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ESG and Climate Change: Pension Fund Dos and Don'ts

RETIREMENT SAVING AND INCOME (November 8, 2022)

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Introduction

- Pension fund administrators have a fiduciary duty to prudently manage financial risks and opportunities when investing plan assets and when managing plan operations that are paid from the pension fund. This includes the financial risks and opportunities associated with climate change and other environmental, social and governance (ESG) issues. But what are the legal dos and don'ts?
- Plan fiduciaries will always be on solid legal ground if they take ESG information into account for financial purposes – to protect the value of accruing pensions or to provide more cost-efficient benefits. They will be on shaky legal ground if they prioritize the use plan assets to achieve ESG impacts ahead of those financial considerations.
- The current legal environment, which puts the financial interests of plan beneficiaries first, is appropriate from a policy perspective. Regulators should resist any framework that prioritizes impacts. ESG regulations beyond those adopted by Ontario and those proposed for adoption federally should be avoided.

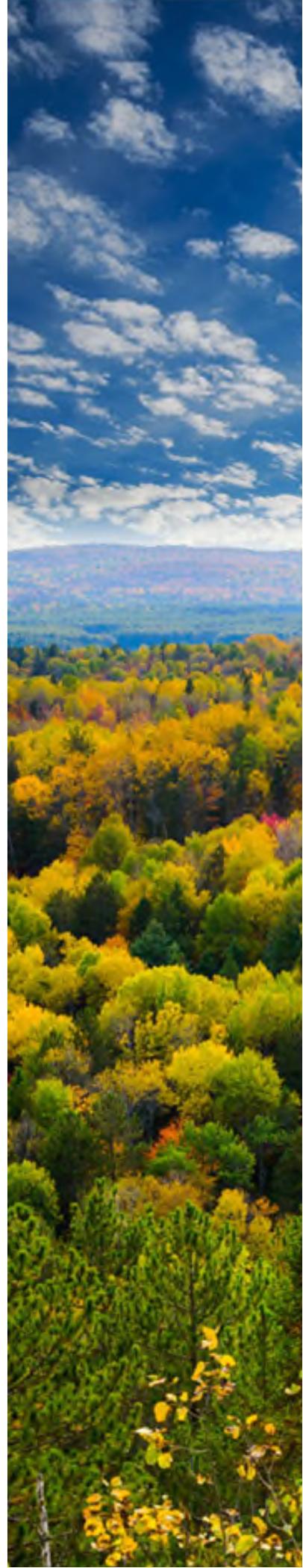
Can Canadian pension plan administrators take ESG factors, including climate change, into account in managing the investment of plan assets, or even when managing their own plan operations?

Must they consider ESG factors? What about the ESG concerns of plan participants, participating employers or plan staff? This paper will answer these questions in a manner that should address some of the confusion or misunderstanding around fiduciary rights and responsibilities. It will do that in the context of both defined-benefit and defined-contribution plans. The goal of this paper is to provide a sort of fiduciary radar to help administrators and other stakeholders understand what can or cannot be done legally in terms of taking climate change or other ESG factors into account when investing the assets of workplace pension plans.

The short answers to the questions above are: (a) plan administrators may take into account any ESG factor relevant to investment performance; (b) plan administrators who

* **Disclaimer:** This is not a legal opinion nor is it legal advice. It is intended to provide general information. Users are advised to seek specific legal advice about their circumstances by contacting their own legal counsel.

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ignore ESG factors that are financially relevant and material put themselves at legal risk; and (c) plan administrators generally have no legal obligation to consider the ESG views of plan stakeholders.

Fiduciaries, however, live in a practical world where they may need to respond pragmatically to the non- financial ESG concerns of investment partners, participants, participating employers or plan staff. Typically, they will want to do this to support or enhance the plan's reputation or to promote or maintain confidence in the plan. Accordingly, this short paper provides some guidance on managing that practical reality as well.

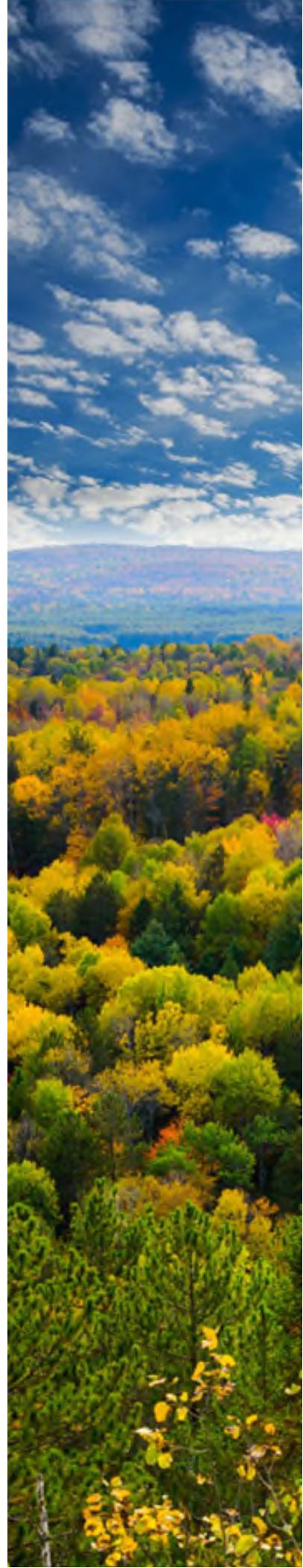


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1. Fiduciary Duty: Decision-Making that Prioritizes Financial Purpose

Pension plan administrators are fiduciaries. In the words of the federal *Pension Benefits Standards Act*, they “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.”¹

The legal concept of the trust and fiduciary duty is about as close as the law gets to imposing a moral code of conduct. This is because trust law relies on behavioural concepts of good will, community standards and competence within a social relationship in which one party, the fiduciary, has control over the assets of another, the beneficiary.²

The behavioural standard of a fiduciary is not perfection. It is reasonableness. A pension plan fiduciary does not have a duty to “maximize returns.” It does have a duty to invest plan assets prudently: that is, to achieve a reasonable rate of return, without undue risk of loss, having regard to all relevant circumstances.

Relevant circumstances certainly include matters within the usual collection of financial, statistical and accounting metrics. But they also include so-called “non-financial” factors that are relevant to investment performance. A good example might be to consider the factors taken into account when hiring an investment manager. Typically, price, asset mix and past financial performance are all recognized as financial factors.

But what about the intangibles that invariably go into manager selection, like, who are the people who were responsible for that past performance, and are they still there? How will the administrator be served or reported to? What communications will be provided and when? What passion, philosophy or decision-making process does the manager bring to the table? Those are not financial factors *per se*, but no one would argue they are not factors that are appropriate to consider when hiring or firing asset managers. These so-called non-financial factors are accepted because they are relevant to financial purpose – to achieve a cost-effective financial result.

The term “non-financial” is often applied to ESG considerations. This term contributes to confusion. An ESG factor is not “non-financial” if it is taken into account as additional information to assess or manage financial risk or financial opportunity. Any fiduciary who ignores ESG information that is both relevant and material to financial management puts themselves at legal risk of being sued.

Another fundamental duty of fiduciaries and plan administrators is to act for a proper purpose (Pollard 2021).³ This means they should exercise investment powers consistent with the purpose of the plan and the purposes of the power.⁴ They must obey the plan documents and any special duties imposed by law. The *Canadian Income Tax Act* requires the “primary purpose” of a tax-qualified plan to be to provide lifetime retirement income as consideration

¹ *Pension Benefits Standards Act* (Canada), ss. 8(3). Note, the duty is owed to employers as well as plan participants.

² See for example the two paragraph, 18th century foundational case of *Keech v. Sanford* [1726] EWHC J76

³ See David Pollard, “The ‘Prudence’ Test for Trustees in Pension Scheme Investment: Just a Shorthand for ‘Take Care’”, in *Trust Law International* 34(4) 2021, pp. 215-247.

⁴ *Ibid.*, at p. 217.

for services rendered by the plan participants.⁵ This is a primary financial purpose that is consistent with common-law views of workplace pension plans.⁶

Fiduciaries have a duty under pension standards laws (and the common law) to “administer” the plan. They bear ultimate accountability for the formulation of investment policies and goals. While they can delegate tasks and responsibilities, they cannot delegate accountability. Sure, they can seek advice relating to the establishment of investment policy, or a plan document could be written to require consultation with members. But even so, fiduciaries cannot delegate ultimate responsibility for investment policy. They can be held personally accountable if investment policy is not consistent with the primary financial purpose dictated by the *Income Tax Act*, pension standards legislation or the common law. As a result, fiduciaries should not rely on the ESG or climate change concerns or wishes of plan participants or participating employers as determinative. They should not take direction from others, nor should they formulate investment policy based on the concerns or desires of plan stakeholders. That doesn’t mean they cannot consider their views, but they cannot prioritize the ESG concerns of plan stakeholders over financial considerations, and they certainly should not take direction from them. Fiduciary duty for investment management cannot be delegated to a survey, or a threat. The decisions of fiduciaries will be evaluated legally in the context of their reasonableness and their relevance to the primary financial purpose of the plan.

So what does all this mean practically? It means that plan administrators who take ESG factors, such as climate change, into account will always be on solid legal ground if they develop investment policy or make investment decisions by using ESG information that is relevant to management of financial risk or financial opportunity. Accordingly, they should compose investment policy and document ESG considerations in a manner that ties ESG or climate change considerations to administration of the financial risks and financial opportunities presented by ESG or climate change factors. They should avoid statements that simply tie ESG or climate change considerations to environmental or other non-financial impacts. Administrators who prioritize ESG impacts or who simply accede to stakeholder concerns about the climate or other ESG factors without some driving economic purpose will be on very shaky legal ground. As noted below, this does not prevent non-financial factors from being secondary considerations; but the safest legal course, is to focus on value, not values. It will be legally helpful for fiduciaries to prioritize, and to be seen to be prioritizing, financial concerns.

While that is generally applicable legal advice, there are still very practical issues that plan administrators must deal with. Plan participants, participating employers, plan staff and the communities they serve may have non-financial expectations that do not turn on legal niceties or financial priorities. Ignoring those non-financial concerns may have adverse reputational effects that could diminish confidence, trust, pride or even the long-term sustainability of the plan. As a practical matter, not a legal matter, it will likely be in the best long-term interests of the plan itself for plan fiduciaries to deal with these concerns pragmatically.

One typical example is climate change. Many plans have recently adopted zero emission climate change targets. On its face, that sounds like an impact goal, not a financial goal. But a close review of the statements from some of Canada’s largest plans about their zero emission targets invariably connects the zero emission statement to the predominant financial purpose. One of them specifically notes that the zero emission goal is not about the impact *per se*, but rather is one of several mechanisms they use to help gauge or oversee their financial progress in assessing, and responding to, climate-related financial risks and opportunities. These statements respond

⁵ *Income Tax Act Regulations*, ss. 8502(a). This also recognizes that registered pension plans are not charities. The pension must be provided as consideration for services rendered.

⁶ See *Cowan v Scargill* [1985] Ch 270, which confirms that the purpose of a workplace pension plan is to provide financial benefits for the beneficiaries.

pragmatically to participant and reputational concerns about climate change while not deviating from the pension fund's primary financial lane.

2. The Duty Owed Differs from Other Institutional Fiduciaries

It is helpful to point out that the allowable legal perspective of pension fund fiduciaries is narrower than that of fiduciaries of other organizations. A good example is the difference between pension plan fiduciaries and fiduciaries who are directors or officers of a corporation.

Officers and directors are required by corporation statutes in Canada to act in the best interests of the corporation. The Supreme Court of Canada has said on a number of occasions over more than three decades that the duty to act in the best interests of the corporation does not mean a focus on shareholders and their immediate financial interests. The federal *Canada Business Corporations Act* was recently amended to reflect this case law. It expressly states that when acting in the best interests of the corporation, the directors and officers may take into account factors that include the interests of shareholders, employees, retirees and pensioners, creditors, consumers, and governments, as well as the environment and the long-term interests of the corporation.⁷

By contrast, as noted above, tax rules require pension fund fiduciaries to focus on the primary financial purpose of providing lifetime retirement income as consideration for services rendered by the plan participants. That is a much narrower purpose than directors or officers have in acting in the best interests of the corporation. The rule applicable to pension fiduciaries requires a primary focus on delivering a financial benefit to members, namely lifetime retirement income.

In short, pension funds have one lane that provides legal safety – a focus on the money. Other business entities or charitable organizations can safely navigate multiple lanes of interest where ESG and climate change impacts may be given equal or superior weight to financial considerations.

3. Possible Exceptions to Financial Priority

While plan fiduciaries are advised to stick to their financial lane, there may be some legal exceptions, but these can be ambiguous, and they will carry differing levels of legal risk.

(a) As a Tie-Breaker

Using a non-financial factor as a secondary tie-breaker consideration between two competing investment alternatives with similar financial characteristics, appears to be relatively safe for pension fund fiduciaries, since the financial purpose analysis precedes, and leads to, the tie-breaker decision.

⁷ *Canada Business Corporations Act*, ss. 122(1.1)

(b) Direct Fiduciary Discretion in Plan Documents

Where plan participants share an identifiable ethical, religious, political or community purpose, such as a pension plan for employees of the Cancer Society, the plan fiduciary may have more flexibility in taking factors consistent with that purpose into account; but only as a concern that must be secondary to the primary financial purpose. If fiduciaries wish to prioritize such a concern, they should write the priority into the plan document in a way that serves to inform or direct fiduciary discretion to that secondary purpose. They cannot do this by simply writing it into a statement of investment policies and procedures because that statement is merely a policy developed by the fiduciaries themselves, not a power granted to the fiduciaries by the sponsor or “settlor” of the plan or required by applicable legislation. It is also only a “policy” – a statement of what they intend to do. It is not a legal standard like a law or a contract dictating what they must do. It does not define their legal obligation; it provides guidance and principles they will follow or implement to help discharge the legal obligation they have.

It is the plan text or trust agreement put in place by the plan sponsor that along with applicable legislation provides effective legal authority. It is those particular plan documents along with the legislation that endows or empowers fiduciaries with their administrative decision-making and oversight authority. Accordingly, the plan documents are what ought to be revised if they wish to elevate or prioritize relevant ESG factors to a purpose consistent with other organizational goals or stakeholder interests. However, these impact purposes should always be, and be seen to be, second in priority to the primary financial purpose of the plan to provide pensions.

(c) A DC Plan Exception?

Another possible exception may exist in regards to defined-contribution (DC) plans that offer individual member investment choice. If the plan fiduciaries have evidence that a significant number of participants would like specific ethical, environmental or similar choices, the fiduciary may wish to include such funds in the menu of choices that are made available to members. Fiduciaries should appreciate that making those funds available for member choice does not transfer fiduciary responsibility for the choice from the fiduciary to the plan member. This is because the fiduciary remains responsible for selecting the menu of choices. It also does not mean that financial considerations should not remain a priority. The plan administrator remains responsible for ongoing monitoring of the menu and for removing underperforming, expensive or misleading funds from the menu of choices, such as those that may reflect “greenwashing” or impose an inappropriate “greenium” (Bauslaugh and Lynch 2022)⁸. In other words, adding an ESG or climate change option may respond to member preferences, but it will increase the fiduciary workload in terms of prudent oversight. Fiduciaries must remain reasonably vigilant to ensure that any particular choice is both financially appropriate to respond to the primary purpose and consistent with the secondary consideration at the time the selection is made and thereafter. As a consequence, a fiduciary will also have to deal with managing removal of any such fund from the menu of choices if the fund subsequently fails to meet either the primary financial or secondary ESG or climate change emphasis.

(d) Low Risk of Substantial Financial Detriment?

Some Canadian financial experts have suggested that an administrator is legally entitled to exercise discretion to take ESG factors into account to achieve impacts if the plan participants are generally in agreement with prioritizing the factor, and the risk of financial detriment is not significant. This two-prong test, which appears to enable investment decisions to be made by fiduciaries on non-financial grounds, comes out of a 2014 UK Law Commission

⁸ “Greenwashing” refers to false or misleading claims about the investment product. A “greenium” is a term used to refer to an additional cost or lower yield imposed on environmentally friendly or sustainable investments or investment products.

Report⁹ that, according to many legal experts in the UK, inappropriately applied fiduciary principles arising out of the law applicable to charities to pension funds.¹⁰ It is not the law in Canada. For one thing, it is perfectly clear in Canada that a tax-qualified pension plan is not a charity. As noted above, the *Income Tax Act* requires tax-qualified pensions to be provided as compensation for employment services rendered.¹¹ The legal conclusion that a workplace pension plan is not a charity (or a gift) is also likely the case under the general common law. In summary, that two-prong test is not applicable and should not be relied on by Canadian plan administrators.

4. ESG Investment Disclosures: Never Say Never

Changes to Ontario law in 2016 require plan fiduciaries to disclose in the statement of investment policies and goals and in participant statements whether they take ESG factors into account when investing plan assets, and if so, how.¹² Ottawa has announced its intention to require similar disclosures for federally regulated plans.

In my experience, this has resulted in more fiduciaries and their advisors seeking legal advice and a deeper understanding of the relevance of ESG factors.

The bottom-line advice is that fiduciaries should never say they never consider ESG factors. That would amount to an admission that they may be improperly fettering their discretion or that they are not adhering to proper fiduciary standards of prudence by intentionally turning a blind eye to information that could be financially relevant and material to the investment of plan assets.

Large funds that make direct investments are likely to have more sophisticated disclosures that may also include information about their engagement strategies. However, for the vast majority of registered pension plans with assets that are passively invested (including many of the large funds), that statement is likely to be more of a simple

⁹ Law Commission, (LAW COM No. 350), *Fiduciary Duties of Investment Intermediaries*, June 2014, at page 113 (found at www.gov.uk/government/publications): “In general, non-financial factors may only be taken into account if two tests are met: (1) trustees should have good reason to think that scheme members would share the concern; and (2) the decision should not involve a risk of significant financial detriment to the fund.” Note, this test is very similar to the two-prong test referred to in the Manitoba Law Reform Commission, *Ethical Investment by Trustees* (January 1993), however the Manitoba report indicates that this test is still subject to a predominant financial consideration: “However, there may be circumstances where it would be appropriate to include ethical or other non-financial factors as additional (but subordinate) factors. This will particularly be the case where the trust can reasonably be said to encompass objectives that go beyond the predominant goal of securing a reasonable financial return. Moreover: (a) An investment policy which respected the reasonable and firmly held moral precepts of a trust’s beneficiaries may be justified, provided it does not imperil the financial returns to the trust. (b) It may be appropriate to have regard to widely held societal values. A trustee who chooses not to invest the trust’s assets in enterprises notorious for dangerous products or discriminatory hiring practices should not be guilty of breach of trust, provided the trustees have nonetheless ensured a sufficiently wide range of alternative investments to produce a reasonable financial return.”

¹⁰ See for example, Philip Bennett. 2019. “Must an Occupational Pension Scheme Take into Account ESG Factors, Even if There is a Risk of Financial Detriment to the Pension Fund?” *Trust Law International* 32(4) p.239, at pages 256-263.

¹¹ *Supra*, footnote 5.

¹² *Pension Benefits Act* (Ontario) Regulation, RRO1990, Reg, 909, subsections 40(1)(v)(ii); 40.1(1)(s)(ii); 40.2(1) (r)(ii); 78(3).

acknowledgement that ESG factors are taken into account in assessing fund performance, and also as one of many factors used to assess manager selection or ongoing oversight and retention.

As implied above, the legal assessment of fiduciary duty does not relate to financial performance *per se*. It relates to the reasonableness of the investment decision-making process itself, regardless of outcome. In simple terms: Were the choices reasonable? Did the fiduciaries consider information relevant to purpose? Did they properly prioritize it? Did they disregard information not relevant to purpose? Are they continuously monitoring to ensure assumptions and objectives remain relevant and that their choices remain reasonable? In short, the legal standard is reasonableness, not perfection.

The legal evidence of reasonableness will be found in the written formulation of the administrator's policies and objectives, as well as in documentation supporting its choice of investments or managers, the appropriateness and timeliness of its ongoing review, its internal or external service provider's ability to do appropriate assessments and the minutes of its deliberations. While performance is not relevant *per se*, poor financial performance is likely to trigger an inquiry. So are statements suggesting that ESG factors are never considered, or that they are given unreasonable (in the circumstances) priority, or that they are considered for impact purposes, rather than financial purposes.

At this time, there seems to be a substantial body of evidence to indicate that integrating ESG factors into investment decision-making is correlated to more positive long-term-risk-adjusted returns – but it is not conclusive. There is also a veritable fire-hose of information and developments relating to the urgent implications of climate change. Not all of it is relevant to financial performance. Much of it is inconsistent. Most fiduciaries will simply not have the resources or band-width to track all of it, so the best they can do is rely on others. This is not likely to be an issue where financial risk and opportunity are driving decision-making, or are seen to be driving decision-making.

Thankfully, the legal duty of plan fiduciaries is not perfection; it is reasonableness. It is an inquiry that must be contextual. Those with expertise will be held to an expert standard of care. Those with no expertise will be held to the reasonable person standard.¹³ The surest route to reasonableness from a legal perspective is to focus on financial purpose, financial relevance, and financial materiality. But context is relevant too – what is the plan administrator itself able to do given its size and sophistication? This legal landscape allows room for those with little expertise; but it leaves little room for saying “never.” It also opens up some uncertainty whenever fiduciaries stray from a laser-like focus on financial purpose when articulating their policy or documenting their decisions.

5. ESG Factor Integration in Plan Operations

Finally, many large plans, like many of our public-sector plans, operate for all intents and purposes as fully fledged financial institutions. They have premises, equipment, boards of directors (trustees), records, computer systems, officers and employees, all paid for from the pension fund.

Moreover, like any financial institution or business entity, they are entitled to implement management systems, strategies and processes to carry out their business purpose of providing pensions. As is the case with any large institution, they will likely adopt strategies or processes for planning, measuring and attributing positive social or environmental changes to the workplace, such as occupational health and safety management systems, anti-discrimination policies, contributions to local charities, or climate change strategies within the workplace. These

¹³ *Pension Benefits Act* (Ontario), subsections 22(1) and (2).

operational strategies serve to buttress, improve or maintain internal employee relations and other management goals or processes. They can also be used to strengthen external relationships by enhancing plan reputation or brand with others, such as potential investment partners. The overall goal will often be to bring a sense of cohesiveness, pride, efficiency, collegiality and common purpose to the workplace, to their business partners and to the communities in which they operate. Inevitably, the costs of these measures will be paid from the pension fund. Assuming all of those measures are in furtherance of the business of providing pensions, this in itself is not inconsistent with the primary financial purpose of the plan. It is not likely to be viewed as an impact, rather than a financial investment of plan assets, as long as it can be reasonably tied to the primary business purpose of providing pensions.

Nonetheless, fiduciaries who use plan assets to implement such human resources, branding or other internal strategies to further their business activity may expose themselves to criticism or legal proceedings. Consequently, they would be well advised to document the process in a manner that ensures it is depicted as a business process, not a plan investment *per se*, and one that is consistent with, or in furtherance of, the primary financial purpose of the plan to provide lifetime pensions as consideration for employment services rendered by plan participants.

6. Do We Need Legal Changes?

Canada's workplace pension system was established with tax incentives to encourage development of a voluntary system that can provide a financially secure transition from the workplace to retirement, as well as support for our financial markets and overall economic efficiency. Despite tax incentives, coverage still remains inadequate with barely 39 percent of the workforce covered by registered pension plans, and most of that in the public sector. The system is also dominated by small plans. Of the more than 16,000 registered pension plans, more than 60 percent have fewer than 10 members, and the 32 largest plans account for more than 50 percent of all plan members (Statistics Canada 2022).¹⁴ By and large, pension administrators are non-experts who rely on fee-taking third-party experts and providers.

In my opinion, a regulatory framework that imposes specific ESG metrics or financial approaches or considerations will not provide an incentive for growth in an environment dominated by non-experts. It is not needed for the large funds, many of which have demonstrated a sophisticated understanding and approach to ESG factor integration and engagement with investee entities. On the other hand, perhaps we ought to be encouraging smaller players to leave the field and join up with large pension funds that can provide more cost-efficient means to obtain financial growth and sustainability. It is possible more regulation related to specific ESG approaches might provide incentives for smaller providers to move to much more efficient, large, industry-wide, multi-employer defined-benefit or target-benefit arrangements.

It is also my view that a regulatory framework that would shift the current emphasis on value to permit greater latitude to consider values or impacts is not appropriate. It seems to me a values approach has the potential to further undermine the economic efficiencies of a workplace pension system already undercut by the transition away from cost-efficient defined-benefit plans to defined-contribution arrangements. It is also fundamentally inconsistent with the policy rationale for encouraging tax-deferred pension savings.

The near-term answer for our specific system appears to be the kind of soft legal approach adopted by Ontario and proposed for adoption federally to improve disclosure. It is an approach that appears to have encouraged or developed awareness and better understanding of ESG factor integration by Canadian workplace pension fund

¹⁴ See various Statistics Canada publications, such as *Registered Pension Plans (RPPs), active members and market value of assets by contributory status* released 2022-07-18, or *Pension plans in Canada, as of January 1, 2021* released 2022-07-18.

fiduciaries and their advisors. Increasingly, they are coming to understand that financial interests come first, and that those financial interests can be better served by appropriately using ESG information to manage financial risk and opportunity.¹⁵

7. Conclusion

The foregoing is meant to provide big picture clarity to the powers and responsibilities of workplace pension plan fiduciaries in connection with ESG factor integration, including climate change.¹⁶ Specific circumstances require specific legal review. Hopefully, this will serve as a sort of fiduciary radar to provide more clarity on an issue that still seems to be perceived as opaque and confusing. A good rule of thumb is that pension fund fiduciaries will always be on safer legal ground by prioritizing value over values when investing plan assets.¹⁷

Any regulation in this area ought to be aimed at simple disclosure rules: a statement as to whether ESG factors are considered, and if so, how. Regulatory guidance should be in place to reinforce understanding that this is about improving or protecting investment performance to provide lifetime retirement income; it is not about changing the world for the better, although that may be a consequence. Regulation should not impose additional sophisticated reporting hurdles. Most importantly, regulation should not permit deviation from the priority to provide lifetime retirement income.

¹⁵ See for example, CAPSA Draft Guideline, Environmental, Social and Governance Considerations in Pension Plan Management, Released June 9, 2022.

¹⁶ For more in depth legal treatment of climate change, see Randy Bauslaugh, Climate Change, Legal Implications for Canadian Plan Fiduciaries and Policy-Makers, a legal opinion prepared for the Canada Climate Law Initiative, and released publicly by the Commonwealth Climate Law Initiative 26 May 2021. It can be accessed here: <https://ccli.ubc.ca/considering-climate-change-is-part-of-pension-trustees-legal-responsibilities-a-new-analysis-reveals/>. It includes research assistance by the CD Howe Institute.

¹⁷ See also, Randy Bauslaugh, "Value, Not Values," *Benefits and Pensions Monitor*, (November 2020); Randy Bauslaugh and Dr. Hendrik Garz, "Pension Fund Investment: Managing Environmental Social and Governance (ESG) Factor Integration," International Congress of Actuaries (Berlin 2018) republished in *Trust Law International* 32: 264-278.

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