CHAPTER 1

Introduction

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Introduction

This *Handbook* responds to the evolution in the ownership of companies and financial assets over the past thirty to fifty years. It also is concerned with the more recent widespread failure of pensions and other long-term savings vehicles to deliver on sustainable financial security goals for the individuals whose monies they are investing.

The volume highlights important changes in the landscape of finance, especially with regard to institutional investors: those large financial institutions entrusted to manage most of our savings, pensions, retirement funds, insurance assets and national wealth reserves. It primarily focuses on the changing legal understanding of the role and purpose of these institutions in many countries. This includes recognition of the influence that collective investment practices of institutional investors have on society and the greater economy, as well as the corresponding influence that economic health and social stability have on the sustainability of institutional investors' performance and their ability to succeed in meeting long-term goals for the beneficiaries who depend on them and who collectively constitute the societies in which they exist. The *Handbook* is also a testament to the rapidly evolving nature of academic research and public policy discourse concerning institutional investment and financial markets.

These changes are significant, are interrelated and are likely to greatly influence the way in which financial intermediation is conceived of and practiced in the coming decades. Fiduciary duty provides a legal and practical framework that guides the development and implementation of institutional investor practices in response to these changes. While a single volume could not cover all of the relevant dynamics that are shaping the evolving understanding of fiduciary duty, this *Handbook* features some of the most significant trends.

Institutional investment and fiduciary duty

Over the past few decades, global capital markets have come to be dominated by institutional investors – pension funds, banks, mutual (unit) funds, insurance companies, sovereign wealth funds and other collective investment vehicles. These institutions control the majority of financial assets in most industrialized countries, and are thereby central to the financial well-being of both corporations and individuals. It is almost impossible in contemporary society to find a person or enterprise without a significant relationship to banks, insurance companies and investment funds alike. Furthermore, as the recent financial crisis demonstrated, the activities and inaction of these institutions matter greatly to the well-being of both local and global economies.

The traditional legal understanding of the purpose of institutional investment is predicated on the concept of fiduciary duty. Institutions or individuals, who are the trustees or fiduciaries of funds, are mandated to manage (or organize the management of) assets in the best interests of the individual beneficiaries or investors: the ultimate recipients or owners of the funds. The obvious (but far too often ignored, trivialized or overly simplified) fundamental question is: what are the "interests" of these ultimate investors and beneficiaries?

Their "interests" have over time become equated with short-term "financial interests" as captured by prevailing finance theories. This has led to a widespread and mistaken belief that fiduciary duty is essentially a duty to maximize short-term returns; an almost mathematical approach to institutional investment. One significant consequence is that jobs in the industry have been reserved mainly for financial professionals with narrow analytical training. This has fostered an institutional investment approach that is confined almost exclusively to econometric analyses of risk and performance against artificially constrained benchmarks that do not reflect a full measure of their impacts on, and alignment with, the interests of end beneficiaries in the real world. These developments have resulted in a disconnect between institutional investor practices and a balanced application of fundamental fiduciary principles.

Understanding of fiduciary duty in the current economic, social and academic context is changing. It is important to note that we are hardly the first to notice and highlight these legal and attitudinal changes. Nor, may we add, is this the first time that the landscape of institutional investment and fiduciary duty has gone through significant changes in regard to both theory and practice. Finally, it should be noted that a broader conceptualization of risk (and externalities) is becoming more widely prevalent, with governance implications that extend well beyond the realm of institutional investment.

A changing legal landscape

Fiduciary duty principles have been around for a long time and are well established in common law. However, the understanding and application of them regularly evolve in response to changes in knowledge, as well as in social, financial and economic circumstances and structures. In civil law and mixed civil law/common law jurisdictions, the idea of being a fiduciary (in theory bound to uphold the interests of the ultimate beneficiary or investor based on the idea of a "trust") has in recent decades come into its own via legislation. The consequence is that there is a growing global congruence in the understanding of fiduciary duty across common law and civil law and mixed civil/common law countries.

A number of local circumstances are affecting the application of fiduciary duty in specific countries. For example, the Kay Review of United Kingdom Equity Markets and Long-Term Decision Making has highlighted the need for clarification of fiduciary duties in response to changing circumstances. But there have also been global developments, reflecting the common human challenges involved in fiduciary relationships.

In the last half of the twentieth century, the interpretation of fiduciary duty principles evolved in response to the efficient market hypothesis and resulted in implementation of new finance theories by institutional owners and investors. This evolution reflected a variety of factors, including the growth of assets under institutional management, innovations in economic theory, the professionalization of financial traders and advisers, and the influence of a variety of stakeholders with material interests in how these relatively recent large institutional owners managed their funds. Many observers today take the financial theory view for granted and feel that "this is the way it always has worked."

This volume argues that we appear to be at the cusp of another fiduciary evolution. There are many causes, such as computerization of the investment industry, globalization of capitalism and financial markets, changes in communication technology, concentration of assets managed by fiduciaries, increasing experience of economic shocks, resource limitations and challenges to key assumptions underlying the application of accepted finance theories posed by recurring market failures and looming externalities.

It is increasingly argued that prevailing finance theories give an impoverished and deeply skewed view of financial value that is focused too much on short-term gains at the expense of sustainable growth over the longer term. Financial industry participants have also focused too much on the individual company, forgetting how companies are interdependent and exert influence on each other throughout the economy. We suggest then that institutional investors do better financially for their beneficiaries by taking a longer term view and also considering systemic issues regarding the sustainability of markets and the interaction of all firms in the economy. This increased emphasis on achieving a balance between short- and long-termism is supported by the fiduciary principle of impartiality: when there are both current income and future interest beneficiaries, fiduciaries should act impartially and not arbitrarily favor the interests of one over the other.

Furthermore, both academics and practitioners increasingly stress the importance of looking beyond what are today's financial concerns (indeed, often too narrowly conceived) to consider wider environmental, social and governance (ESG) matters. What are sometimes called "extra financial" are often "not yet financial." Some institutions have begun to take this to heart and adopted "responsible," "socially responsible" or "sustainable" investment approaches. Indeed, "sustainability" and ESG are rapidly becoming the "talk" of both financial and nonfinancial firms. But "walking the walk" consistently is still very far off. Arguments for an emphasis on ESG factors have been mounted from the fiduciary principle of impartiality, but also from an appeal to beneficiaries' broader interests in a healthy society and planet, as well as from general ethical and precautionary principles. Views of a particular issue can and often have become transformed into a broad social norm and as such can become "material" factors that affect asset prices.

Finally, it is also increasingly argued that fiduciaries need to focus more on their beneficiaries, who are the ultimate investors. For too long, the direction of investment funds has been set by professionals in the finance industry who are likely to have a rather different world view and set of priorities than the average investor or beneficiary. Personal interests and behavioral biases have also affected the perceptions of investment professionals and how they implement responsibilities, often without an understanding of how those factors influence the process. This *Handbook* includes contributions from authors who encourage further recognition of these effects and from authors who seek greater clarity in understanding of the interests of beneficiaries and end investors, perhaps even with some input into the investment decisions of their fund.

A changing research landscape

A parallel development has been a surge in academic interest in issues related to institutional investment and fiduciary duty from a broadened range of disciplines and perspectives. Over the past few years, we have seen highly relevant research from such diverse academic fields as finance, management, organizational design, behavioral economics, sociology, anthropology, geography and philosophy. These fields, new to previously established canons of finance, can add a lot. Jean-Claude Trichet, former President of the European Central Bank, noted: "as a policymaker during the crisis, I found the available [economic and financial] models of limited help. In fact, I would go further: in the face of the crisis, we felt abandoned by conventional tools." Trichet goes on to appeal for inspiration from a multitude of disciplines – physics, engineering, psychology and biology – to help better explain the economic landscape (in Davies 2012).

Economics professor and former IMF chief economist, Raghuram Rajan argues:

> three factors largely explain our collective failure [in predicting the crisis]: specialization, the difficulty of forecasting, and the disengagement of much of the profession from the real world. Like medicine, economics has become highly compartmentalized – macroeconomists typically do not pay attention to what financial economists or real-estate economists study, and *vice versa*. Yet, to see the crisis coming would have required someone who knew about each of these areas – just as it takes a good general practitioner to recognize an exotic disease. Because the profession rewards only careful, well-supported, but necessarily narrow analysis, few economists try to span sub-fields (Rajan 2011).

Purpose and use of this *Handbook*

The *Handbook* is an attempt to collect current information and thought on the application of fiduciary duty principles and insights into factors that will shape evolution of fiduciary practices over the next decade. It contains both global and local market perspectives, in recognition of the roles that each plays in shaping understanding and application of shared fiduciary principles. Current thinking from related fields is surveyed, and the *Handbook* intentionally presents forward-looking, interdisciplinary perspectives, with the recognition that institutions guided by fiduciary principles have experienced declining success in meeting their goals and are facing challenges that extend beyond the boundaries of finance theory.

The *Handbook* reflects the belief that social, demographic, economic and physical changes in the environment in which fiduciaries operate (and in the knowledge base available to them) have presented an opportunity for introspection, learning and evolution in understanding and implementing fiduciary practices. The starting point is a focus on intergenerational equity, which recognizes that fiduciary duties extend to the human beings who are intended beneficiaries rather than to an inanimate collective legal entity. This provides a foundation for application of interdisciplinary advances in the understanding of human behavior and of environmental and human systems to fiduciary practices, within the context of current circumstances.

The volume presents a unique collection of input from various perspectives that we hope will be helpful for scholars interested in a broad range of issues connected to institutional investment and fiduciary duty. It should also be instructive for students who are new to the area and unfamiliar with current changes in both theory and practice regarding financial institutions. Finally, and perhaps most importantly, we hope it will be a good read for investment professionals, asset owners and corporate investees alike, who might not have considered current changes in interpretation and application of fiduciary duty principles to institutional investment. The *Handbook* attempts to provide tools for fiduciaries to better meet the challenges of their journey from the world of the twentieth to the twenty-first century.

A brief overview of the contents

The *Handbook* is organized into six parts with different but complementary themes.

Part I provides a global outlook on current (changes in) interpretations of the fiduciary duties of institutional investors, highlighting many similarities between countries but also some significant differences. Waitzer and Sarro (Chapter 2) review the efforts of the Supreme Court of Canada to develop a broader conceptual framework for fiduciary obligations and consider steps that might be taken to address them in the context of pension fund administration. The chapter concludes by considering the trajectory of the law and how it appears to be positioning fiduciaries with public responsibilities. Youngdahl (Chapter 3) provides an overview of current fiduciary duty principles in the United States, including those contained in common law and in the Employee Retirement Income Security Act (ERISA), with an eye to identifying evolving standards and challenges faced by fiduciaries. Fox (Chapter 4) considers the governance and accountability mechanisms that operate in United Kingdom pension schemes and, in particular, analyzes the central role that trustees play in the fiduciary relationships that they have with a variety of stakeholders. Noble (Chapter 5) reviews the development of Australia's "hybrid" superannuation system, with special emphasis on recent reforms and current governance and investment challenges. Sandberg, Siegl and Hamilton (Chapter 6) survey and discuss the Swedish regulatory environment for institutional investment and are particularly interested in whether, and how, it promotes responsible investment practices. The chapter also includes a case study of the AP funds. Finally, Maatman (Chapter 7) provides an overview of the structure and regulation of the Dutch pension system and associated fiduciary duties.

Part II presents a selected landscape of fiduciary institutions and their practices in a variety of contexts. Johnson and Viederman (Chapter 8) examine the relationship between the charitable purposes of nonprofit organizations and fiduciary obligations, including how they relate to trust and endowment monies. Beeferman (Chapter 9) argues that the current dominant understanding of fiduciary duty is overly narrow regarding defined benefit pension plans. He concentrates on the role of trustees in understanding the prudent person rule and argues for a more comprehensive view of the scope of fiduciary duty to encompass broader issues beyond narrowly defined portfolio returns. Hebb and Zanglein (Chapter 10) focus on economically targeted investments (ETIs) under ERISA in the United States, suggesting that over time and in spite of apparent interpretive changes by the regulator, the application of fiduciary duty in regard to ETIs has not changed significantly. Diaz-Rainey, Finegan, Ibikunle and Tulloch (Chapter 11) explore the role of institutional investment in the European Union Emissions Trading Scheme, arguing that investment in carbon increases portfolio diversification benefits while carrying some unusual risks. Perino (Chapter 12) looks at investors' rights in the United States under the 1995 Private Securities Litigation Reform Act (PSLRA), examining how the involvement of institutional investors has impacted outcomes of corporate fraud lawsuits. Finally, Molinari (Chapter 13) looks at fiduciary duty in the United Kingdom, focusing on the shrinking space for fiduciary obligation to beneficiaries at the very moment when they are in need of it the most.

Part III develops several of the themes underlying the previous parts by challenging conventional wisdom about fiduciary duty. Bernstein and Hawley (Chapter 14) question whether the search for alpha (above-market, risk-adjusted returns) is a breach of fiduciary duty when sought by institutional investors pursuing an active stock picking strategy. They argue that the alpha hunt is a zero or negative sum game when practiced on a large scale. Hoepner and Zeume (Chapter 15) examine the relation between so-called "sin stocks" (tobacco, alcohol) and fiduciary duty, suggesting that real world "sin stock" portfolios do not outperform their benchmarks and that hence fiduciary duty does not legitimize or even encourage overly sinful investment. Thamotheram and Ward (Chapter 16) develop the idea that "risk" as traditionally analyzed is far too narrow. They suggest that a clear focus on the end beneficiary would remedy this situation. Gramlich (Chapter 17) examines problems of both financial and other forms of sustainability in terms of systemic risk and argues that, without an ethical compass, sustainability is not likely to succeed. Huang, Ingram, Terry and Thompson (Chapter 18) look at the fiduciary duty of impartiality through the lens of cultural theory and from the vantage point of stakeholder analysis in order to understand how stakeholders with different views respond to uncertainty. Eshraghi and Taffler (Chapter 19) look at financial and market behavior from the perspective of emotional finance, focusing in particular on how such a perspective explains behaviors of institutional investors and what that implies prospectively.

Part IV highlights scholarship that aims to develop (or critically discuss the possibility of) a broader interpretation of fiduciary duty to include environmental, social and governance (ESG) dimensions. Clark (Chapter 20) rereads pivotal court cases on fiduciary duty in order to reveal the historical origins and function of the concept. He suggests a reconceptualization of the practice of investment that further emphasizes sustainability. Urwin (Chapter 21) considers how the evolving application of fiduciary duty affects pension funds' investment exposures to ESG factors. He specifically highlights broader interpretations of fiduciary duty that lead to the inclusion of ESG policy in practice. Lydenberg (Chapter 22) seeks a broader interpretation of fiduciary duty that replaces the prevalent focus on rational activity (maximizing what is in one's self-interest) with a standard of reasonableness (activity guided by principles needed for societal cooperation). Sandberg (Chapter 23) reviews attempts at reinterpreting fiduciary duty and takes a more pessimistic stance about the possibility of justifying socially responsible investment in this way. Instead, he proposes an alternative legal framework with independent social and environmental obligations. Darr (Chapter 24) relates the results of a set of interviews with fiduciary "insiders," which demonstrates that broader societal expectations of institutional investors are increasing, although these societal expectations may not yet constitute an enforceable legal duty. Finally, Guyatt (Chapter 25) argues that a combination of new tools, evolving beliefs and industry conventions is integral to supporting a broader interpretation of fiduciary duty. While some challenges remain, she thinks the building blocks are in place for change to be meaningful and sustained.

Part V aims to give voice to the viewpoints of the ultimate fund beneficiaries or investors and discusses potential roles for them in investment decision-making. Berry and Scanlan (Chapter 26) outline the legal case for pension fund beneficiaries to have a greater say in investment policy – both proactively, by having their views taken into account in the formulation of policy, and reactively, by being empowered to hold fiduciaries to account for decisions made on their behalf. They also address common legal and practical objections to such involvement and explore how these play out in practice through real-world case studies. Sandberg, Jansson, Biel and Gärling (Chapter 27) present the results of empirical research on the attitudes of beneficiaries, specifically on how beneficiaries define their own "best interests" and whether they think that fund managers should include social, ethical and environmental concerns in investment decisions. Correspondingly, Barkemeyer, Figge, Hahn, Hoepner, Liesen and Neher (Chapter 28) present the results of empirical research on the sustainability-related perceptions and priorities of practitioners in socially responsible investment, and argue that the general mismatch with such perceptions in society creates a "nonfinancial fiduciary duty problem." Finally, Nilsson (Chapter 29) discusses what current knowledge regarding retail investors' views and preferences can indicate about the likely attitudes of the beneficiaries of large institutional investors, with a particular focus on whether one can expect such beneficiaries to have stable and reasonable preferences in the complex context of financial investment.

Part VI concludes with chapters on fiduciary duty and governance. Ambachtsheer and Pollice (Chapter 30) examine the role and growth of multi-stakeholder paradigms as a form of "soft law" in regulating and influencing corporate behavior by various types of financial institutions. Eccles, Herron and Sarafeim (Chapter 31) look at the fiduciary roles of corporate board members, suggesting that investment fiduciaries have something important to learn from corporate boards, which extends beyond "shareholder primacy." Krzus (Chapter 32) explores the role of private sector initiatives to promote integrated reporting and sustainability accounting, arguing that there are significant business benefits from such approaches. Weller (Chapter 33) looks at the detrimental impact of short-term corporate practices in the nonfinancial sector of the US economy. He argues that they undermine many corporate governance activities. Waddell (Chapter 34) examines the role of pension fund trustees in implementing their fiduciary duties, focusing on recommendations of the Stanford Institutional Investor Forum. Cadman and Maraseni (Chapter 35) analyze survey data that suggests the governance of institutional investors needs to take account of a broader range of principles and stakeholders than it typically does. The part concludes with Davis (Chapter 36), who takes these themes further by arguing that dominant institutional investor governance practices are characterized by widespread failures that impede effective investor monitoring, stewardship and governance activities, making some of their actions perverse. He proposes a number of remedies.

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PART I

Fiduciary duty: a global outlook

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CHAPTER 2

The public fiduciary: a Canadian perspective

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Introduction

Fiduciary duty is a dynamic concept – one that has responded to changing contexts and worldviews but is firmly rooted in clear and enduring legal principles. As society faces governance challenges, there is a growing recognition of the need to take a longer-term and more systemic view of fiduciary obligations. This challenge is particularly acute in the financial services sector.

The Supreme Court of Canada (the "Court") has focused on developing a coherent view of the nature of fiduciary relationships and the consequences thereof. In doing so, it has extended the scope for fiduciary duties and consequential remedies. After a summary discussion of how fiduciary duties have been applied in the pension fund context, this chapter reviews the efforts of the Court to develop this broader conceptual framework. We then consider, in the context of pension fund administration, steps that might be taken to address and mitigate liability in respect thereof. We conclude by considering the trajectory of the law – why pension fiduciaries are increasingly required to look beyond the immediate "imperatives" of the market to longer-term, systemic concerns, such as intergenerational equity and sustainable development. So positioning fiduciaries with public responsibilities will further alter legal and governance precepts.

The fiduciary obligations of pension fund trustees

Pension trustees are subject to a range of fiduciary obligations, including duties of care, loyalty to the interests of beneficiaries, and obedience to the purposes of the fund. Unlike corporate law (directors' duties are to act in the best interests of the corporation as a whole), trustees' duties are to present and future individual beneficiaries.

Following the collapse of the "South Sea bubble" in the early eighteenth century, English courts of equity required trustees to restrict their investments to government obligations and mortgages. In 1830, an American court took a different approach, instructing trustees "to observe how men of prudence, discretion and intelligence manage their own affairs."[1] The flexibility of this objective behavioral standard was quickly circumscribed.[2] As recently as the 1970s, stock investments were widely viewed as imprudent for trust fiduciaries.[3]

Over time, the market environment made this restrictive approach impractical. Trustees needed to hedge against inflation and the superior performance of equities (and foreign securities) favored diversification. So, too, did growing acceptance of modern portfolio theory, which suggested a portfolio-level approach to investment. With the reintroduction of the "prudence standard" came the repeal of rules prohibiting the delegation of investment responsibilities, recognizing the growing complexity of managing financial assets and the need for trustees to rely on professionals.[4] The prudent person standard was refined in the 1990s by recognizing that prudence should be measured on an overall portfolio basis (rather than by discrete consideration of particular investments), and by

[1] *Harvard College* v. *Amory*, 9 Pick. (26 Mass.) 446 (1830).
[2] In *King* v. *Talbot*, 40 NY 76 (1869), a New York court limited trustees to investments in government bonds and mortgages.
[3] See *Restatement (Second) of Trusts* §227, Comment (f) (1959).
[4] See, for example, *Restatement (Second) of Trusts* §171 (1959).

imposing a higher standard of care when a trustee is an investment professional.[5]

Events of the past decade have challenged the narrow application of modern portfolio theory as the basis for prudent investment and risk management practices. For example, it is now broadly accepted that most funds' returns come from general exposure to the market (beta) rather than seeking market benchmark outperformance strategies (alpha) (Ibbotson 2010).[6] This makes systemic market factors critical to fiduciary responsibility. Pension fiduciaries are increasingly expected to consider questions of future value and "to assess the impact of their investment decisions on others, including generations to come," with all the uncertainties so entailed (Lydenberg 2013: 11). Risk management for pension funds extends well beyond that which is captured by market benchmarks, extending to market integrity, systemic risks, governance risks, advisor risks and the like. There is a growing recognition that projects (and asset classes) of longer duration often yield the highest private (and social) returns.

To the extent it is unlikely that current governance frameworks will facilitate a smooth transition in the pricing of externalities, there are likely to be inflection points that trigger rapid repricing, with severe consequences for various types of assets (e.g., when a realistic price is placed on carbon emissions). Pension trustees should be considering ways to mitigate consequential risks. A renewed focus on the duty of loyalty – acting in the best interests of beneficiaries (including responsibility for the oversight of supply chain conflicts of interest, precautionary risk management, intergenerational impartiality and the incorporation of sustainability factors into investment management processes) – helps address these concerns.

[5] See, for example, Uniform Prudent Investor Act §§ 2(b), (f) (1994); *Pensions Act 1995* (UK), 1995, c. 26, ss. 33(1), 35, 36(2).

[6] While this concept is widely embraced by academics and market professionals, there remains a significant gap in practice. We suspect that many pension trustees would be hard pressed to explain the difference between alpha and beta in this context and that most continue to assess their managers in relation to benchmarks.

Mapping fiduciary duties: the supreme court of Canada's heroic quest

To determine the relevance of the duty of loyalty, it is useful to examine the principles and purposes that have motivated its development. This is a task that common law courts have generally avoided, preferring a category-based approach, under which relationships are recognized as fiduciary if they fall within (or resemble) the historically recognized categories of fiduciary: trustees, solicitors, corporate directors and partners.

The Court has been an exception. Its singular focus and unique perspective on fiduciary duties can be traced to its need to address Crown liability to Aboriginal peoples. It did so in its 1984 decision *Guerin* v. *The Queen*, where the Court recognized a new class of fiduciary relationship between the Crown and Aboriginal peoples. In doing so, the Court rejected a category-based approach to fiduciary law, stating instead that a relationship is fiduciary in nature in any case where one party (the fiduciary) has discretionary power over the interests of another (the beneficiary), and is obligated to use that power to serve the other's best interests.[7]

In *Hodgkinson* v. *Simms* (1994), the Court offered two related justifications for regulating the use of fiduciary power. First, fiduciary law compensates for beneficiaries' inherent vulnerability to abuse of power by fiduciaries. Because of the often highly specialized nature of fiduciary services, beneficiaries cannot meaningfully monitor the fiduciary's work and must trust the fiduciary to exercise care and look after their best interests. Such a relationship, the Court noted, cannot be "characterized by a dynamic of mutual autonomy," and for this reason, "the marketplace cannot always set the rules."[8] Instead, fiduciary law imposes a higher standard, rooted in norms of loyalty and good faith, to protect clients' interests.

In protecting the interests of individual clients, fiduciary law also seeks to further the interests of the public as a whole. The Court noted that

[7] *Guerin* v. *The Queen*, 2 SCR 335 (1984). See also *Galambos* v. *Perez*, 3 SCR 247 (2009), paras 70, 76.

[8] *Hodgkinson* v. *Simms*, 3 SCR 377 (1994), 422.