit plan claims may be relatively new ground for class action law firms to till; but they will no doubt take their lead from the considerable activity relating to climate change litigation in more traditional corporate and securities realms.[70] As asset owners and investors, pension plan fiduciaries should ensure these developments remain on their radar screens, particularly since there are reliable websites tracking climate change litigation around the world.[71] As this area develops, fiduciaries of large plans will no doubt be approached to be lead plaintiffs[72] in climate change related class litigation.

7. Insulating Plan Fiduciaries from Climate Change Claims

Unlike other types of legal claims, there is no element of intent involved in fiduciary breach -- administrators or their delegates will be responsible whether they understand they have fiduciary responsibility or not, and whether they are compensated or not. As demonstrated in *McVeigh*, there may not even be any actual damages or unjust

67 *Greenpeace Luxembourg v Schneider*, *available at*: 20191217_Not-availab http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20191217_Not-available_judgment.pdf le_judgment.pdf (columbia.edu).

68 In *Arch Coal*, class members alleged breaches of fiduciary duty pursuant to the *Employee Retirement Income Security Act* ("***ERISA***"). Plaintiffs asserted that the defendants retained Arch stock as investment options in the plans when a reasonable fiduciary would have done otherwise. The complaint alleged that defendants should have known that the pension plan's investments in Arch stock were imprudent because of the "sea-change" in the coal industry. Causes of this "sea-change" cited in the complaint included the regulation of carbon dioxide emissions from power plants. The case was stayed when Arch Coal filed for Chapter 11 bankruptcy in 2016.

69 In 2017, the federal district court for the Eastern District of Missouri dismissed a class action under *ERISA* that had been brought against the coal company Peabody Energy Corporation (Peabody) and related entities and individuals. The court concluded that the plaintiffs, who were participants in Peabody employee stock option plans, had failed to state a claim that the defendants breached their duty of prudence under *ERISA* by retaining and continuing to purchase Peabody stock in light of public information that established that doing so was unreasonable. The court also found that the plaintiff's "non-public information" claim—based on Peabody's allegedly deceptive representations regarding the future of coal—failed because the plaintiffs had not established that a prudent fiduciary could not have concluded that alternatives to continued investment in Peabody stock would do more harm than good.

70 This information can be found on publicly available websites that track climate change litigation around the globe. For example, Columbia Law School maintains a Climate Change Litigation Database, *available at*: http://climatecasechart.com/ that tracks both U.S. and Non-U.S. litigation (in more than 40 countries) and which can be searched in different ways by jurisdiction, or types of defendants. It indicates Canada currently has 25 cases. Another data base with information on global litigation and changes in the law is maintained by the Grantham Research Institute on Climate Change and the Environment, London School of Economics, *available at*: http://climate-laws.org.

71 *Ibid.*

72 A lead plaintiff is generally the entity or person with the greatest financial interest in the relief sought by the putative class who is also typical of the putative class. A lead plaintiff acts on behalf of all other class members in directing the class action lawsuit.

enrichment involved, but simply the possibility of damage flowing from a failure to act prudently, including making appropriate disclosures. *McVeigh* (and other cases) also signal an increase in public interest litigation funded or supported by public interest organizations intent on pursuing political, socio-cultural and environmental goals by more strategically focussing on legal action opportunities relating to climate change.

The best defence to any claim of fiduciary misconduct is evidence of reasonable behaviour. There are basic actions pension fund fiduciaries and their expert delegates can take to provide demonstrable evidence of good fiduciary behaviour, which is to say, evidence they are actively identifying and managing climate change risk and opportunity, including the following:

- *Expressly address climate change in the written statement of investment policies and procedures ("**SIPP**").* Written policies are, in legal terms, *prima facie* evidence of good fiduciary conduct; they establish a presumption, subject to further evidence or information, that fiduciaries have formally considered management of climate change risk and opportunity. SIPPs for plans registered in Ontario must disclose whether, and if so how, ESG factors are incorporated into investment policy.[73] The federal government currently has a consultation as to whether it should require such disclosure for federally-regulated pension plans.[74] Whether required or not, such disclosures will serve as evidence of whether and how fiduciaries understand and respond to their legal duty to deal with climate change as a financial risk or opportunity factor in the larger context of plan (and benefit) sustainability. Of course, it can also provide evidence of fiduciary breach, where, for example, the SIPP states they never consider it, or where the SIPP states it is considered, but there is no evidence to support that it is considered.

- *Acknowledge in writing, post-investment monitoring and engagement strategies.* The specifics of engagement should not be part of a policy statement. Details should be driven by circumstances. The policy statement only needs to accommodate a broad range of responses and in some cases might identify sample engagement strategies. The range of responses should include everything from informal conversations with the investee entity's officers or directors, to proxy voting, to divestment and to suing. The details of engagement will, and should be, driven by particular circumstances, overall investment style (passive or more active), the investment time frame for that investment, the urgency of the situation, the fiduciary's level of confidence that the investee company can respond, whether direct conversations with directors or senior management are possible, whether collaboration with other investors is possible, consistency with proxy voting guidelines, the nature of the ownership structure and the plan's investment in it, the investee company's history of response to shareholder engagement, and – bottom-line – whether the plan fiduciaries can identify and articulate a path to financial improvement that can be driven by engagement on ESG factors. Similar engagement strategies should be employed for investment managers, consultants and other investment service providers, where the plan is investing in funds and not making direct investments.

- *Keep policy statements short and to the point*. Everyone with investment responsibility within the fiduciary organization should be able to read and understand the policy, and be fully capable of explaining it to third parties. Keeping it short also means it can accommodate constantly evolving circumstances. It is the reaction to circumstances and particular facts that drives the reasonableness of fiduciary behaviour. Policy disclosure should not be a 'how to' manual. It should be developed as strategic guidance. An investment policy should be broad enough to allow a contextual application that can then be documented

---

[73] Regulation 909, R.R.O. 1990, s 78(3).

[74] Office of the Superintendent of Financial Institutions, 'Navigating Uncertainty in Climate Change: Promoting Preparedness and Resilience to Climate-related Risks', (January 2021), *available at* Navigating Uncertainty in Climate Change - Promoting Preparedness and Resilience to Climate-Related Risks (osfi-bsif.gc.ca) (hereafter OSFI 2021).

to demonstrate reasonableness. Policy statements should be flexible enough to enable fiduciaries and their delegates to implement customized practices that suit perceived needs and to modify those practices in light of changing conditions and standards.

– *Ensure investment and engagement policies are appropriate for the circumstances.* Most small plans use and rely on external expert managers. As a result, their policies will not likely be able to say much more than that they take their manager's ability to identify and take climate change factors into account in manager selection, retention, and termination. It doesn't mean it will be a governing consideration, since climate change integration abilities may be completely offset by management fees, expense ratios, or manager experience. In cases where it's a close call, written reasons for any particular decision to hire, fire, or keep a manager that has to do with their ability to consider climate change factors ought to be set out in minutes or file notes relating to the decision. Finally, oversight and engagement on climate change investment factors should not be fundamentally different than it would be for other more traditional financial factors.

– *Follow through and be consistent with written policy initiatives.* Another reason to avoid long-winded policy statements is the possibility of inconsistent actions. Not adhering to a policy, or not promptly changing it to accommodate new information or a change in style will simply be used as evidence of inappropriate fiduciary behaviour. It is absolutely essential that oversight and operations are consistent with written policies and other communications, and where there is inconsistency, provide evidence that it was intentional … or amend the policy.

– *Maintain minutes of material decisions*. Minutes of meetings are also evidence, and often the best evidence. They can be used to demonstrate appropriate (or inappropriate) consideration of the policy and application of the policy. They can also usefully be employed to explain a course correction or any exception that might otherwise be viewed as inconsistency or violation of the policy. They will also be evidence of the frequency with which fiduciaries are considering climate change factors and whether fiduciaries are properly considering such factors in a context of value, not values, in implementing investment decisions.

– *Share the SIPP and other policies and management decisions with plan stakeholders*. This practice can be a double-edged sword; but experience suggests that fiduciaries are generally in a better position to defend their actions where they have been generous with disclosures reasonably considered to be material to plan stakeholders. From our review of large plan best practices, it appears that appropriate disclosure of climate change management is considered to be a critical governance issue for many plans. The administrator should be satisfied that disclosures are accurate, convey meaningful information, and that the plan's internal controls and procedures have been designed to detect and deter inaccurate information or variance from the primary financial purpose of taking climate change into account. Plan leadership should ensure that there are effective protocols for stakeholder disclosure and communications in order to be able to respond in a timely manner to climate change issues and concerns that may be of widespread interest to stakeholders.

– *Keep abreast of legal and other relevant climate change developments and industry practices.* As noted elsewhere in this opinion paper, climate-related risks and opportunities are expected to be more pervasive and urgent than other types of ESG risks and opportunities. It is important for fiduciaries and their delegates to ask the right questions, seek out the right information and to make informed decisions. Many global institutions such as the World Bank, the United Nations, and the OECD provide guidance, education, training and information that will be of relevance to plan fiduciaries.[75] However there is also specific financial and legal guidance available to Canadian fiduciaries; for example, from sources such as the Chartered Professional Accountants of Canada[76] as well as Canadian securities regulators.[77] CSA Staff Notice 51-358, *Reporting of Climate Change-related Risks* was issued in August, 2019 and it provides useful background and context that should not only be of interest to plan fiduciaries, but may equip them with questions and areas of inquiry that may be adapted to use with fund managers as well as reporting issuers.[78] Many Canadian pension plans report their financial statements in accordance with international financial reporting standards (IFRS) and IFRS has published guidance on how to account for material climate-related financial risks.[79] As noted above, pension plan fiduciaries may also want to determine whether they should participate as lead plaintiffs or otherwise in proceedings against investee companies or investment funds for a broad range of legal deficiencies, including for example, concealment or misstatement of information about their processes or product's contribution to climate change, failure to disclose climate change risks, exaggeration of climate risks or responses, fraudulent, deceptive or misdirected management of risks imposed by climate change regulations, or failure to produce timely or accurate reports addressing climate change.[80]

In summary, in the investment context, a fiduciary demonstrates loyalty and prudence by the process through which investment decisions are undertaken and managed. Key components relevant to demonstrating the process include creating a formal investment policy, implementing it, monitoring it and recording decisions contemporaneously in writing that demonstrate consistency with it, or reasons for deviating from it.[81]

---

75 See for example, International Finance Corporation (IFC), 'Climate Risk and Financial Institutions: Challenges and Opportunities' (World Bank Group, 2021), *available at*: https://www.ifc.org/wps/wcm/connect/fe18be47-a0cc-4b5d-a134-078a995ce8bd/ClimateRisk_FinancialInstitutions.pdf?MOD=AJPERES&CVID=n48iBMz; United Nations Environment Programme, Finance Initiative, Climate Change & the TCFD, 'Risks & Opportunities for the Finance Sector' (2020), *available at*: https://www.unepfi.org/training/training/climate-change-training/; OECD, 'Investing in Climate, Investing in Growth: a Synthesis' (2017), *available at*: https://www.oecd.org/environment/cc/g20-climate/synthesis-investing-in-climate-investing-in-growth.pdf; UN-convened Net-Zero Asset Owner Alliance, '2025 Target Setting Protocol' (2020), *available at*: Alliance 2025 Target Setting Protocol – United Nations Environment – Finance Initiative (unepfi.org); PRI, 'Fiduciary Duty in the 21st Century: Canada Roadmap*', available at*: download (unpri.org); ICGN, 'Corporate Governance Principles revised' (2021), *available at*: Global Governance Principles; Mercer, 'Investing In A Time Of Climate Change — The Sequel' (2019), *available at*: Climate Change: The Sequel Mercer; S Barker *et al*, 'The Emergence of Foreseeable Biodiversity-related Liability Risks for Financial Institutions: A Gathering Storm?' (2020), *available at*: Publications – Commonwealth Climate and Law Initiative (ox.ac.uk).

76 Alan Willis and Sarah Keyes, *Climate Change & the TCFD : Risks and Opportunities for the Banking Industry*, (2nd edn, Chartered Professional Accountants of Canada, 2017), *available at*: Climate Change Briefing: Questions for Directors to Ask (nrcan.gc.ca).

77 Canadian Securities Administrators, 'Environmental Reporting Guidance' (CSA Staff Notice 51-333, 2010), *available at*: CSA Staff Notice 51-333 - Environmental Reporting Guidance (osc.ca); Canadian Securities Administrators, 'Report on Climate change-related Disclosure Project' (CSA Staff Notice 51-354, 2018), *available at*: 2018-04-05 CSA Notice 51-354 Climate Change Progress Report.pdf (novascotia.ca); Canadian Securities Administrators, 'Reporting of Climate Change-related Risks' (CSA Staff Notice 51-358, 2019), *available at*: 51-358 - Reporting of Climate Change-related Risks [CSA Staff Notice] | BCSC.

78 Canadian Securities Administrators , 'Reporting on Climate Change Related Risks' (CSA Staff Notice 51-358, 2019), *available at*: https://www.osc.ca/sites/default/files/pdfs/irps/csa_20190801_51-358_reporting-of-climate-change-related-risks.pdf.

79 IFRS, 'Effects of climate-related matters on financial statements' (November 20, 2020), at 1, *available at*: effects of climate related matters on financial statements (ifrs.org); See also Nick Anderson, 'IFRS Standards and climate-related disclosures' (International Financial Reporting Standards and International Accounting Standards Board, November 2019), available at: IFRS - Nick Anderson—IFRS Standards and climate-related disclosures (hereafter IFRS Standards and Climate-related Disclosures).

80 Climate Change Litigation Database, *Supra* note 71; also see discussion at pages 14-15.

81 A policy is a guideline, not a law, not a contractual commitment or a statutory obligation; however, taking decisions that vary from a policy without explanation or change to the policy, exposes the fiduciary to legal risk.

8. Lessons from Big Plans[82]

In the summer and fall of 2020, the CD Howe Institute surveyed the climate-change approaches of 40 of Canada's largest pension funds as disclosed in publicly available information.[83] The 10 largest pension funds in Canada have assets of more than $1.7 trillion,[84] "an amount approaching the size of the country's annual GDP." [85] Three of Canada's largest pension plans are considered to be among the top 20 plans in the world and eight are in the top 100.[86]

Not surprisingly, all the large plans seem to have sophisticated approaches to investment generally, make direct and indirect investments, and make use of both internal and external investment expertise. All appear to have well developed ESG policies. More than two-thirds of them explicitly reference the integration of climate factors within their ESG investment processes, more than 48% of them engage with investee entities on climate, and at least 25% of them explicitly reference climate change scenario analysis of the type recommended by the Final TCFD Report.[87] The TCFD recommendations include guidance on conducting climate-related scenario analysis, integrating climate-related risks into existing risk management processes and making effective financial disclosures relating to those processes. The TCFD has also produced a consultation document on forward-looking metrics for the financial sector.[88]

In terms of disclosure to plan participants, the *McVeigh* case[89] highlights the legal and practical importance of appropriate and timely disclosure relating to investment management of climate change risks and opportunities. Of the funds that explicitly indicate they have adopted TCFD climate change scenario analysis, it appears that most, if not all, have adopted TCFD recommended disclosures. Overall, the review of publicly available descriptions of big plans suggests that at least 30% of funds explicitly engage with members on climate resiliency

---

82 The author would like to thank Elodie Girves, Research Intern, CD Howe Institute, and recent graduate of the Munk School of Global Affairs, for making a November, 2020 draft of her private research paper, 'Pension Plan Fiduciaries Duties: How Canadian Pension Funds are Tackling Climate Change' available for purposes of this paper.

83 Pension standards legislation in Canada requires all registered pension plans to have a Statement of Investment Policies and Procedures (**SIPP**), and to make the SIPP and other financial information available for inspection by plan participants, but the SIPPs and other financial information is not required to be available for public inspection. Accordingly, Elodie Girves reviewed 10 of the largest funds referenced in the Shift 2019 Report on 'Canada's Pension Funds and Climate Risk: A Baseline for Engagement', and then took the next 30 largest plans for which she could obtain SIPPs from the Benefits Canada, '2020 Top 100 Pension Funds Report', which is based on assets reported at December 31, 2019.

84 Leo Kolivakis, 'Canada's Top 10 Pensions in Big Trouble?' (*Pension Pulse*, March 27, 2020), *available at*: http://pensionpulse.blogspot.com/2020/03/canadas-top-10-pensions-in-big-trouble.html.

85 Patrick DeRochie, 'Time is now for Canada's public pension giants to invest in a safe climate future', *National Observer* (December 28, 2020), *available at*: https://www.nationalobserver.com/2020/12/24/opinion/canada-public-pension-invest-safe-climate-future. GDP in this context appears to refer to Gross Domestic Product expenditures, see Statistics Canada, *available at*: Table 36-10-0222-01 Gross domestic product, expenditure-based, provincial and territorial, annual (x 1,000,000).

86 Rick Baert, '10 largest Canadian public pension funds' assets top $1 trillion', (*Pensions & Investments*, December 10, 2015), *available at*: https://www.pionline.com/article/20151210/ONLINE/151219992/10-largest-canadian-public-pension-funds-assets-top-1-trillion-report.

87 The G20's Task Force on Climate -related Financial Disclosures was established December 4, 2015 with 31 members representing both preparers and users of financial disclosures from across the G20. It is chaired by Michael Bloomberg, founder of Bloomberg L.P. Its purpose is to develop voluntary, consistent climate-related financial disclosures for use by companies in providing information to lenders, insurers, investors and other stakeholders. Results were first published in the TCFD Recommendations Report on June 29, 2017, *available at*: https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf. The Task Force has since continued its work, which includes providing implementation supports, such as guidance on conducting climate-related scenario analysis and integrating climate-related risks into existing risk management processes and making effective financial disclosures relating to those processes — as well as a consultation document on forward-looking metrics for the financial sector. Refer to TCFD 2020 Status Report, *supra* note 52.

88 TCFD 2020 Status Report, supra note 52.

89 *McVeigh*, *supra* note 60.

issues and 15% go so far as to offer structured training for their plan participants to raise awareness of climate-related issues.

Large funds appear to favour engagement with investee entities over divestment.[90] The review of large funds research indicated that engagement, rather than divestment is definitely employed by more than 37% of the funds that published information on direct share ownership. Climate-related change is referenced in 50% of the proxy voting policies of the studied funds, and it appears that at least 48% of the studied funds take steps to discuss improvement in climate factor disclosures with investee entities.

The results were more ambiguous in terms of engagement with external managers, but seem to indicate that two-thirds of the funds do not have established processes to verify how external asset managers take climate-related concerns into account in their investment decision –making. This is not a criticism ─and it is also not a surprise. SIPPs, as policy documents, are usually, and should be, more focussed on principles, rather than specific acknowledgement of interactions or assessment details.[91]

The large funds appear to be great collaborators. Collaborative engagement with peers and with asset owner associations such as the Canadian Coalition for Good Governance or the United Nations-supported Principles for Responsible Investment (**PRI**) help to reinforce the urgency of climate change considerations as a legitimate and essential investment performance issue, assist in developing effective investment policy and strategy, support development of relevant financial metrics, and contribute to accelerating sustainable investment practices on a national and global scale.

More importantly collaboration may lead to development of better metrics for assessing, tracking and analysing climate-related investment risks and opportunities. It may also contribute to a common classification system to enable more consistent categorization of economic activity that affects climate change mitigation and adaptation. The research indicated that while there is currently no standard method of measurement, many funds have adopted the guidelines outlined by the TCFD – which recommends using the weighted average carbon intensity measure.[92] The research also indicated that about 25% of the funds studied clearly express targets on carbon emission reductions including two pension funds that have applied a net-zero plan objective.

While it is difficult to draw definitive lessons from publicly available documents, what is clear from this limited survey is that climate change information and metrics appear to be taken into account by most large funds and that they employ a broad range of techniques. Some make use of questionnaires and other devices that serve to align communication and financial channels. Oversight protocols appear to not only elicit relevant climate change information but to provide some evidence that it is being considered and used to manage volatility, vulnerability or exposure to climate change investment risk. Most of the plans also seem to take a wide spectrum of reasonable

90 Whether pension funds should prioritize divestment from carbon and fossil fuels over engagement or other strategies was the subject of an interesting debate between the author and Simon Archer, partner at Goldblatt Partners LLP and co-director of Osgoode Hall Law School's Centre for Comparative Research in Law and Political Economy. Both acknowledge the urgency of climate change, so the issue debated was really a question of how to get to a finish line. Mr Simon argued for divestment and points out that globally, many pension funds are divesting. The author argues that divestment is "a one-time gesture that puts fiduciaries on the sidelines with their fingers crossed and no remaining influence". See Benefits Canada, 'Is Carbon Divestment Becoming Obligatory for Pension Plans?' (April, 2020), *available at*: https://www.benefitscanada.com/news/bencan/head-to-head-is-carbon-divestment-becoming-obligatory-for-pension-plans/.

91 See for example, Bauslaugh and Garz, *supra* note 28, at section 2: ESG Investing – How To.

92 TCFD, 'Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures' (2017), at 43-44. This is well summarized in the University of Toronto Asset Management Corporation's, 'Carbon Footprint Report' (July 2018), at 4, *available at*: https://utam.utoronto.ca/wp-content/uploads/2019/03/Carbon-Footprint-Report-July-2018.pdf.

steps to identify climate-related information, projects or circumstances that could enhance returns. All seem to have a broad arsenal of engagement strategies.

Practices for addressing climate change all appear to be fluid enough to accommodate what is clearly a constantly evolving approach to ensure appropriate evolution of responses from investee entities and managers, to measure improvements to adaptive capacity and resilience, and to ensure there is dialogue to not only motivate investee entities or managers to do better, but to assist them in that process. The bottom-line appears to be that big funds generally take climate change into account in assessing financial risk and opportunity, and while not necessarily related to that specific consideration, their returns seem to be better than average.[93]

But are the big funds doing enough? A 2018 report of the Canadian climate change advocacy organization, Shift, relied on in part for the CD Howe survey, concluded:

> While there has been notable effort from some funds in the last few years to significantly improve efforts to address climate risk and capture opportunity, currently, the best performing Canadian funds are still well behind international leaders. Canadian pension funds have historically been well regarded for their stability and performance. However, failure to advance new efforts on climate change will carry considerable financial and reputational risk in the future.[94]

If the large funds are only at the starting gate, where are the vast majority of Canadian pension fund administrators? It raises questions about the understanding and progress that is being made by the vast majority of smaller and less well-resourced administrators. But more than this, it raises fundamental questions about whether this issue is even on their radar screens.

9. Public Policy Implications

In view of the absolute size of pension assets under management, their relative importance within the Canadian economy, and the number of pension funds administered by fiduciaries whose focus and expertise is not likely to be investment management, a key public policy question is whether legislative prescriptions may be useful or necessary to ensure the implications of climate change on pension fund investment management is being considered by pension plan fiduciaries.

Ontario's pension standards legislation imposes an ESG disclosure requirement.[95] Other jurisdictions do not. What are the policy pros and cons of forcing disclosure? In view of the legal risks associated with ignoring, improperly managing or failing to disclose climate change risks and opportunities as identified in this opinion paper, is a law needed? If a law is needed, should there be a specific disclosure requirement that relates to climate change? Based on what the Canadian pension funds in the CD Howe and Shift samples appear to be doing about climate change factor integration, are there any best or consistent practices that could be converted

93 Alexander Dyck and Lukasz Pomorski, 'Is Bigger Better?' (2011), *available at*: https://www-2.rotman.utoronto.ca/facbios/file/Is_Bigger_Better_dyck_pomorski.pdf; Report from the Pension Investment Adviser to the Deputy Premier and Minister of Finance, 'Facilitating Pooled Asset Management for Ontario's Public-Sector Institutions', (Ontario, October 2012).

94 Shift Action for Pension Wealth and Planet Health, 'Canada's Pension Funds and Climate Risk' (2019), at 15; see also, Brittany Stares, 'Failure to launch: Why are Canadian pension funds dragging their feet when it comes to climate change?' (*Corporate Knights*, 2018), *available at*: Failure to launch | Corporate Knights.

95 Regulation 909, R.R.O. 1990, requires the disclosure to be included in each plan's statement of investment policies (s 78(3)), and in statements required to be given to members (s 40(1)(v)(ii)), former members (s 40.1(1)(s)(i)), and retirees (s 40.2(r)(ii)).

to a legally required approach? What are other governments with minimum workplace pension standards legislation doing?

In view of the breadth of the range of plans and vast inconsistency in fiduciary expertise, in view of the fact that workplace plans are voluntary undertakings, and most importantly, in view of the evidence of the economic urgency presented by climate change, legislative prescriptions may be useful in terms of at least ensuring that the importance of the issue is brought to the attention of fiduciaries. The decision and comments made by the Supreme Court of Canada in the 2021 *GHG Reference* clearly supports the legitimacy of such a legislative initiative.

For many fiduciaries the connection between climate change and investment management is not likely to be intuitive, and the legal obligation may be easily confused with a "values" rather than a "value" analysis. As a consequence, general fiduciary obligations (whether imposed by statute or common- or civil- law) and the financial risks and opportunities associated with climate change may be at serious risk of being ignored, overlooked or misunderstood. And it is not simply a concern that these risks exist and may not be properly considered, but that they are urgent and material. It is that urgency and materiality that is the best reason to adopt, at the very least, a rule similar to Ontario's ESG disclosure rule, particularly in an industry dominated by non-expert fiduciaries. A disclosure rule may go a long way to clarifying expectations by establishing an appropriate base line to raise awareness that could result in more timely improvements in understanding and fiduciary governance. More specifically, and given the urgency of climate change and the long time horizon associated with full realization of the certain and already committed effects of climate change, a strong policy argument can be made that all jurisdictions should adopt Ontario's ESG disclosure rules with a slight modification that requires specific reference to climate change management.

This is not an onerous recommendation. It falls far short of the approach to be taken by the U.K. in its revisions to its minimum pension standards legislation that are to apply this year.

In January, 2021 the U.K. released draft legislation relating to climate change pension governance requirements that are expected to come into force in the U.K. by October, 2021.[96] These requirements are distinct from ESG obligations already imposed on fiduciaries of U.K. pension plans, and are much more prescriptive. The climate change rules require fiduciaries to assess and produce a written report on climate change risks and opportunities and what they are doing about it, with specific requirements to carry out prescribed governance activities "as far as they are able" which include setting targets, undertaking scenario analysis, choosing appropriate metrics to identify and assess climate-related risks and opportunities, obtaining data relevant to the selected metrics, and ongoing measurement of the performance of the plan against any target set by plan fiduciaries. This legal requirement will roll out in stages with large funds engaging immediately and reporting as early as March 2022, and smaller funds potentially reporting in 2024 or 2025. Most of the requirements flow directly from the Final TCFD Report.

Another aspect of the U.K.'s regulatory approach is non-statutory guidance "intended as best practice." This will no doubt establish a yardstick by which to measure appropriate fiduciary behaviour. Of significance, the guidance acknowledges that those exercising fiduciary oversight may not have climate-related expertise, that they may not be personally carrying out the legislated activities or implementing climate-related investment strategies, and that they will be relying on experts to do this. But it points out the legal reality that as a result of the new U.K.

---

[96] Department for Work & Pensions, 'Governance and Reporting of Climate Change Risk: Guidance for Trustees of Occupational Schemes' (Government of the United Kingdom, January 27, 2021), *available at*: https://www.gov.uk/government/consultations/taking-action-on-climate-risk-improving-governance-and-reporting-by-occupational-pension-schemes-response-and-consultation-on-regulations/governance-and-reporting-of-climate-change-risk-guidance-for-trustees-of-occupational-schemes.

regulations fiduciaries are ultimately responsible for compliance – for identifying, assessing and managing the climate-related risks to which the plan is exposed. As a result, “they should have sufficient knowledge and understanding to interpret the results of any analysis and the know how to take action in light of these results, or indeed to challenge assumptions, external advice and information. In the case of corporate trustees, they should ensure that those exercising their functions have this knowledge and understanding.”[97]

That same admonition applies to Canadian fiduciaries as well. Even without a detailed regulatory scheme such as that introduced by the U.K., and even without adopting the more basic disclosure rule recommended above, Canadian fiduciaries would be well-advised to keep their knowledge and understanding of climate-related risks and opportunities up-to-date, so that they can meet threshold fiduciary knowledge and understanding requirements and engage effectively with consultants, asset managers and other investment intermediaries on climate change matters. In our view, the likelihood they will do this, or even pay attention to climate change risk and opportunity, would be greatly accelerated and likely enhanced by introducing a simple disclosure rule relating to climate change management.

Tax-qualified workplace pension and retirement savings arrangements are legislated public policy tools. They are intended to enable a broad range of stakeholders to make tax-deductible contributions and make tax-deferred investments to achieve retirement income security. Because of the financial materiality of climate change, ignoring or dismissing its relevance to investment management, erodes the effectiveness of these tools. A legislated rule would at least ensure that climate change is not ignored or dismissed. It will also underscore the fiduciary importance of proper management of climate related investment risks and opportunities. It would support the underlying economic and social purposes of tax-assisted retirement savings arrangements. As such, and given the well documented urgency and financial materiality of climate change, it ought to be a legislative priority.

It is consistent social policy and the urgency and financial materiality of climate change that ought to drive this legislative initiative, not simply best practices. A legislative initiative together with practical and specific explanatory guidance, could go a long way to ensuring that plan fiduciaries and their expert delegates attend to the material and urgent business risks and opportunities posed by climate change. In other words, such a rule could help improve governance by increasing understanding that the immediate purpose is not to address threats posed by climate change to the environment in some general sense, but to bring into focus the urgent threat posed to financial markets, economies, fund performance, plan sustainability and … threats posed to the personal legal liability of plan fiduciaries.

10. Conclusion

There is no reasonable doubt that climate change exerts, and will continue to exert, a de-stabilizing influence on global, national and local economies and markets, not to mention the lives and financial security of every individual on the planet. From the perspective of a fiduciary responsible for pension fund investment, climate change should not be about beliefs or ideals; it should not be about saving the planet, or contributing to an effort to avert poverty, drought or global productivity. It is simply a matter of facing the evidence that climate change threatens economic stability and by extension the investment performance of the pension funds that plan fiduciaries have a duty to manage. The bottom-line is that their management focus must be on value, not values, and that climate change affects value.

[97] *Ibid.*, at para 32.

But bringing clarity to the legal obligation is not the only purpose of this paper. A broader purpose is to equip fiduciaries with a better understanding of the risks and opportunities they must manage, and the practical and legal approaches they might consider to reduce legal liability and improve effective fund management, by summarizing essential legal strategies and including a description of approaches adopted by the big plans. Given the economic urgency of climate change, and the uneven level of understanding and expertise among most fiduciaries of Canadian workplace pension plans, it also urges policy-makers to consider legislative assistance in the form of a simple climate change disclosure rule to support the social and economic purposes workplace pension plans serve within our retirement income security infrastructure.

About the Author

Randy Bauslaugh is a Toronto-based pension and benefits lawyer and counsel to McCarthy Tétrault LLP. The opinions expressed are solely those of the author.

The author wishes to acknowledge the significant assistance of **Professor Cynthia Williams**, the Osler Chair in Business Law at the Osgoode Hall Law School, and **Dr. Janis Sarra**, Professor of Law at the Peter A. Allard School of Law. Dr. Sarra and Professor Williams are the Canadian investigators of the Commonwealth Climate and Law Initiative, founded at Oxford University and are the Principal Co-investigators of the Canada Climate Law Initiative, a research collaboration between the University of British Columbia and York University.

The author would also like to thank **Elodie Girves**, Research Intern, CD Howe Institute, and recent graduate of the Munk School of Global Affairs, for her contribution to section 7 by making a November, 2020 draft of her private research paper, '*Pension Plan Fiduciaries Duties: How Canadian Pension Funds are Tackling Climate Change*' available for purposes of this opinion.

VANCOUVER

Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5
Tel: 604-643-7100
Fax: 604-643-7900

CALGARY

Suite 4000, 421 7th Avenue SW
Calgary AB T2P 4K9
Tel: 403-260-3500
Fax: 403-260-3501

TORONTO

Suite 5300, TD Bank Tower
Box 48, 66 Wellington Street West
Toronto ON M5K 1E6
Tel: 416-362-1812
Fax: 416-868-0673

MONTRÉAL

Suite 2500
1000 De La Gauchetière Street West
Montréal QC H3B 0A2
Tel: 514-397-4100
Fax: 514-875-6246

QUÉBEC CITY

500, Grande Allée Est, 9e étage
Québec QC G1R 2J7
Tel: 418-521-3000
Fax: 418-521-3099

NEW YORK

55 West 46th Street Suite 2804
New York NY 10036
UNITED STATES
Tel: 646-940-8970
Fax: 646-940-8972

LONDON

1 Angel Court, 18th Floor
London EC2R 7HJ
UNITED KINGDOM
Tel: +44 (0)20 7786 5700
Fax: +44 (0)20 7786 5702