In the Court of Appeal of Alberta

Citation: Valard Construction Ltd v Bird Construction Company, 2016 ABCA 249

Date: 20160829
Docket: 1503-0074-AC
Registry: Edmonton

Between:

Valard Construction Ltd.

Appellant
(Plaintiff)

- and -

Bird Construction Company

Respondent
(Defendant)

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Frederica Schutz

Reasons for Judgment Reserved of The Honourable Madam Justice Schutz
Concurred in by The Honourable Madam Justice Rowbotham

Dissenting Reasons for Judgment Reserved of The Honourable Mr. Justice Wakeling

Appeal from the Judgment by
The Honourable Mr. Justice G.A. Verville
Dated the 27th day of February, 2015
Filed on the 12th day of March, 2015
(2015 ABQB 141, Docket: 1003 11170)

Reasons for Judgment Reserved of
The Honourable Madam Justice Schutz

Introduction

[1] The parties agree that there are two issues on appeal: is the respondent legally liable for failing to inform the appellant of the existence of a labour and material payment bond, and was the trial court's indemnity costs award justified?

[2] "[L]egal truth can usually be found only in the details": ***Froese v Montreal Trust Co of Canada***, [1996] BCJ No 1091 (CA) at para 50, 137 DLR (4th) 725.

Facts

[3] Suncor Energy owned the construction site at which the appellant supplied labour and materials, through its contract with Langford Electric Ltd, the subcontractor hired by the respondent. Subcontractor Langford did not pay the appellant and is insolvent.

[4] The appellant is a large construction company with between 500 to 600 employees and is active across Canada. The appellant has its own surety and bonding facility (Respondent's Extracts of Key Evidence ["REKE"] at p R2, Trial Transcript ["TT"] p 69, l 18 – p R3, TT p 70, l 1).

[5] The appellant's trial witness was its project manager, who was responsible for the appellant's account with Langford. The project manager was aware of how labour and material payment bonds worked, as well as the terms and notice provisions in labour and material payment bonds, and he had previously made a claim on a labour and material payment bond (Appellant's Extracts of Key Evidence ["AEKE"] at p A1, TT p 40, ll 30-37; REKE at p R2-R3, TT p 69, l 41 – p 70, l 6).

[6] The record discloses the following:

- The project manager failed to request a copy of the prime contract between the respondent and site owner Suncor, failed to request a copy of the contract between the respondent and Langford, and failed to ask whether or not payment security had been provided (REKE at p R4, TT p 44, ll 1-9);

- The project manager was aware that the respondent was working with site owner Suncor, and no one prevented him from asking the respondent about its contract with Suncor or its subcontract with Langford (REKE at p R5, TT p 71, ll 3-29);

- The project manager did not send to the respondent a copy of the appellant's subcontract or purchase order with Langford (REKE at p R6, TT p 72, ll 7-16);

- The project manager did not send any of the appellant's time and materials sheets or invoices to the respondent and/or Suncor, and he never advised the respondent of the magnitude of the appellant's outstanding account (REKE at p R7, TT p 75, ll 16-28; p R8, TT p 87, ll 23-31; p R9, TT 74, ll 23-32);

- Despite being under internal pressure since 2009 about the unpaid Langford account, the project manager failed to advise the respondent and/or Suncor about the appellant's outstanding account with Langford until April 19, 2010 (REKE at p R10, TT p 78, ll 23-41; p R11, TT p 79, ll 1-21; R18, TT p 83, ll 7-10).

[7] By email dated August 10, 2009, Langford advised the respondent that the appellant was requesting more money for the work it had done than Suncor was willing to pay. The respondent replied that it would be impossible to get more money from Suncor, and that Suncor was already upset with the respondent's last claim (AEKE A32). By email dated October 2, 2009, sent by the appellant's project manager to his contact at Langford, the project manager stated that the outstanding Langford account was "going to be a hot topic." By email dated December 9, 2009, the project manager reiterated to his contact at Langford that he was in "extremely deep trouble over this account." Yet, the project manager decided to not "rock the boat" by alerting the respondent and/or Suncor to the appellant's outstanding account with Langford (REKE at p R11, TT 79, ll 1-9; R12-R16; p R17, TT p 81, ll 1-25; p R18, TT p 83, ll 7-10).

[8] It was not until April 19, 2010, that the respondent received from the appellant backup documentation regarding the outstanding balance being claimed by the appellant (REKE at p R19, TT p 85, ll 21-27; p R20, TT p 122, ll 4-29; p R21, TT p 123, ll 1-24; p R22, TT p 135, ll 4-10; p R23, TT p 126, ll 23-36).

[9] The April 19, 2010 communication from the appellant's project manager to the respondent was the first communication in which the appellant asked the respondent whether Langford had provided a labour and material payment bond (REKE at p R24, TT p 104, ll 7-39).

[10] The appellant's claim to the bonding company surety under the labour and material payment bond was made too late. Although the appellant initially sued the bonding company surety, it later discontinued that lawsuit. The respondent is the sole remaining defendant.

Standard of Review

[11] The parties agree that the issues on appeal raise questions of law, for which the standard of review is correctness. Fact findings of the trial court are entitled to deference, on a standard of palpable and overriding error.

Analysis

Findings of Fact

[12] The trial court made two crucial findings of fact: first, it was not significant that the respondent knew in August of 2009 that the appellant wanted additional money from Langford because the respondent was not made aware until April 19, 2010 that the appellant had not been paid; second, having heard nothing further, the respondent was entitled to assume that Langford and the appellant had worked out their differences. I discern no error in these findings of fact, much less palpable and overriding error.

Wording of the Labour and Material Payment Bond

[13] In the labour and material payment bond, the respondent is the "Obligee/Trustee", the "Principal" is the insolvent subcontractor Langford, with whom the appellant subcontracted, and the "Claimant" is the appellant. The "Surety" is the issuing bond company. The labour and material payment bond says, in part:

> The Principal and the Surety, hereby jointly and severally agree with the Obligee, as Trustee, that every Claimant who has not been paid as provided for under the terms of its contract with the Principal, before the expiration of a period of ninety (90) days after the date on which the last of such Claimant's work or labour was done or performed or materials were furnished by such Claimant, may as a beneficiary of the trust herein provided for, sue on this Bond, prosecute the suit to final judgment for such sum or sums as may be justly due to such Claimant under the terms of its contract with the Principal and have execution thereon. Provided that the Obligee is not obliged to do or take any act, action or proceeding against the Surety on behalf of the Claimants, or any of them, to enforce the provisions of this Bond. If any act, action or proceeding is taken either in the name of the Obligee or by joining the Obligee as a party to such proceeding, then such act, action or proceeding, shall be taken on the understanding and basis that the Claimants, or any of them, who take such act, action or proceeding shall indemnify and save harmless the Obligee against all costs, charges and expenses or liabilities incurred thereon and any loss or damage resulting to the Obligee by reason thereof. Provided still further that, subject to the foregoing terms and conditions, the Claimants, or any of them may use the name of the Obligee to sue on and enforce the provisions of this Bond. (AEKE at P A42, Condition #2)

[14] The labour and material payment bond in issue is the CCDC 222-2002 form published by the Canadian Construction Documents Committee in 2002, and has been in use since. The wording of this form of labour and material payment bond has been judicially considered by the Supreme Court of Canada: ***Johns-Manville Canada Inc v John Carlo Ltd,*** [1983] 1 SCR 513, 147 DLR (3d) 593. The wording is intended to create a limited trust, as is necessary to circumvent the third-party beneficiary rule that would otherwise preclude a non-party entity from claiming any rights under the bond. At the time such labour and material payment bonds issue, the identity of all potential claimants is not known. ***Johns-Manville Canada Inc*** at paras 5, 11; ***Dawson Construction Ltd v Victoria Insurance Co of Canada*** [1986] BCJ No 1959 (BCSC) at paras 15-19; ***Harris Steel Ltd v Alta Surety Co*** (1993), 6 CLR (2d) 55 (NSSC(AD)), at paras 19-20.

[15] The bond's wording is explicit that the respondent obligee/trustee is not obliged to do or take any act, action or proceeding against the surety on behalf of the claimants to enforce the provisions of the bond. And, the bond imposes no positive obligations of any other kind upon the respondent. Without more, the obligations of parties to a labour and material payment bond are established by the wording of the bond: ***Johns-Manville Canada Inc*** at para 17.

[16] But, the appellant urges that the respondent had a separate, positive and enforceable legal duty to inform the appellant of the existence of the labour and material payment bond so that the appellant could make a timely claim to the bonding company surety. The appellant contends that the respondent failed to fulfill its legal duty and it is this failure that prevented the appellant from making a timely claim to the bonding company surety.

[17] The appellant will succeed only if this Court concludes that the respondent owed the appellant a legal duty to inform, a duty that must be found outside of the wording of the bond; further, this Court must conclude that the respondent breached its legal duty and, finally, that the appellant has established the requisite causal connection between the respondent's breach and the appellant's alleged damages.

Did the Respondent Have a Legal Duty to Inform?

[18] The appellant submits that the respondent's legal duty to inform is found in ***Hawkesley v May***, [1956] 1 QB 304, and ***Brittlebank v Goodwin*** (1868), LR 5 Eq 545, cases which speak to the obligations of trustees in other circumstances; or, the respondent's legal duty to inform can be found elsewhere, within the law of fiduciary obligations.

[19] The appellant is a large, experienced and sophisticated contractor. Its project manager knew about labour and material payment bonds, although he had neither seen nor been asked to post such a bond in his roughly 10 years working in the oil sands, as either a general contractor or subcontractor.

[20] The trial judge found as a fact that the appellant took no reasonable steps prior to April 19, 2010 to inquire about or to learn of the existence of the labour and material payment bond. The

appellant's project manager testified that positive steps to obtain knowledge of the existence of the bond were deliberately not taken, as he did not want to "rock the boat" with the respondent (and, by implication, site owner Suncor), despite having ". . . already encountered problems with invoices rendered to Langford at the time it left the Project site on May 20, 2009" (Reasons, para 86).

[21] The trial court found that the respondent's representatives acted honestly at all material times and had no knowledge of the fact that the appellant was a claimant who had not been paid as provided for under the terms of its contract with Langford (Reasons, para 87).

[22] On April 19, 2010, when the appellant's project manager asked the respondent for information about the labour and material payment bond, the respondent provided that information. Given that the primary objective of a labour and material payment bond is to insulate a general contractor in the place of the respondent from being brought into unpaid sub-subcontractors builders' lien litigation, and further given that any failure on the part of the respondent to supply such information when requested is actionable under Alberta's *Builders' Lien Act*, RSA 2000, c B-7, no advantage was to be gained by the respondent in not providing information about the bond to the appellant, when asked.

[23] Canadian courts have rejected the appellant's proposition that the trustee/obligee under a labour and material payment bond has a positive legal duty to take steps to bring the existence of a labour and material payment bond to the attention of potential claimants.

[24] ***Dominion Bridge Co v Marla Construction Co,*** [1970] 3 OR 125 (Ont Co Ct) at para 20, 1970 CarswellOnt 743, rejected the proposition that the obligee/trustee under a labour and material payment bond had a duty to "seek out" a potential claimant and advise the claimant of the existence of the bond, and said: "[n]o such duty is imposed by the bond itself. In the absence of applicable authority I would not imply such a duty in law."

[25] ***Dominion*** at paras 19-20 specifically rejected the cases of ***Hawkesley*** and ***Brittlebank***, because these cases dealt with the duty owing to infants in respect of trusts to their benefit, and did not apply in the context of a construction industry labour and material payment bond. ***Dolvin Mechanical Contractors Ltd v Trisura Guaranty Co***, 2014 ONSC 918, 2014 CarswellOnt 4708**,** recently applied ***Dominion***, in a case that is factually analogous to this appeal.

[26] The appellant does not dispute the fact that it had the means to legally compel the respondent to provide information about a bond under s 33 of Alberta's *Builders' Lien Act*. Nor does it suggest ignorance of its general rights under a labour and material payment bond, or the need for timely notice to be given under such an instrument. The appellant's knowledge and ability to independently, legally compel information from entities it explicitly knew possessed the ability to confirm or refute the existence of a bond, in circumstances where the appellant was aware of the possibility that such a bond may exist, wholly distinguishes the appellant's situation from that of an infant who has no means whatsoever of learning of the existence of a trust in their favour,

except and unless the trustee informs them of the trust's existence. Infant beneficiaries ignorant of a trust will necessarily remain ignorant, by force of circumstance, until informed otherwise by some person completely unknown to them. In contrast, the appellant remained ignorant of the existence of its entitlement to claim under this specific labour and material payment bond because the appellant *elected* not to make inquiries, all the while knowing that such inquiries would definitively confirm or refute the existence of a bond. In sum, the infant beneficiaries possessed no independent ability to obtain necessary information; the appellant did.

[27] Moreover, the respondent was not in a fiduciary relationship with the appellant. When discussing fiduciary obligations in ***Hodgkinson v Simms***, [1994] 3 SCR 377 at para 40, 1994 Carswell BC 438, the Supreme Court of Canada sharply contrasts arm's length commercial relationships that are characterized by self-interest, with relationships giving rise to fiduciary duties. ". . . [T]he precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship;" and "[t]here is no substitute in this branch of the law for a 'meticulous examination of the facts' [citation omitted]": ***Hodgkinson*** at para 37. Here, again, the appellant possessed the independent, arm's length, and statutorily-compelled power to obtain complete information about the labour and material payment bond throughout the duration of its sub-subcontracting work on the Suncor site, and thereafter. This fact entirely removes the appellant from Canadian law that affords protections to those who are found to be in reliance-based relationships. In no sense can it be said that the appellant was legally dependent upon another (the respondent) who had agreed to relinquish self-interest and act solely on behalf of the appellant. The trial judge's findings of fact on this issue are unassailable. I decline to find that the relationship between the appellant and the respondent was, in any sense, reliance-based. The law of fiduciary obligations does not assist the appellant.

[28] The Canadian cases offered by the respondent are sound in law and principle. In Alberta, a contractor in the position of the respondent has no legal duty to inform any potential claimant about the existence of a labour and material payment bond, unless and until a clear and unequivocal request for information about the bond is made. Alberta's *Builders' Lien Act* provides the method for a potential claimant – a lienholder – to make a demand for information, and imposes consequences upon those who fail to promptly comply with such a demand.

[29] Finally, the appellant contends that the respondent ought to have taken certain particular steps, including posting the bond in its jobsite trailer, and argues this would not have been an onerous undertaking. Assuming without deciding that posting labour and material payment bonds to the worksite trailer notice board would not be an onerous undertaking, neither the common law nor Alberta's *Builders' Lien Act* imposes any such legal duty upon the respondent. Although s 20 of Alberta's *Builders' Lien Act* and s 17 of the *Public Works Act*, RSA 2000, c P-46 impose obligations to display certain information in a conspicuous place, neither statutory provision applies to this case. And, I do not agree that either statutory provision reflects a codification of the common law extant.

[30] The respondent did not owe a legal duty to inform the appellant of the existence of the labour and material payment bond, irrespective of howsoever such duty might be satisfied, until the respondent was specifically asked by the appellant about the existence of a labour and material payment bond. That specific request was made by the appellant on April 19, 2010. The respondent answered the appellant's specific request.

[31] Accordingly, this ground of appeal is dismissed.

Is the Costs Award Against the Appellant Justified?

[32] In the same lawsuit, the appellant sued the respondent and the bonding company surety.

[33] I agree that there is no indication in the bond's wording in Condition #2 that would restrict the indemnity provision only to situations where the respondent is added as a plaintiff. I do not agree, however, that the appellant's claim against the respondent is "a proceeding to enforce the provisions of the bond." Rather, the appellant's claim against the respondent is for breaching its alleged *sui generis* legal duty to inform the appellant of the *existence* of the bond.

[34] An award of indemnity costs is not justified, and the appeal on this ground is allowed.

[35] Failing agreement, the parties may seek a costs direction by filing brief written materials within 60 days hereof.

Appeal heard on April 5, 2016

Reasons filed at Edmonton, Alberta
this 29th day of August, 2016

_____

Schutz J.A.

I concur: _____

Authorized to sign for: Rowbotham J.A.

Dissenting Reasons for Judgment Reserved of
The Honourable Mr. Justice Wakeling

I. Introduction

[36] This is a business trust case. It presents an important issue that no Canadian appellate court has previously resolved.

II. Questions Presented

[37] A construction contract between Bird Construction Company and Langford Electric Ltd. contained a term obliging the latter to secure a labour and material payment bond for the benefit of those that worked on a designated Suncor Energy Inc. project under contract with Langford Electric.

[38] Langford Electric purchased the requisite bond from the Guarantee Company of North America and delivered the bond to Bird Construction. The bond named Bird Construction as the trustee.

[39] Bird Construction took no steps to bring the existence of the bond to the attention of potential beneficiaries in a timely manner.

[40] Valard Construction, a creditor of Langford Electric on account of work performed on the Suncor project and a bond beneficiary, only learned of the bond's existence after the period during which Valard Construction could claim against the Guarantee Company had expired.

[41] Langford Electric is now judgment proof.

[42] Valard Construction sued Bird Construction for the limit under the bond alleging that the defendant breached its duties as the bond trustee to Valard Construction, a bond beneficiary.

[43] Did Bird Construction, as the bond trustee, have a duty to notify Valard Construction in a timely manner that the bond existed? If not, did it have a duty to take reasonable steps to bring the bond to the attention of Valard Construction?

[44] If Bird Construction had one of these duties, did Bird Construction notify Valard Construction in a timely manner of the bond's existence or take reasonable steps to bring the bond to the attention of Valard Construction?

[45] Did Valard Construction take reasonable steps to determine if a labour and material payment bond that it might be able to claim on existed?

[46] Should Valard Construction, as soon as it realized that Langford Electric's account was overdue, have invoked its rights under the *Builders' Lien Act*[1] and asked Suncor and Bird Construction for a copy of the construction contracts between the owner and Bird Construction and Bird Construction and Langford Electric?

[47] If Valard Construction did not take reasonable steps to determine if a labour and performance bond existed, what is the legal effect of this omission?

[48] Bird Construction claims that the bond obliges Valard Construction to indemnify the former for the costs it incurred in defending the latter's breach-of-trust action. Does it?

III. Brief Answers

[49] A trustee, whether under a business trust or any other kind of trust, is a fiduciary and has onerous obligations as a fiduciary.

[50] As a general rule, if a beneficiary or a potential beneficiary would derive a benefit from knowing that a trust exists and the criteria identifying a beneficiary, a trustee must undertake reasonable measures to make available to a sufficiently large segment of the class of beneficiaries or potential beneficiaries information about the trust's existence and the criteria identifying a beneficiary. This obligation increases the likelihood that beneficiaries or potential beneficiaries will be able to take the necessary steps to protect any interests they may have under the trust. In determining what constitutes a sufficiently large segment of the class of beneficiaries or potential beneficiaries and the related question, what measures are reasonable to make available information about the existence of the trust, a court must take into account the criteria identifying a beneficiary, the nature of the benefits a beneficiary may enjoy and the costs associated with different communication methods.

[51] Valard Construction and other potential beneficiaries would have derived a substantial benefit from knowing that the bond existed and the criteria identifying those who were beneficiaries under the bond. Had Valard Construction known about the bond before the expiry of the 120 day period following the date it last performed work under its contract with Langford Electric, it would have made a timely claim against the Guarantee Company for payment of the outstanding Langford Electric invoices.

---

[1] R.S.A. 2000, c. B-7, s. 33(1).

[52] Bird Construction, as the bond trustee, had to take reasonable measures to make available to a sufficiently large segment of potential beneficiaries information about the bond's existence and the criteria identifying a beneficiary.

[53] In this case, a sufficiently large segment of beneficiaries or potential beneficiaries is all beneficiaries or the potential beneficiaries. The criteria identifying potential beneficiaries are clear. The benefits of being a beneficiary are high – up to $659,671. And the costs of a communications strategy designed to bring the bond's existence to the attention of all undertakings that did business with Langford Electric was relatively low.

[54] In this case reasonable communication measures have to take into account the possibility that businesses having construction agreements with Langford Electric may be able to discharge their obligations to Langford Electric without sending personnel to the Suncor project site. What constitutes reasonable measures for one group may not be adequate for the other group.

[55] Posting a copy of the bond at Bird Construction's Suncor site office where meetings attended by contractors were regularly held would constitute a reasonable measure for those who had contracts with Langford Electric and worked on the Suncor project site. While it is possible that some contractors who worked on site may not check the bulletin board, this is not a risk that Bird Construction should have to bear. A trustee need only take reasonable measures designed to make information *available* about the bond's existence to potential beneficiaries or beneficiaries. A trustee is not under an obligation to ensure that every potential beneficiary or beneficiary actually receives notice of the bond's existence.

[56] The likelihood that the bond-posting strategy would have the potential to reach all potential beneficiaries or beneficiaries who did not visit the Suncor project site is too low to make it a reasonable measure for this group.

[57] To achieve adequate disclosure for this segment of the class Bird Construction would have to adopt protocols that have the potential to disseminate information about the bond to those enterprises with whom Langford Electric did business but were able to discharge their Suncor project obligation without attending the site.

[58] Two options are obvious. First, Bird Construction may insist that Langford Electric include in its contracts with subcontractors a provision that discloses the bond's existence and requires the subcontractor to notify Bird Construction in writing that it acknowledges receiving notice of the bond's existence. Second, Bird Construction may demand that Langford Electric provide it in a timely manner with a list of all subcontractors that it has retained to work on the Suncor project. Bird Construction would then have an obligation to take reasonable steps to communicate to this group the bond's existence.

[59] The cost of these measures would be negligible.

[60] Bird Construction took no steps whatsoever to notify Valard Construction of the existence of the bond when the latter would have benefitted from such knowledge. The trustee disclosed the bond's existence only when Valard Construction asked about it and it was too late for Valard Construction to file a claim as a bond beneficiary.

[61] Bird Construction failed to discharge its obligation as the bond trustee.

[62] It is responsible for the damages that Valard Construction, a bond beneficiary, suffered as a result of its failure to discharge its obligations as the bond trustee.

[63] Whether Valard Construction did or did not take reasonable measures to determine if a labour and performance bond existed is irrelevant. Bird Construction did not plead laches as a defence or invoke s. 41 of the *Trustee Act*.[2] This means that the reasons why Valard Construction failed to discover before April 19, 2010 the existence of the bond are irrelevant. The nature of Bird Construction's duty as bond trustee is not affected by the conduct of a beneficiary.

[64] Valard Construction has no obligation to indemnify Bird Construction for the costs Bird Construction incurs in defending Valard Construction's breach-of-trust action. The board's indemnification provision does not apply when Bird Construction is the defendant in a breach-of-trust lawsuit.

IV. Statement of Facts

[65] Suncor retained Bird Construction as its general contractor for a project at its Fort McMurray oil sands site.[3]

[66] Bird Construction entered into a contract with Langford Electric dated October 20, 2008.[4] The latter agreed to perform designated electrical work on the project. Another term of this contract required Langford Electric to secure a labour and material payment bond. Bird Construction had a policy that required any enterprise with which it had a contract for an amount in excess of $100,000 to perform project work to post a labour and material payment bond.[5]

---

[2] R.S.A. 2000, c. T-8. This provision gives the Court jurisdiction to relieve the trustee for liability for breach of trust if the "trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust".

[3] *Valard Construction Ltd. v. Bird Construction Co.*, 2015 ABQB 141, ¶ 8.

[4] Id.

[5] Id. ¶ 33.

[67] On November 25, 2008 Langford Electric secured from the Guarantee Company[6] a labour and performance bond for $659,671.[7] This is a standard form contract – Standard Construction Document CCPC 222-2002.[8] Langford Electric subsequently provided Bird Construction with a copy of the bond. Bird Construction did not post the bond at the work site or take any other steps to bring its existence to the attention of potential bond beneficiaries. The bond trustee just filed it.[9]

[68] On March 2, 2009 Langford Electric retained Valard Construction to perform some needed Suncor project services.[10]

[69] Valard Construction is a utility contractor with 500 to 600 employees in Canada. It has its own surety bonding company.[11]

---

[6] The Guarantee Company is a "compensated surety". See K. McGuinness, Construction Lien Remedies in Ontario 320 (2d ed. 1997) ("While there is a minor variation in the costs of bonds, they usually cost in the range of one-half to one percent of the principal amount secured"). The Supreme Court of Canada, in *Citadel General Assurance Co. v. Johns-Mansville Canada Inc.*, [1983] 1 S.C.R. 513, 521-52, described "a compensated surety" in the following terms: "In more recent times, particularly in the construction industry, the need for financial guarantees to ensure prompt payment for materials and labour supplied has seen the entry into this field of professional surety companies, often called bonding companies, which are frequently also engaged in the insurance business. Their business consists of guaranteeing performance and payment in return for a premium. ... It was argued that they should not be treated by the courts with the same solicitude reserved heretofore for accommodation sureties". See also *Tebbets v. Mercantile Credit Guarantee Co.*, 73 F. 95, 97 (2d Cir. 1896) ("'surety' companies ... undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance and should be treated as such") & Arnold, "The Compensated Surety", 26 Colum. L. Rev. 171 (1926).

[7] *Valard Construction Ltd. v. Bird Construction Co.*, 2015 ABQB 141, ¶ 8. The bond confusingly stipulates two different amounts. The Arabic numeral is "$659,671.00". The word amount is $100 larger, "six hundred fifty nine thousand *seven* hundred seventy one and 00/00 dollars" (emphasis added). Valard Construction claims payment of the smaller amount – $659,671. There is no need in a printed document to use words to describe an amount designated in numerals. The numerals are easily discerned. The extra words are superfluous and the source of potential confusion. Just as happened here. Lawyers committed to plain language documents should never utilize both numerals and words to describe an amount unless there is a very good reason for doing so. See M. Asprey, Plain Language for Lawyers 303 (4th ed. 2010) & Eagleson, "Numbers: figures or words: a convention under the spotlight", 50 Clarity 32, 34 (November 2003). Chief Justice McLachlin encouraged lawyers and judges to delete from their text unnecessary words: "If it is possible to cut out a word, always cut it out", "Legal Writing: Some Tools", 39 Alta. L. Rev. 695, 697 (2001). Less is more in legal writing.

[8] See K. McGuinness, Construction Lien Remedies in Ontario 583-84 (2d ed. 1997).

[9] *Valard Construction Ltd. v. Bird Construction Co.*, 2015 ABQB 141, ¶ 34.

[10] Id. ¶ 18.

[11] Id. ¶ 17.

[70] Valard Construction worked on the Suncor project from March 17, 2009 to May 20, 2009 inclusive.[12] It encountered unforeseen difficulties. This required extra work and increased the cost of its services substantially.

[71] Langford Electric failed to pay all of Valard Construction's invoices.[13]

[72] John Cameron Wemyss, Valard Construction's project manager, did not notify Suncor or Bird Construction that Langford Electric had not paid its accounts.[14] The project manager was reluctant to "rock the boat".[15] Companies that worked on oilsands projects had to have good working relationships.[16]

[73] Mr. Wemyss was familiar with labour and material payment bonds.[17] He had previously claimed against a surety for an unpaid account.

[74] On February 11, 2010 Valard Construction commenced an action against Langford Electric for its unpaid invoices in the Court of Queen's Bench of Alberta.[18]

[75] On March 9, 2010 the Court of Queen's Bench of Alberta granted Valard Construction default judgment for $660,000.17.[19]

[76] On April 19, 2010 Mr. Wemyss, having heard that there might be a bond, contacted Bird Construction, notified it that Langford Electric owed Valard Construction a large sum and asked if such a bond existed.[20]

[77] Bird Construction immediately indicated that there was a bond and gave Mr. Wemyss the bond issuer's contact information.[21]

---

[12] Id. ¶ 10.

[13] Id. ¶ 3.

[14] Id. ¶ 25.

[15] Id. ¶ 24.

[16] Id.

[17] Id. ¶ 22.

[18] Id. ¶ 11.

[19] Id.

[20] Id. ¶ 25.

[21] Id. ¶¶ 25, 31 & 32.

[78] On April 19, 2010 Valard Construction submitted a bond claim to the Guarantee Company.[22]

[79] The existence of a labour and material payment bond surprised Mr. Wemyss.[23] He had been in the construction industry for over ten years and had never encountered a labour and material payment bond on an oilsands project. Bonds were a standard feature in public projects.

[80] In addition, the contract between Langford Electric and Valard Construction, made no mention of a labour and material payment bond. Nor had Mr. Wemyss ever seen a copy of the bond posted anywhere on the Suncor site or heard Bird Construction make any reference to it at site meetings.[24]

[81] Chris Von Klitzing, Bird Construction's Suncor project manager, stated that Bird Construction did not post bonds on work sites.[25]

[82] Mr. Klitzing had no idea until April 19, 2010 that Langford Electric had not paid Valard Construction and that Valard Construction held a default judgment against Langford Electric.[26]

[83] On June 14, 2010 the Guarantee Company denied Valard Construction's claim.[27]

[84] On June 30, 2010 Valard Construction commenced an action against the Guarantee Company for payment of the bond amount.[28]

[85] On August 13, 2010 the Guarantee Company filed its defence. It pled that Valard Construction was precluded from commencing the action because it failed to give the Guarantee Company written notice within 120 days after the date upon which Valard Construction performed its last work on the project, May 20, 2009.[29] The 120-day deadline expired on September 17, 2009. It also claimed that Valard Construction's delay had prejudiced it.

---

[22] Id. ¶ 12.

[23] Id. ¶¶ 22 & 86.

[24] Id. ¶ 25.

[25] Id. ¶ 34.

[26] Id. ¶ 37.

[27] Id. ¶ 12.

[28] Id. ¶ 13.

[29] Id.

[86] On December 15, 2010 Valard Construction amended its statement of claim against the Guarantee Company adding Bird Construction as a defendant.[30]

[87] On February 8, 2011 Bird Construction filed its statement of defence. It denied that "it had any obligation, fiduciary or otherwise to advise ... [Valard Construction] of the details of its relationship with Langford [Electric], including the existence and terms of the Payment Bond". It did not plead laches or s. 41 of the *Trustee Act*.[31]

[88] In a counterclaim filed on July 8, 2011 Bird Construction sought indemnification for all costs Bird Construction incurred in defending the breach-of-trust action.[32]

[89] On October 31, 2013 Valard Construction discontinued its action against the Guarantee Company, satisfied that noncompliance with the bond terms had caused the surety actual prejudice.[33]

[90] Bird Construction applied for summary dismissal of Valard Construction's claim. Justice Verville wisely converted the proceedings into a mini-trial.[34] The three witnesses gave their evidence in less than a day.[35]

[91] The trial judge dismissed Valard Construction's action. He held that Bird Construction, as the bond trustee, did not have any obligation to protect the interests of Valard Construction by providing notice to Valard Construction of the bond's existence.[36]

---

[30] Id. ¶ 14.

[31] R.S.A. 2000, c. T-8.

[32] *Valard Construction Ltd. v. Bird Construction Co.*, 2015 ABQB 141, ¶ 14.

[33] Id. ¶¶ 15 & 76. See K. Scott & R. Reynolds, Scott and Reynolds on Surety Bonds 2-49 (looseleaf 2014 release 2) ("If the surety has been prejudiced by the manner in which notice ... has been given ... then the notice requirement will be enforceable").

[34] Id. ¶ 7.

[35] Id.

[36] *Valard Construction Ltd. v. Bird Construction Co.*, 2015 ABQB 141, ¶¶ 79 & 85.

V. Important Provisions of the Labour and Material Payment Bond and Applicable Statutory Provisions

A. Labour and Material Payment Bond

[92] The important provisions of the labour and material payment bond issued by the Guarantee Company of North America read as follows:[37]

> Langford Electric ... as Principal ... and ... Guarantee Company ... as Surety ..., are held and firmly bound unto Bird Construction ... as Obligee ... in the amount of ... $659,671 ... lawful money of Canada for the payment of which sum ... [Langford Electric] and ... [Guarantee Company] bind themselves ... jointly and severally.
>
> Whereas, ... [Langford Electric] has entered into a written contract with ... [Bird Construction], dated ... [October 20, 2008] for Suncor Energy Mem 2 Bay Shop Expansion in accordance with the Contract Documents submitted ... and ... hereinafter referred to as the Contract.
>
> 2. ... [Langford Electric] and ... [Guarantee Company], hereby jointly and severally[38] agree with ... [Bird Construction], as Trustee, that every Claimant who has not been paid as provided for under the terms of its contract with .... [Langford Electric], before the expiration of a period of ninety ... days after the date on which the last of such Claimant's work or labour was done or performed or materials were furnished by such Claimant, may as a beneficiary of the trust herein provided for, sue on this Bond, prosecute the suit to final judgment for such sum or sums as may be jointly due to such Claimant under the terms of its contract with ... [Langford Electric] and have execution thereon. Provided that ... [Bird Construction] is not obliged to do or take any act, action or proceeding against ... [Guarantee Company] on behalf of the Claimants, or any of them to enforce the provisions of this Bond. If any act, action or proceeding is taken either in the name of ... [Bird Construction] or by joining ... [Bird Construction] as a party to such proceeding, then such act, action or proceeding, shall be taken on the understanding and basis that the Claimants, or any of them, who take such act, action or proceeding shall indemnify and save harmless ... [Bird Construction] against all costs, charges and expenses or liabilities incurred thereon, and any loss or damage resulting to ... [Bird Construction] by reason thereof. Provided still further that, subject to the foregoing

[37] This is Standard Construction Document CCDC 222-2002.

[38] K. Scott & R. Reynolds, Scott and Reynolds on Surety Bonds 2-17-18 (looseleaf 2014 release 2) (joint and several liability allows the surety to pursue the principal contractor for indemnification).

terms and conditions, the Claimants, or any of them may use the name of ... [Bird Construction] to sue on and enforce the provisions of this Bond.

3. It is a condition precedent to the liability of ... [Guarantee Company] under this Bond that such Claimant shall have given written notice as hereinafter set forth to each of ... [Langford Electric, Guarantee Company and Bird Construction], stating with substantial accuracy the amount claimed and that such Claimant shall have brought suit or action in accordance with this Bond, as set out in such clauses 3(b) and 3(c) below. Accordingly, no suit or action shall be commenced hereunder by any Claimant;

> (a) unless such notice shall be served ... [on Langford Electric, Guarantee Company and Bird Construction] ... . Such notice shall be given
>
> > (i) in respect of any claim for the amount or any portion thereof, required to be held back from the Claimant by ... [Langford Electric] under either the terms of the Claimant's contract with ... [Langford Electric] or under the lien legislation applicable to the Claimant's contract with ... [Langford Electric], whichever is the greater, within one hundred and twenty ... days after such Claimant should have been paid in full under the Claimant's contract with ... [Langford Electric];
> >
> > (ii) in respect of any claim other than for the holdback, or portion thereof, referred to above, within one hundred and twenty ... days after the date upon which such Claimant did, or performed the last of the work or labour or furnished the last of the materials for which such claim is made under the Claimant's contract with ... [Langford Electric].

B. Applicable Statutory Provisions

[93] Sections 33(1) and 41(2) of the *Builders' Lien Act*[39] read as follows:

33(1) A lienholder, by notice in writing, may at any reasonable time demand,

> (a) of the owner or the owner's agent, the production for inspection of the contract with the contractor,
>
> (b) of the contractor, the production for inspection of

[39] R.S.A. 2000, c. B-7.

> (i) the contract with the owner, and
>
> (ii) the contract with the subcontractor through whom the lienholder's claim is derived,
>
> and
>
> (c) of the subcontractor through whom the lienholder's claim is derived, the production for inspection of the contract with the contractor,
>
> and the production for inspection of a statement of the state of accounts between the owner and contractor or contractor and subcontractor, as the case may be.
>
> (2) If, at the time of the demand or within 6 days after it, the owner ... , the contractor or the subcontractor, as the case may be,
>
> (a) does not produce the written contract and statement of accounts
>
> ...
>
> then, if the lienholder sustains loss by reason of the refusal or neglect or false statement, the owner, contractor or subcontractor, as the case may be, is liable to the lienholder in an action for the amount of the loss ... .
>
> ...
>
> 41(2) A lien for the performance of services may be registered at any time within the period commencing when the lien arises and
>
> (a) ... terminating 45 days from the day that the performance of the services is completed or the contract to provide the services is abandoned ... .

VI. Analysis

A. Bird Construction Acknowledges that It Is the Bond Trustee

[94] This case has a very narrow focus. It requires a statement of the duties of a trustee under a labour and material payment bond.

[95] Before directly addressing this issue it is helpful to immediately explain why trust principles play an indispensable role in Canadian labour and material payment bonds.[40] Bird Construction's factum[41] provides a clear answer: "The ... L & M Bond creates a limited trust which is necessary in order to avoid the 'third party beneficiary' rule that would have otherwise prevented a 'claimant', who is not a party to the bond, from suing on it. The trust is necessary because at the time that the bond is created, the identities of potential 'claimants' are not known".

[96] In this passage Bird Construction fairly concedes[42] that the labour and materials payment bond[43] creates a trust.[44] Elsewhere it acknowledges that it is a trustee.[45]

---

[40] D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 77 (4th ed. 2012) ("[under a] labour and material payment bond ... [t]he contractor and surety ... assume ... the obligation that all suppliers of labour and material to the project will be paid").

[41] Factum of the Respondent, ¶ 16. See also D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 69 (4th ed. 2012) ("The common law rule has long been that only persons who are party to a contract may sue upon it"). Bonds utilize the trust concept to overcome the principle that only parties to a contract may enforce it. K. McGuinness, Construction Lien Remedies in Ontario 584 (2d ed. 1997) ("The owner is named as the trustee on behalf of the claimants. The original reason ... was to circumvent the requirement for privity of contract, which prevented the suppliers to the contractor from suing directly on the bond") & *Harris Steel Ltd. v. Alta Surety Co.*, 119 N.S.R. 2d 61, 66-67 (C.A. 1993) leave den'd [1993] 2 S.C.R. v. In some jurisdictions, legislation has declared that persons who are not parties to a performance bond may commence an action against the surety. *Construction Lien Act*, R.S.O. 1990, c. C30, s. 69(1); *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 48 & K. McGuinness, Construction Lien Remedies in Ontario 584 (2d ed. 1997). In the United States, on account of the *Miller Act*, 49 Stat. 794, 40 U.S.C. § 270(b) (1935), persons who are not parties to the surety contract secured by a construction contractor for a United States public work may sue the surety to enforce the terms of the bond for its benefit. See *Fleisher Engineering & Construction Co. v. United States*, 311 U.S. 15, 17 (1940); *United States v. Cortelyou & Cole Inc.*, 581 F. 2d 239, 241 (9th Cir. 1978) & Arnold, "The Compensated Surety", 26 Colum. L. Rev. 171, 184 n. 56 (1926).

[42] The party asserting the existence of a trust bears the persuasive burden of establishing the facts that support the creation of a trust. *Tobin Tractor (1957) Ltd. v. Western Surety Co*., 40 D.L.R. 2d 231, 239 (Sask. Q.B. 1963) & G. Bogert, Trusts 26-27 (6th ed. 1987).

[43] G. Bogert, Trusts 2 (6th ed. 1987) ("The trust instrument is the document by which property interests are vested in the trustee and beneficiary and the rights and duties of the parties (called the trust terms) are set forth").

[44] Hart, "What Is a Trust?", 15 Law Q. Rev, 294, 301 (1899) ("A trust is an obligation, imposed either expressly or by implication of law whereby the obligor is bound to deal with property over which he has control for the benefit of certain persons of whom he himself may be one, and any one of whom may enforce the obligation"). See also D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 3-4 (4th ed. 2012) (refers to several definitions with approval); E. Gillese, The Law of Trusts 5 ("a trust arises when there is a split in legal and beneficial ownership to property – that is, whenever one person holds legal title to property and is legally obliged to manage that property for the benefit of another. It is an equitable concept that enables two persons to have shared ownership rights in a single piece of property. ... A trust can be created for any purpose so long as the purpose is not illegal or contrary to public policy") & D. Hayton, P. Matthews & C. Mitchell, Underhill and Hayton Law Relating to Trusts and Trustees 2 (18th ed. 2010) ("A trust is an equitable obligation, binding a person (called a trustee) to deal with property (called trust property) owned by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries ...), of whom he may himself be one, and any one of whom may enforce the obligation").

[97] Justice Gillese describes the markers of a trust:[46]

> In order to create a trust, there must be certainty of intention to create the trust, the subject matter of the trust must be described with such certainty that it is ascertained or capable of ascertainment, and those who are to benefit from the trust – the objects or beneficiaries – must be described in terms clear enough that the trust obligations can be performed properly. These three requirements are known as certainly of intention, certainty of subject matter, and certainty of objects. A statement or series of statements that together satisfy the three certainties amount to a declaration of trust. A declaration of trust is to be distinguished from the creation of a trust: the latter occurs when both the trust has been declared and title to the property has been conveyed to the trustee.

[98] What kind of trust is at the heart of the bond?

[99] It is an express trust.

[100] In *Re Lubberts Estate*,[47] I ventured this definition: "An express trust exists if A, the settlor, declares an intention to transfer ascertainable property to B, the trustee, for the benefit of C, an identifiable person or object, the beneficiary, and A conveys the trust property to B".

[101] The bond displays these essential features.

[102] First, the bond clearly states that Langford Electric, the settlor,[48] intended[49] to create a trust. The text is unmistakable:[50] "The Principal and the Surety, hereby jointly and severally agree with

---

[45] *Valard Construction Ltd. v. Bird Construction*, 2015 ABCA 141, ¶¶ 5 & 38. See G. Dal Pont & D. Chalmers, Equity and Trusts in Australia and New Zealand 403 (2d ed. 2000) ("a trust must have a *trustee* who holds the legal title to the trust property") & G. Bogert, Trusts 90 (6th ed. 1987) (a trustee is needed to administer a trust).

[46] E. Gillese, The Law of Trusts 41 (3d ed. 2014). See also J. Glister & J. Lee, Hanbury and Martin Modern Equity 79 (20th ed. 2015); D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts 140 (4th ed. 2012); D. Hayton, P. Matthews & C. Mitchell, Underhill and Hayton Law Relating to Trusts and Trustees 107 (18th ed. 2010); G. Dal Pont & D. Chalmers, Equity and Trusts in Australia and New Zealand 403 (2d ed. 2000) & G. Bogert, Trusts 19, 70, 121 & 122 (6th ed. 1987).

[47] 2014 ABCA 216, ¶ 49; [2014] 10 W.W.R. 41, 60-61. See also J. Glister & J. Lee, Hanbury and Martin Modern Equity 58 (20th ed. 2015) ("An express trust is one intentionally declared by the creator of the trust, who is known as the settlor, or, if the trust is created by will, the testator"); E. Gillese, The Law of Trusts 39 (3d ed. 2014) ("An express trust is one that is created intentionally; it is the conscious act of a person to transfer property to one party, with the stipulation that the property is held for the benefit of another") & G. Bogert, Trusts 19 (6th ed. 1987) ("An express trust is one which comes into being because a person having the power to create it expresses an intent to have the trust arise and goes through the requisite formalities").

[48] A, a settlor, may purchase a promise from B the discharge of which will benefit C, the beneficiary, and assign to D, the trustee, the right to enforce B's promise. G. Bogert, Trusts 22 (6th ed. 1987).

the Obligee, as Trustee, that every Claimant who has not been paid as provided for under the terms of its contract with the Principal ... may *as a beneficiary of the trust herein provided* for, sue on this Bond, prosecute the suit to final judgment for such sums ... as may be justly due to such Claimant under the terms of its contract with the Principal ...".

[103] Second, certainty of subject matter also exists. There is no doubt about the identity of the trust property.[51] The bond records a promise made by the Guarantee Company to Langford Electric for consideration to pay a specified sum of money to a described class of beneficiaries under stipulated conditions. The property the trustee holds for the beneficiaries is a chose in action[52] – a right of action against the Guarantee Company for amounts Langford Electric owes the claimant, a beneficiary, up to $659,671, the amount of the bond. "The subject matter is ascertained when it is a fixed amount or a specified piece of property".[53]

[104] Third, the members of the class who are the beneficiaries of the trust – the holders of the equitable interest in the trust property – are ascertainable.[54] A trust instrument must describe the beneficiary with sufficient precision that "the court can be sure who are the person or persons the settlor intended to benefit".[55] The class is populated by persons who have a contract with Langford Electric to provide labour or material or both to the Suncor project and Langford Electric has not paid them in accordance with their contracts for at least ninety days after the date the beneficiary last performed work under its contract with Langford Electric. The text is precise. There is no risk

---

[49] See D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 141 (4th ed. 2012) ("There is no need for any technical words ... for the creation of a trust") & G. Bogert, Trusts 24 (6th ed. 1987) ("No particular words or phrases need to be used, and words of trusteeship are not necessarily conclusive").

[50] Emphasis added. See *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513, 520 (the surety acknowledged that a labour and material performance bond identical in its key provisions to the bond under review here created a trust).

[51] D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 159 (4th ed. 2012) & G. Bogert, Trusts 25-26 & 70 (6th ed. 1987).

[52] A chose in action is property. It is a right to bring an action to secure realty or personal property. The owner of the chose in action may assign it to another by contract or as a gift. The chose in action may become trust property. See D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 68 n.101 (4th ed. 2012).

[53] E. Gillese, The Law of Trusts 43 (3d ed. 2014). See also D. Hayton, P. Matthews & C. Mitchell, Underhill and Hayton Law Relating to Trusts and Trustees 107 (18th ed. 2010) ("If either the property or the beneficiaries cannot be ascertained with certainty there can be no trust for the beneficiaries, the settlor remaining beneficial owner of the property") & G. Bogert, Trusts 73 (6th ed. 1987) ("An indefinite or uncertain trust res is as fatal to the trust as no subject matter whatever").

[54] D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 167 (4th ed. 2012) & G. Bogert, Trusts 24 (6th ed. 1987).

[55] G. Bogert, Trusts 122 (6th ed. 1987).

that a reasonable objective observer will not know who the beneficiaries are.[56] A beneficiary need not be in existence when the trust instrument is prepared.[57]

[105] A valid trust exists even if the beneficiaries are unaware of its existence when it is created.[58] This is vital to the efficacy of a labour and material payment bond because the entities that the settlor will do business with are unknown when the bond agreement is struck. It goes without saying that it is difficult, if not impossible, to know, when the bond is entered into, which businesses the settlor will ultimately select to assist it discharge its construction obligations and which members of this class of potential beneficiaries will not be paid and will eventually become beneficiaries.

B. A Trustee Has Onerous Duties

[106] A trustee-beneficiary relationship is a fiduciary relationship.[59]

[107] The trustee is the fiduciary.

---

[56] E. Gillese, The Law of Trusts 45 (3d ed. 2014) & D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 167-68 (4th ed. 2012).

[57] G. Bogert, Trusts 125-26 (6th ed. 1987).

[58] *Segelov v. Ernest & Young Services Pty Ltd.*, [2015] NSWCA 156, ¶ 118 ("an entitlement under a trust is valid notwithstanding that the beneficiary has no knowledge of it"); *DeLeuil's Executors v. DeLeuil*, 255 Ky. 406, 410; 74 S.W. 2d 474, 476 (Ct. App. 1934) ("the owner of property can make himself a trustee of it for another ... without that other being appraised of the trust"); *Irving Bank-Columbia Trust Co. v. Rowe*, 210 N.Y.S. 497, 499; 213 App. Div. 281, 283 (1925) (a trust may be created without a beneficiary being aware of it); G. Bogert, Trusts 130 (6th ed. 1987) ("That the settlor did not inform the beneficiary of his acts of trust creation before or at the time of performing them does not prevent completion of the trust") & American Law Institute, Restatement of the Law of Trusts § 36 (2d ed. 1959) ("A trust can be created without notice to or acceptance by the beneficiary"). Suppose that A declares in writing that he held designated securities in trust for B, his first grandchild; the securities to be transferred on the child attaining eighteen years of age. A continues to hold the legal title. But the equitable interest now resides in B, even though B is unaware of his ownership interest. A informs only his stockbroker of the trust's existence. It is still a valid trust. A trust can be created without the beneficiary having any knowledge of its existence. A person, within a reasonable time of learning that he or she has the status of a beneficiary, must decide either to accept or reject the equitable property interest associated with the status of beneficiary. *Bacon v. Barber*, 110 Vt. 280, 287; 6 A. 2d 9, 12-13 (Sup. Ct. 1939) ("The right of renunciation must ... be exercised within a reasonable time after opportunity is afforded the donee to do so; and must be shown by some positive, overt act, or course of conduct"). Suppose that A gave B his boa constrictor in trust for C, his grandniece, when she turns eighteen. C, twelve when the trust was created, as a pre-teen, had shown keen interest in A's snake. C developed ophidiophobia shortly before she turned eighteen. C declined to accept an ownership interest in the boa constrictor, as soon as B informed her of her interest in her great-uncle's snake. See G. Bogert, Trusts 131 (6th ed. 1987) ("there is the common law privilege not to have one's property ownership increased by others without voluntary acceptance of the tendered property interest").

[59] E. Gillese, The Law of Trusts 10 (3d ed. 2014) & D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 9 & 42 (4th ed. 2012).

[108] A trustee has onerous[60] duties.

[109] "The trust is a fiduciary relation involving the duty of unselfish loyalty and extreme good faith. ... Among those law-imposed duties are the obligations that the trustee act solely in the interest of the beneficiary, treat the beneficiary with the utmost fairness and frankness, conceal nothing from him, and take no advantage of him".[61] Justice Gillese expressed a similar opinion:[62] "The trustee ... [must] put the beneficiary's interest first in the performance of any act and the exercise of any powers or duties". A trustee shoulders onerous responsibilities "because the trustee has the right and power to control property belonging to another (the beneficiaries)".[63] This is the duty of loyalty.[64]

[110] Asking a trustee to shoulder an onerous burden is not unfair. "[N]o one is obligated to accept the office of trustee".[65]

[111] Chief Justice Cardozo, then of the New York Court of Appeals, expressed a similar standard in *Meinhard v. Salmon*:[66]

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned

---

[60] J. Glister & J. Lee, Hanbury and Martin Modern Equity 475 (20th ed. 2015) & E. Gillese, The Law of Trusts 154 (3d ed. 2014).

[61] G. Bogert, Trusts 29 & 79 (6th ed. 1987). See also G. Bogert, Trusts 2 & 341 (6th ed. 1987) ("The court of equity ... places on the trustee the duty to act with strict honesty and candor and solely in the interest of the beneficiary. ... The trustee owes a duty to the beneficiaries to administer the affairs of the trust solely in the interests of the beneficiaries, and to exclude from consideration his own advantages and the welfare of third persons").

[62] The Law of Trusts 154 (3d ed. 2014). See also D. Pavlich, Trusts in Common-Law Canada 276 (2014) ("a trustee, because he must act in good faith and advance the interests of the beneficiary, cannot pursue his own interests (or the interests of someone other than the beneficiary) in a way that does not accord priority to the beneficiary").

[63] E. Gillese, The Law of Trusts 10-11 (3d ed. 2014).

[64] E. Gillese, the Law of Trusts 154 (3d ed. 2014) & G. Bogert, Trusts 341 (3d ed. 1987). The duty of loyalty is the theoretical basis for the duty to protect the trust assets, to account and "to provide information". E. Gillese, The Law of Trusts 154 (3d ed. 2014).

[65] D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 996 (4th ed. 2012). See also G. Bogert, Trusts 100 (6th ed. 1987) ("Every person who is tendered the office of trustee has the power to accept or decline it").

[66] 164 N.E. 545, 546; 249 N.Y. 458, 464 (1928).

> to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions ... . Only thus has the level of conduct for fiduciaries been kept at a higher level than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

[112] In addition to acting in utmost good faith, a trustee must display a "standard of care and diligence ... [expected of] a man of ordinary prudence in managing his own affairs".[67]

[113] A trustee must protect the interests of the beneficiaries without waiting to be asked to do so by the beneficiaries.[68]

[114] A trustee who violates any duty the trustee owes to a beneficiary is in breach of the trust[69] and is responsible to a beneficiary for any loss resulting from the breach of trust.[70]

---

[67] *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, 315 (1976). See also *Learoyd v. Whiteley*, L.R. 12 A.C. 727, 731 (H.L. 1887) ("A trustee must use ordinary skill and caution" per Lord Halsbury, L.C.) & 733 ("As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs" per Lord Watson); *Re Speight*, 22 Ch. D. 727, 740 (C.A. 1883) ("It never could be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business would adopt"); J. Glister & J. Lee, Hanbury and Martin Modern Equity 477 (20th ed. 2015) ("Trustees must act honestly; and must take, in managing trust affairs, all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own"); D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 975 (4th ed. 2012) ("the trustee must show ordinary care, skill, and prudence, he must act as the prudent person of discretion and intelligence would act in his own affairs"); G. Bogert, Trusts 334 (6th ed. 1987) ("In the management of the trust the trustee is bound to display the skill and prudence which an ordinarily capable and careful man would use in the conduct of his own business of a like character and with objectives similar to those of the trust") & American Law Institute, Restatement of the Law of Trusts § 174 (2d. ed. 1959) ("The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property"). The *Trustee Act*, R.S.A. 2000, c. T-8, ss. 3-8 stipulates standards for trustees who invest trust funds.

[68] *Hawkesley v. Mays*, [1956] 1 Q.B. 304, 325 (1955); *In re Wentworth*, 181 N.Y.S. 435 aff'd 181 N.Y.S. 442; 190 App. Div. 829 aff'd 129 N.E. 646, 230 N.Y. 176 (Ct. App. 1920) & Salomon, "Labour and Material Payment Bonds", 19 McGill L.J. 433, 437 (1973).

[69] American Law Institute, Restatement of the Law of Trusts § 201 (2d ed. 1959) ("A breach of trust is a violation by the trustee of any duty which as trustee he owes to the beneficiary").

[70] *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, 320 (1976) ("The measure is the actual loss which the acts or omissions have caused to the trust estate"); *Toronto Dominion Bank v. Uhren*, 24 D.L.R. (2d) 203, 214 (Sask. C.A. 1960) (Culliton, J.A. quoted with approval from Snell's Principles of Equity 221 (24th ed.): "The measure of the trustee's liability for breach of trust is the loss thereby caused to the trust estate") & American Law Institute, Restatement of the Law of Trusts § 205 ("If the trustee commits a breach of trust, he is chargeable with ... any loss ... resulting from the breach of trust"). See also J. Glister & J. Lee, Hanbury and Martin Modern Equity 629 (20th ed. 2015) ("A trustee who fails to comply with her duties is liable to make good the loss to the trust estate"); E. Gillese, The Law of Trusts 180 (3d ed. 2014); D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 1279 (4th ed. 2012); D. Hayton, P. Matthews & C. Mitchell, Underhill and Hayton Law Relating to Trusts and Trustees 1113-14

[115] With these underlying principles in place, I will next consider the key issue – did Bird Construction discharge its important trustee duties?

C. A Trustee Must Undertake Reasonable Measures To Make Available to a Sufficiently Large Segment of the Class of Beneficiaries or Potential Beneficiaries Information About the Trust's Existence

[116] A trustee's overriding obligation is to do what is required to advance the interests of the trust[71] and its beneficiaries.[72]

[117] There are several aspects of this overriding obligation.[73]

[118] This appeal engages one of them.

[119] As a general rule,[74] a trustee must take reasonable measures to make available to a sufficiently large segment[75] of the class of beneficiaries or potential beneficiaries[76] information

---

(18th ed. 2010); G. Dal Pont & D. Chalmers, Equity and Trusts in Australia and New Zealand 71 (2d ed. 2000) & G. Bogert, Trusts 558 (6th ed. 1987).

[71] *Breakspear v. Ackland*, [2008] EWHC 220, ¶ 62; [2009] Ch. 32, 53.

[72] *Ontario v. Ballard Estate*, 119 D.L.R. 4th 750, 754 (Ont. Ct. Gen. Div. 1994) ("[a trustee] is duty bound to act in the best interests of the beneficiaries"); *Armitage v. Nurse*, [1998] Ch. 241, 253 (C.A. 1997) ("trustees [have a duty] to perform the trusts honestly and in good faith for the benefit of the beneficiaries") *& Segelov v. Ernst & Young Pty Ltd.*, [2015] NSWCA 156, ¶ 136 (a trustee must faithfully perform a trustee's duties).

[73] New Zealand Law Commission Review of the Law of Trusts: A Trusts Act for New Zealand 96 (2013) ("all of the mandatory duties we list ... are as vital to the existence of a trust as the obligation of honesty and good faith").

74 There are exceptions to the general rule or presumption. See New Zealand Law Commission, A Review of the Law of Trusts: A Trusts Act for New Zealand 114 (2013). First, the trustee may have reasonable grounds to believe that the beneficiaries are already aware of the trust's existence and their status as beneficiaries. This may relieve the trustee of the obligation under the general rule or presumption. Suppose that A, on January 1, 1995, delivered a 1962 Bentley S2 Continental automobile to B, an automobile museum, in trust for C, A's grandnephew until C graduated from law school or attained the age of thirty, whichever occurred first. A asked B to maintain this vehicle in pristine condition and gave B permission to display it. A delivered to B a cheque for $200,000 payable to B for this purpose. C was only sixteen years of age in 1995. A was in a nursing home when he constituted the trust. A informed B in writing that he had informed C of the trust's existence. But he had not. He forgot. A died in 2000. C graduated from law school in 2003. After A's death B's officers turned over several times. B misplaced the trust documents. The officers of B who knew about the trust had either retired or left B for other reasons. It was not until 2010 that B realized that it held the vehicle in trust and delivered the car to him. In the thirteen years following the constitution of the trust, the value of the Bentley spiked. It hit $1.5 million in 2007. By the time C acquired possession of the Bentley, its value had declined substantially. The 2008 market crash adversely affected the value of a whole range of luxury products – automobiles, jets and boats. C sued B for breach of trust, seeking as damages the loss in value between 2003, the time C became a lawyer, and 2010, the time B delivered the Bentley to C. Could B successfully argue that it had no obligation notify C of his status as a beneficiary because it had reasonable grounds to believe that A told C about the trust? Segelov v. Ernst & Young Service Pty Ltd., [2015] NSWCA 156 & Mulford v. Mulford, 53 A. 79 (1902) (a trustee who has

about the trust's existence and the criteria identifying a beneficiary. This obligation increases the likelihood that a beneficiary or a potential beneficiary will be able to take any necessary steps to protect any interests they may have under the trust and that the trust will serve the purpose the settlor intended for it.[77] "The trustees are accountable to these beneficiaries, and this accountability

---

reasonable grounds to believe that a beneficiary has knowledge of his or her status as a trustee has no obligation to formally notify the beneficiary of his or her status as a beneficiary). Second, the settlor may have good reasons for keeping the trust a secret and may have directed the trustee not to give the beneficiary advance notice of the trust's existence and the person's status as a beneficiary. The trust's existence may adversely affect the settlor's relationship with third parties. Suppose that A creates a trust for B, his only child. C, A's second wife, does not like B. A does not want C to know about the trust. It would annoy C. E.g., Breakspear v. Ackland, [2008] EWHC 220; [2009] Ch. 32 (the settlor delivered a wish list letter to the trustees with the request that they not disclose it so that it would not generate family discord). The settlor may reasonable believe that the beneficiary's best interests are promoted by keeping the trust a secret. Suppose that A believes his son's industry would be greatly diminished if he knew that the trust A created for his son's benefit would make him a wealthy man when his son turned thirty. A was satisfied that his son would establish good work habits by the time he turned thirty if he did not know what the future had in store for him. Or suppose that B, the beneficiary of the trust A established, did not know that she had a medical condition that would substantially impair her ability to earn a living. A did not want B to know about the trust because it would prompt her to ask questions that A did not want to answer. E.g., Breakspear v. Acklands, [2008] EWHC 220, ¶ 54; [2009] Ch. 32, 51 ("it is appropriate that the beneficiary ... be kept ignorant [of some life-threatening illness]") & DeLeuil's Executors v. DeLeuil, 255 Ky. 406, 74 S.W. 2d 474, 474-75 (Ct. App. 1934) (a father instructed the trustee bank not to inform his daughter who was in poor physical and mental health about a trust he created for her benefit). Other valid reasons may speak against imposing an obligation to disclose. See generally New Zealand Law Commission, Review of the Law of Trusts: A Trusts Act for New Zealand 103 (2013) (nondisclosure of the trust's existence may be appropriate in limited circumstances).

[75] New Zealand Law Commission, Review of the Law of Trusts: A Trusts Act for New Zealand 103 (2013) ("Trustees have a mandatory obligation to provide sufficient information to sufficient beneficiaries to enable the trust to be enforced").

[76] I see no reason to distinguish between those with a present interest and those with only a contingent interest. See *Ontario v. Ballard Estate*, 119 D.L.R. 4th 750, 756 (Ont. Ct. Gen. Div. 1994) ("In a hypothetical case, it may be that in the end, the residual legatee will receive nothing because the executors or trustees have not acted in good faith or breached their fiduciary duty").

[77] See *In re Short Estate*, [1941] 1 W.W.R. 593, 596 (B.C. Sup. Ct.) (a trustee has an obligation to bring the existence of the trust to a beneficiary's attention); *Hawkesley v. May*, [1956] 1 Q.B. 304, 322 (the Court held that a trustee had a duty to inform a beneficiary that he had an interest in the trust fund); *Brittlebank v. Goodwin*, L.R. 5 Eq. 545, 550 (Ch. 1868) ("[the trustee had a] duty ... to have informed the persons interested when they attained 21, of the position of the fund and of their rights"); *Burrows v. Walls*, 43 Eng. Rep. 859, 868 (Ch. 1855) ("It was undoubtedly the duty of the three trustees ... to have explained to the infants [the beneficiaries] as they came of age what their rights were"); *Moore v. Sanders*, 106 S.W. 2d 337, 339 (Tex. Ct. Civ. App. 1937) ("it was the duty of the trustee to notify the guardian of the beneficiaries of the existence of the [trust] fund"); *Mulford v. Mulford*, 53 A. 79 (N.J. Super. Ct. 1902) (a trustee who has no reasonable basis to conclude that a person would know that he or she is a trust beneficiary must formally notify the person of his or her status); *Segelov v. Ernst & Young Pty Ltd.*, [2015] NSWCA 156, ¶ 130 (whether a trustee has an obligation to inform a person who is a beneficiary or a potential beneficiary of a trust's existence is determined by "the nature and the terms of the relevant trust and the social or business environment in which the trust operates"); *Hartigan Nominees Pty. Ltd. v. Rydge*, 29 N.S.W.L.R. 405, 432 (C.A. 1992) ("For myself, I doubt whether it is the duty of a trustee to inform all persons who may possibly take under a discretionary power of the nature and extent of that possibility") per Mahoney, J.A.; J. Glister & J. Lee, Hanbury and Martin Modern Equity 545 (20th ed. 2015) ("The

beneficiaries are entitled to be informed about matters currently affecting the trust"); L. Tucker, N. Le Poidevin & J. Brightwell, Lewin on Trusts 909-10 (19th ed. 2015) ("A trustee of a settlement *inter vivos* is under a duty to inform a beneficiary who has recently attained his majority and become entitled in possession under the settlement, not only of the existence of the settlement, but also of his interest under it, so that they can pay him what is due. ... We consider that trustees have a duty to take reasonable steps to inform an adult beneficiary with a future vested, vested defeasible or contingent interest under the settlement of its existence and the general nature of his interest under it, as soon as reasonably practicable after the interest comes into existence, unless the trustees reasonably believe that by reason of the remoteness of the interest the beneficiary has no reasonable prospect of successfully asserting rights to information on demand, or there are other special circumstances (not merely the wish of the settlor to keep the existence of the trust a secret) justifying delay in disclosure"); E. Gillese, The Law of Trusts 154 (3d ed. 2014) ("the duty of loyalty [includes] ... the duty to provide information"); 98 Halsbury's Laws of England 315 (5th ed. 2013) ("A trustee has a duty to inform a beneficiary of full capacity of his interest under the trust, but is under no duty to provide him with legal advice as to his rights"); New Zealand Law Commission, Review of the Law of Trusts: A Trusts Act for New Zealand 103 (2013) ("There is a presumption that trustees must ... notify qualifying beneficiaries (those who the settlor intended to have a realistic possibility of receiving trust property under the terms of the trust) as soon as it is practicable of the fact that a person is a beneficiary, names and contact details of trustees, and the right of beneficiaries to request a copy of the trust deed or trust information"); D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 1126, 1132 & 1134 (4th ed. 2012) (a trustee must inform the beneficiaries of the trust's existence); D. Hayton, P. Matthews & C. Mitchell, Underhill and Hayton Law Relating to Trusts and Trustees 813 (18th ed. 2010) ("a beneficiary of full age and capacity has a right to be told by the trustees that he is a beneficiary and, indeed, a right to be told by the settlor the name and address of the trustees to whom demands for accounts and requests for discretionary distributions can be sent"); G. Dal Pont & D. Chalmers, Equity and Trusts in Australia and New Zealand 621 (2d ed. 2000) ("The scope and extent of this obligation [to disclose to beneficiaries the existence of their rights under the trust instrument] remains unclear. What can be said is that it is unlikely that trustees are required to seek out and inform all persons under a discretionary power of their rights under the trust"); G. Bogert, Trusts 352 & 494 (6th ed. 1987) ("At the beginning of his administration the trustee has a duty to ... ascertain who the beneficiaries are, and should notify them of their interests. ... The trustee is under a duty to furnish to the beneficiary on demand all information regarding the trust and its execution which may be useful to the beneficiary in protecting his rights and to give to the beneficiary facts which the trustee knows or ought to know would be important to the beneficiary"); American Law Institute, Restatement of the Law of Trusts § 173 (2d ed. 1959) ("the trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property"); *Schmidt v. Rosewood Trust Ltd.,* [2003] UKPC 26, ¶ 67; [2003] 2 A.C. 709, 734-35 (Isle of Man) ("Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves and third parties" in determining whether disclosure is appropriate); *In re Tillott*, [1892] 1 Ch. 86, 88 (H.C.) ("The general rule ... is ... that the trustee must give information to his *cestui que trust* as to the investment of the trust estate"); *Erceg v. Erceg*, [2016] NZCA 7, ¶ 29 (in determining whether to order the disclosure of trust documents the court must consider what decision "ensure[s] the sound administration of the trust", the interests of the beneficiary to a full account, the wishes of the settlor) & *Loud v. Winchester*, 52 Mich. 174, 183; 17 N.W. 784, 787 (Sup. Ct. 1883) ("The beneficiaries under a trust have the right to be kept informed at all times concerning the management of the trust, and it is the duty of the trustees to inform them"). A trustee that informs a creditor-beneficiary of the existence of a labour and material payment bond is not responsible for the damages associated with the failure of the beneficiary to make a claim against the surety. *Ford Glass Ltd. v. Canada*, 1 C.L.R. 21 (Fed. Ct. Tr. Div. 1983). See *Surrogate Court Rules*, Alta. Reg. 130/95, rr. 13 & 26 (an executor must notify all beneficiaries of their interest under the will before filing an application for grant of probate).

would be meaningless if trustees could choose not to tell the beneficiaries of their beneficiary status and their interests".[78]

[120] The New Zealand Law Commission characterized this trustee obligation as mandatory in nature: "Trustees have a mandatory obligation to provide sufficient information to sufficient beneficiaries to enable the trust to be enforced".[79]

[121] This basic proposition requires clarification and explanation.

[122] First, this obligation attaches to a trustee if knowledge of the trust's existence and the markers of a beneficiary would be of value to a beneficiary or a potential beneficiary.[80] It makes no sense to impose a duty that does not either advance the interests of a beneficiary or potential beneficiary or increase the likelihood that the purposes of the trust will be achieved.[81]

[123] Would a potential beneficiary need this information in order to advance a claim as a beneficiary? Is knowledge on the part of a beneficiary or potential beneficiary essential to the trust achieving the purpose that the settlor pursued?

[124] Suppose that A establishes a discretionary family trust with $10 million. The trust instrument allows B, A's first-born son, to draw on an annual basis the income from the trust fund

[78] D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 1126 (4th ed. 2012). See also *Hawkins v. Clayton*, 164 C.L.R. 539, 554 (H.C. 1988) ("It may be that there is a broad principle, founded on general standards of honesty and fair dealing, that some duty of disclosure is imposed on one who holds the property of another ... when the other does not know of his entitlement to the property and the holder has reason to believe that the other does not know of his entitlement") per Brennan, J.

[79] Review of the Law of Trusts: A Trusts Act for New Zealand 103 (2013). According to the Commission, its recommendations accord with "internationally accepted trust law principles". Id. 64. See also *Hawkins v. Clayton*, [1988] HCA 15, ¶ 13; 164 C.L.R. 539, 555 ("where the custodian [of a will] has reason to believe that the disclosure by him to the executor of the existence, contents or custody of the will is needed in order that the will may be made effectual, the custodian is under a duty promptly to take reasonable steps to find, and to disclose the material facts to, the executor") per Brennan, J.

[80] *In re Short Estate*, [1941] 1 W.W.R. 593, 596 (B.C. Sup. Ct.) (had the trustee informed the guardian of the beneficiary of her interest in the trust property she may have taken steps that would have "avoided the whole or a substantive part of the capital loss ... and the whole or a substantial part of the operating loss") & D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 1126, 1132 & 1134 (4th ed. 2012). See also *Hawkins v. Clayton*, [1988] HCA 15, ¶ 13; 164 C.L.R. 539, 555 ("where the custodian [of a will] has reason to believe that the disclosure by him to the executor of the existence, contents or custody of the will is needed in order that the will may be effectual, the custodian is under a duty promptly to take reasonable steps to find, and to disclose the material facts to, the executor") per Brennan, J.

[81] *SAS Trustee Corp. v. Cox*, [2011] NSWCA 408, ¶ 149 ("I cannot see how a trustee is in breach of a duty it owes to a beneficiary by failing to give the beneficiary information that the trustee has no reason to believe will be of the slightest practical use to the beneficiary").

to pay the costs of educating any grandchild or great-grandchild of A under the age of thirty if B thinks the proposed education program will benefit the grandchild. If B did not notify his nieces and nephews or their parents and his own children of the trust's existence the potential beneficiaries or their parents would be deprived of the opportunity to present to B specific requests for education funding. This point is easy to illustrate. Suppose C, B's niece, is a gifted young golfer. She is twelve years old and wants to attend a Florida golf school on a year-round basis. If C did not inform B of her wishes and the existence of a golf school that she wants to attend, B may never have known about C's education wish and that an educational institution dedicated to training golf prodigies existed.

[125] Some trusts are, as far as the beneficiaries are concerned, in effect, self-executing and require no act on the part of a potential beneficiary for the trust's purpose to be achieved.[82] The trustee of this type of trust may be under no obligation to take any steps to bring the trust's existence to the attention of potential beneficiaries. Suppose that A donates $1 million to the University of Alberta to fund $500 scholarships for the law students who finish in the top one percent of their first and second years of law school studies. The University's records identify the eligible beneficiaries and its officers automatically distribute the trust funds to the eligible law students. A law student does not have to apply to receive the scholarship. If it was thought that $500 was too small a sum to affect a person's decision to attend the University of Alberta's law school, the University, as trustee, would have no obligation to publish the existence of this trust. If it was thought that the existence of this trust may cause some prospective students to decide to attend law school, the trustee would have a duty to publish its existence. I suspect that the trustee would discharge any notice obligations by publishing this scholarship on its website or in its catalogue.

[126] Second, the reasonableness of the methods the trustee undertakes to publish the existence of the trust to a sufficiently large segment of potential beneficiaries is a function of the criteria identifying a beneficiary, the nature of the benefits a beneficiary may receive and the costs associated with the different communication methods.[83]

---

[82] E.g., *Segelov v. Ernst & Young Pty Ltd.*, [2015] NSWCA 156, ¶ 131 (the trustee automatically, and without any act on the part of the beneficiary required, deposited the beneficiary's trust payment into a joint bank account owned by the beneficiary and her husband).

[83] See *Hawkins v. Clayton*, [1988] HCA 15, ¶ 13; 164 C.L.R. 539, 554 ("when disclosure [of the fact that a solicitor has a will in his or her possession] is required, the steps which need to be taken are those which are reasonable in the circumstances, including the contents of the will, the custodian's knowledge and means of knowledge of the identity and location of the parties interested under the will and of their relationship with one another. The cost of extensive inquiries and the expected value of the estate are relevant considerations in determining what costs are reasonable") per Brennan, J. & *Segelov v. Ernst & Young Services Pty Ltd.*, [2015] NSWCA 156, ¶ 141 ("The primary judge considered, correctly in my view, that the duty of notification raised many questions as to the scope and content of the asserted obligation. ... Whether the trustee should be required to maintain some form of up to date register of beneficiary contact detail and how often it would be required to actively seek out information was left unanswered by counsel for Ms. Segelov").

[127] Suppose that A has had a very successful business career and attributes his success, in part, to the values he acquired while playing organized hockey as a boy. A establishes a trust with a $5 million gift so that boys and girls under the age of fifteen who are the grandchildren or great-grandchildren of persons who graduated from Edmonton's Jasper Place High School and want to play organized hockey in Edmonton but cannot afford it may do so. A asks B Trust Co. to serve as the trustee; B Trust Co. agrees.

[128] The trust instrument does not record the measures that B Trust Co. must implement to publicize the trust. In determining the measures that B Trust Co. must undertake to bring the trust's existence to the attention of a sufficiently large segment of potential beneficiaries, consideration must be given to where the families of potential beneficiaries reside, the media that may provide notice of the trust's existence to the most potential beneficiaries, the cost of different media for publishing the trusts' existence and the places potential beneficiaries or their parents may congregate.

[129] B Trust Co. might conclude that it is desirable to contact the Edmonton Minor Hockey Association and ask it to publish in materials it distributes to its members the trust's existence. As well, B Trust Co. might post notices on bulletin boards in Edmonton's indoor and outdoor rinks and ask Edmonton school boards to tell parents about the trust in school newsletters. Given the amount of the trust, B Trust Co. might decide that it would be prudent to publish a notice in the local newspapers.

[130] These measures will probably reach most of the persons who meet the criteria defining the beneficiary class. A communication strategy that has the potential to inform this segment of potential beneficiaries of the trust's existence meets the standard imposed on B Trust Co. as a trustee. It is not possible to reach every potential beneficiary. That some persons who meet the criteria will be missed – some poor families who live in Vegreville may have decided to relocate to Edmonton had they received notice of the trust – does not detract from the fact that a sufficiently large segment of beneficiaries or potential beneficiaries will be reached. This degree of information disclosure is sufficient.

[131] In some scenarios the trustee must implement a communication strategy that is designed to bring the existence of the trust to all potential beneficiaries or beneficiaries. This may be the case if there are not many potential beneficiaries or beneficiaries, the rewards for being a beneficiary are high and the cost of disseminating information to bring the existence of the trust to all potential beneficiaries or beneficiaries is not very significant.

[132] Suppose that A, the owner of a downtown Calgary condominium gives the condominium to B Trust Co. in trust. The trust instrument states that C, A's longtime secretary, may reside in the condominium rent free for as long as she wishes, and that on C's death or at the time she ceases to reside in the condominium, it shall be sold and the proceeds divided equally among the children of D, A's brother, then alive. The trust asset is worth $2 million when C dies thirty years later at

ninety-five. B Trust Co., knows that D had five children. The beneficiaries will each receive no less than $400,000. Four of the children live in Alberta. No one has seen G, the fifth child for over twenty years. G was a heroin addict and estranged from her family. B Trust Co., after a missing-person search firm is unable to locate G, publishes five notices at monthly intervals in the major newspapers in Alberta and Canada's two national newspapers at a cost of $20,000. This communication strategy would probably meet the test – reasonable measures to make available information to a known beneficiary about the trust's existence.

D. Nonconstruction Trust Case Law Imposes Notice Obligations on Trustees

[133] The authors of Waters' Law of Trusts in Canada pose a rhetorical question in the following passage:[84]

> If the essence of any trust can be defined as a fiduciary ownership, or the separation of title holding and management from enjoyment, it is precisely that essence which has made the trust so valuable in commercial dealings. Whether the trust is employed as a security or holding device, as an instrument for group investment, or as a substitute for incorporation, that essential element of the trust is crucial to the success of the operation. Moreover, the employment of the trust principle in business and commerce has undergone great expansion in Canada. Are the fundamental principles of the law of trusts ... compatible with the nature of commercial dealings?

[134] They obviously are, given the presence of pension trusts, profit-sharing trusts, registered retirement savings plan trusts, pooled investment trusts, health and welfare benefits trusts, condominium insurance trusts, stock voting trusts and a host of other commercial purpose trusts.[85]

[135] In spite of the prevalence of commercial trusts, there is a dearth of case law on the question before the Court.

[136] Two English,[86] one Canadian[87] and two American state courts[88] have held that a trustee has a duty to inform infants when they have a vested interest in the trust or their guardians that they are the beneficiaries of a family trust.

---

[84] D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 579 (4th ed. 2012).

[85] Id. 579-607. See also *Schmidt v. Rosewood Trust Ltd*., [2003] UKPC 26, ¶ 1; [2003] 2 A.C. 709, 715 (Isle of Man) ("It has become common for wealthy individuals in many parts of the world ... to place funds at their dispositions into trusts ... regulated by the law of, and managed by trustees resident in, territories with which the settlor ...has no substantial connection"); *Re a Solicitor*, [1952] Ch. 328, 332 (1951) ("as the principles of equity permeate the complications of modern life, the nature and variety of trusts ever grow"); J. Glister & J. Lee, Hanbury and Martin Modern Equity 75 (20th ed. 2015) (trusts are of "contemporary importance ... in the commercial context") & D. Pavlich, Trusts in Common-Law Canada 43 (2014) ("Today, the trust is ... significant in mutual funds, REITS and pension fund arrangements").

[137] The trustees in the two English cases had failed to take reasonable steps to inform the infants when their interests vested, or their representatives who were known to the trustee, of the existence of a trust that made them beneficiaries and were held to be in breach of their duties as trustees.

[138] In the British Columbia case, *In re Short Estate*,[89] Justice Manson criticized the trustee for failing to take reasonable measures to inform the mother of the settlor's nine-year old grand-niece that the deceased had provided, in a testamentary trust, for the grand-niece's "maintenance, support and education" until she turned eighteen. It should have been obvious to the trustee that without a communication from the trustee the beneficiary would likely never have learned of her status as a beneficiary. Without citing any authority, Justice Manson stated that "a trustee does owe duties to a *cestui que trust* and one of the first of them is to let the *cestui que trust* know of his interest and something about the trust".[90]

[139] The Texas Court of Civil Appeals came to the same conclusion in *Moore v. Sanders*.[91] It removed a trustee, in part, because she failed to inform the guardian of infants who were beneficiaries of a trust created for them by their deceased father: "[I]t was the duty of the trustee to notify the guardian of the beneficiaries of the existence of the [trust] fund".[92]

[140] These cases are consistent with the principle that a trustee must take reasonable measures to make available to a sufficiently large segment of beneficiaries or potential beneficiaries information about the trust's existence and the markers of a beneficiary. In cases that feature a small number of known beneficiaries or potential beneficiaries it is reasonable to require the trustee to take low-cost measures to make available to known beneficiaries or potential beneficiaries information about of the trust's existence.

---

[86] *Hawkesley v. May*, [1956] 1 Q.B. 304, 322 (1955) ("there was a duty upon ... the trustees of the Musgrave settlement ... to inform the plaintiff on attaining 21 that he had an interest in the capital and income of the trust funds of the Musgrave settlement") & *Brittlebank v. Goodwin*, L.R. 5 Eq. 545, 550 (Ch. 1868) ("Another duty [of the trustee] was to have informed the [beneficiaries] ... when they attained twenty-one, of the position of the fund and their rights").

[87] *In re Short Estate*, [1941] 1 W.W.R. 593 (B.C. Sup. Ct.).

[88] *Moore v. Saunders*, 106 S.W. 2d 337, 339 (Tex. Ct. Civ. App. 1937) & *Mulford v. Mulford*, 53 A. 79 (N.J. Super. Ct. Ch. Div. 1902).

[89] [1941] 1 W.W.R. 593 (B.C. Sup. Ct.).

[90] Id. 596.

[91] 106 S.W. 2d 337 (1937).

[92] Id. 339.

[141] In *Mulford v. Mulford*,[93] the Superior Court of New Jersey also dealt with this issue. Vice-Chancellor Pitney was satisfied that the trustee properly and reasonably proceeded on the assumption that the parents of the infant beneficiaries had informed the infant beneficiaries that they were beneficiaries under their great-aunt's will. For this reason, he excused the executor for his failure to formally inform the beneficiaries when they turned twenty-one of their status as beneficiaries of a testamentary trust:[94]

> Another point made by the counsel of [the beneficiaries] ... was that it was the duty of the ... [trustee], as each of the defendants reached 21 years of age, to notify them that they had an interest under their great-aunt's will, and just what that interest was. It may be that it would have been much better on his own account for the ... [trustee] to have gone through that ceremony, but I am unable to find that he is guilty, in the eye of a court of equity, of any delinquency in not having done so. He certainly had every reason to suppose that the [beneficiaries] ... as they became old enough to understand any such matters, were informed by their parents that they were beneficiaries under their great-aunt's will.

[142] This case stands for the proposition that a trustee who has reasonable grounds to believe that the beneficiaries have knowledge of their status as beneficiaries is relieved of the obligation to formally notify them of their status as beneficiaries.[95] A corollary of this principle is that a trustee who has no reasonable basis for concluding that the beneficiaries would have knowledge of their status as a beneficiary is obliged, as a trustee, to formally notify the beneficiaries of their status. In other words, the general rule – a trustee must take reasonable measures to make available to a sufficiently large segment of the beneficiaries or potential beneficiaries information about the trust's existence and the criteria identifying a beneficiary – applies unless a trustee has a reasonable basis for concluding that a person already knows of his or her status as a beneficiary.

[143] *Segelov v. Ernst & Young Services Pty Ltd.*,[96] a recent decision of the New South Wales Court of Appeal, stands for the same proposition as does *Mulford v. Mulford*.

[144] The facts were unusual. The beneficiary did not allege that the trustee failed to make trust payments to her. It did. Trust payments were made to the bank account that she and her husband held jointly. Her complaint is largely attributable to the facts that she did not know that she was a

---

[93] 53 A. 79 (1902).

[94] Id. 83.

[95] E.g., *Segelov v. Ernst & Young Services Pty Ltd.*, [2015] NSWCA 156, ¶ 36 (the trustee could reasonably conclude that a beneficiary in receipt of trust payments would be aware of their status as beneficiaries because the beneficiary had an obligation to file a tax report disclosing receipt of the payment).

[96] [2015] NSWCA 156.

beneficiary and was unaware that her husband was appropriating the funds paid into their joint bank account for his own use.

[145] Justice Gleeson, for a unanimous panel, opined that a trustee's obligation to give notice of the existence of a trust to beneficiaries or potential beneficiaries was a function of "the nature and terms of the relevant trust and the social or business environment in which the trust operates".[97] Applying this standard, the Court rejected a claim by a former wife of an Ernst & Young partner that Ernst & Young Services Pty Ltd., the trustee of a services trust, had an obligation to notify her every time that it made a payment into the joint bank account that she and her husband had.

[146] The facts amply support the conclusion that Ernst & Young Services Pty Ltd. had reasonable grounds to conclude that Ms. Segelov knew that she was a trust beneficiary. Her husband nominated her as a beneficiary.[98] It would not appear that he had to do so. The trustee made trust payments into a joint bank account.[99] Finally, the trustee provided Ms. Segelov with income tax documents recording the trust payments on which she had to pay tax.[100]

E. The Labour and Material Payment Bond Trust Cases Are Inconsistent with Fundamental Trust Principles

[147] There are three construction law cases on point. One is a 1970 Ontario County Court oral decision;[101] the second is a 2014 Ontario Superior Court judgment[102] and the third is the judgment under appeal.

[148] Both Ontario courts concluded that a labour and material payment bond trustee had no obligation to take reasonable measures to inform beneficiaries of the trust's existence[103] even though the trustee would have had no reasonable basis to believe that the beneficiaries would have been aware that a labour and material payment bond existed for their benefit.

---

[97] Id. ¶ 130.

[98] Id. ¶ 3.

[99] Id. ¶¶ 3 & 131.

[100] Id. ¶ 43.

[101] *Dominion Bridge Co. v. Marla Construction Co.*, 12 D.L.R. 3d 453.

[102] *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*, 2014 ONSC 918; 36 Contr. L.R. 4th 126.

[103] *Dominion Bridge Co. v. Marla Construction Co.*, 12 D.L.R. 3d 453, 457-58 (Ont. County Ct. 1970) & *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*, 2014 ONSC 918, ¶ 57; 36 Constr. L.R. 4th 126, 138.

[149] In *Dominion Bridge Co. v. Marla Construction Co.*,[104] Judge Grossberg declined to impose a duty on Sun Oil, the owner of the gas station under construction and the trustee under the labour and material payment bond it required the general contractor to acquire, to provide bond beneficiaries with timely notice of the bond's existence.

[150] The judge noted there was no construction case in Canada, England or the United States of which he was aware that had done so. He stated that "[i]n the absence of applicable authority I would not imply such duty in law".[105]

[151] He also held that the text of the bond did not expressly require the trustee to notify potential beneficiaries of the bond's existence.[106]

[152] The trial judge limited the two English cases[107] that imposed a duty on a trustee to notify beneficiaries to their facts – infant beneficiaries – and suggested that there would be practical problems if he acceded to the plaintiff's submissions:[108]

> [W]hen did the duty arise? at what point of time? what exactly was that duty? must Sun Oil embark upon inquiries [as to] who were the labourers? who were the creditors? who were the suppliers? Must Sun Oil seek out the creditors and suppliers? If the contention ... for the plaintiff be upheld, Sun Oil would be obliged to acquire knowledge of all materials purchased, all labourers on the job from day to day and to keep a constant surveillance. The consequences of the submission must be that Sun Oil must seek out material, men, suppliers, labourers, subcontractors, etc. of Marla and acquaint each that there was a bond in existence.

[153] *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*,[109] a 2014 judgment of the Ontario Superior Court of Justice, held that the Toronto Transit Commission, the

---

[104] 12 D.L.R. 3d 453, 457-58 (Ont. Cty. Ct. 1970).

[105] Id.

[106] Id.

[107] *Hawkesley v. May*, [1956] 1 Q.B. 304 (1955) & *Brittlebank v. Goodwin*, L.R. 5 Eq. 545 (Ch. 1868).

[108] Id. 457.

[109] 2014 ONSC 918, ¶ 57; 36 Constr. L.R. 4th 126, 138-39.

trustee of a labour and material payment bond, had no obligation under common law[110] or statute to notify a beneficiary of the bond's existence.[111]

[154] These Ontario judgments are not binding on this Court[112]. And, with respect, I do not find them persuasive.

[155] I first address Judge Grossberg's observation that he was not aware of any construction case in Canada, England or the United States that had imposed a duty on a construction company impressed with the obligations of a bond trustee to take reasonable steps to notify beneficiaries of the bond's existence.

[156] Justice Laskin, as he then was, in *Thorson v. Canada*,[113] provided the proper response to this dilemma: "Counsel for the respondents contended that a provincial Attorney General could take declaratory proceedings, but he could cite no authority for this proposition nor could I find any. However, want of authority is not an answer if principle supports the submission".

[157] Justice Hugessen, when sitting on the Quebec Court of Queen's Bench, also considered the significance of the precedential vacuum:[114]

> All parties before me readily concede that there is no precedent in point ... either in Canadian or British case law. Petitioner invites me to conclude from this that the answer to the question is so self-evident that it has never been raised. I am not prepared to accept this argument. ... Simply because something has never been done before is no good reason to say that it should not be done now. ... If the matter has not been decided before, it falls to be decided now ... .

[158] In short, fundamental principles will provide the answer.[115]

---

[110] 2014 ONSC 918, ¶ 57; 36 Constr. L.R. 4th 126, 138 ("Prior to the enactment of the *Construction Lien Act*, it had been held that an owner/trustee/oblige[e] of a labour and material payment bond was not under a duty to give a sub-contractor information about the bond unless asked for it: *Dominion Bridge Co. v. Marla Construction Co.*").

[111] Id. at ¶ 62; 36 Constr. L.R. 4th at 139.

[112] Friedman, "Stare Decisis at Common Law and Under the Civil Code of Quebec", 31 Can. B. Rev. 723, 125 (1953) ("The first, and probably, the most important part of ... [the] doctrine [of stare decisis] is the principle that all courts are bound by the decisions of superior courts in the hierarchy").

[113] [1975] 1 S.C.R. 138, 152 (1974).

[114] *Laporte v. The Queen*, 29 D.L.R. 3d 651, 655 (1973).

[115] *DG v. Bowden Institution*, 2016 ABCA 52, ¶ 104 ("As no binding precedent governs, this Court must resolve this question, taking into account first principles"); *Re Murphy's Settlement*, [1998] 3 All E.R. 1, 10 (H.C.) ("The somewhat unusual, if simple, facts of the present case ... do not seem to have come before the court until now. I must

[159] A court tasked with the resolution of an issue that it has not resolved before must turn to first principles for guidance. This has always been the correct approach to questions that arise for the first time and it, undoubtedly, always will be.[116] "The strength of an argument is a function of its persuasiveness, not its precedential pedigree".[117]

[160] The fundamental principle is that a trustee has a duty of loyalty. This includes the duty to undertake reasonable measures to make available to a sufficiently large segment of beneficiaries or potential beneficiaries information that announces the existence of the trust and the markers of a beneficiary if a beneficiary or potential beneficiary would derive a benefit from knowing that a trust existed and the criteria defining a beneficiary.

[161] I see no principled basis,[118] in the absence of an express and unequivocal term in the trust instrument text to the contrary, for holding a trustee under a labour and material payment bond to a lower standard than applies to a trustee under a family trust. Academic commentary of which I am aware does not call for disparate treatment.[119] It calls for comparable treatment. There is no sound reason for establishing a principle that justifies abridging the duties of business trust trustees unless the trust instrument does so.

[162] I agree with the extrajudicial opinion of Lord Justice Millett of the Court of Appeal of England and Wales to this effect:[120] "Equity's place in the law of commerce, long resisted by

---

therefore reach my conclusion with such assistance as I can obtain from the authorities cited to me and from first principles") & *Hartigan Nominees Pty. Ltd. v. Rydge*, 29 N.S.W.L.R. 405, 417 (C.A. 1992) (in the absence of binding authority the Court considered the "competing arguments of principle or policy").

[116] See *McMorran v. McMorran*, 2014 ABCA 387, ¶ 56; 378 D.L.R. 4th 103, 137 ("The fact that something has never been done before is not sufficient reason not to do it if the language of the *Special Forces Pension Plan* allows it and the outcome is not inconsistent with the general structure of the pension plan") per Wakeling, J.A. & O. Holmes, Speeches 68 (1896) ("we rely upon ... the fact that we never thought of any other way of doing things, as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom").

[117] *International Association of Machinists and Aerospace Workers, Local Lodge 1579 v. L-3 Communications Spar Aerospace Ltd.*, 201 L.A.C. 4th 85, 140 (Wakeling, Q.C. 2010).

[118] Holmes, "The Path of the Law", 10 Harv. L. Rev. 457, 469 (1897) ("a body of law is more rational ... when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated ... in words").

[119] D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 578-79, 1126, 1132 & 1134 (4th ed. 2012); Flannigan, "Business Applications of the Express Trust", 36 Alta. L. Rev. 630, 636 (1998); D. Hayton, P. Matthews & C. Mitchell, Underhill and Hayton Law Relating to Trusts and Trustees 813 (8th ed. 2010); Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" 110 Law Q. Rev. 238, 238 (1994) & G. Bogert, Trusts 352 & 494 (6th ed. 1987).

[120] "Equity's Place in the Law of Commerce", 114 Law Q. Rev. 214, 214 (1998). See also Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World", 110 Law Q. Rev. 238, 238 (1994)

commercial lawyers, can no longer be denied. ... [E]quity deploys [two principal concepts] in the commercial field: the fiduciary duty and the constructive trust."

[163] A labour and material payment bond trustee occupies an important position for the benefit of subcontractors and it is neither unprincipled nor unfair to insist that a trustee take reasonable measures to make available information about the existence of the bond to the subcontractors. This is not an onerous obligation.

[164] In my opinion, the notice concerns Judge Grossberg catalogued in *Dominion Bridge Co.* are not significant.[121] Requiring a trustee in Sun Oil's position to take reasonable steps to make available to potential beneficiaries information about the existence of the labour and material payment bond is not asking too much of a trustee of a business trust. Sun Oil could have posted the bond at a prominent place at the work site. This would have given potential beneficiaries who discharged their contractual obligations by appearing at the work site a reasonable opportunity to learn of the bond's existence. If the trustee knew or had reason to believe that all subcontractors would perform their contractual obligations on site, that is all that the trustee would have to do. If Sun Oil knew or had reason to believe that some subcontractors could perform their contract work without coming to the site, Sun Oil could have discharged its trustee obligations by insisting in its contract with its general contractor that the general contractor notify all subcontractors of the bond's existence in writing or provide Sun Oil with a list of subcontractors so that Sun Oil could notify them.

[165] If labour and material payment bond trustees are convinced that these obligations are onerous and impractical, they should instruct their lawyers to draft labour and material payment bonds that expressly declare the notice obligation that the trustee bears. Careful drafters will realize that as the obligation of the trustee to discharge the universally accepted duties of a trustee diminishes, the risk that a court may decline to characterize the relationship as a trust increases.

[166] The trial judgment under appeal is the third construction case.[122] Justice Verville, a senior trial judge, concluded that the bond set out the terms of the trust and that the bond did not oblige Bird Construction, the trustee, "to protect the interests of potential claimants".[123] This

("Equitable doctrine and relief have penetrated the citadels of business and commerce, long thought, at least by common lawyers, to be immune from the intrusion of such alien principles").

[121] They might be more demanding in some fact patterns. E.g., *Segelov v. Ernst & Young Services Pty Ltd.*, [2015] NSWCA 156, ¶ 141 (the Court suggested that it would be impractical to require the trustee to maintain an up-to-date record of contact data for several hundred beneficiaries when it was reasonable to assume that the partners who designated the beneficiaries would notify the person they designated as beneficiaries of their status). It is helpful in assessing the merits of a proposed norm to consider its consequences. *Hawkins v. Clayton*, [1988] HCA 15, ¶ 9; 164 C.L.R. 539, 546 ("The consequences for other cases that may flow from a different conclusion could be far reaching").

[122] *Valard Construction Ltd. v. Bird Construction Co.*, 2015 ABQB 141.

[123] Id. ¶ 79.

determination caused the trial judge to relieve Bird Construction of the burden of abiding by the duty of loyalty and completely undermined the foundation of Valard Construction's case. It meant that Bird Construction had no duty to take reasonable measures to bring the bond to the attention of Valard Construction.

[167] The trial judge's reasons for this pivotal holding are set out below:

> [79] [T]he sub-contract between Langford and Bird required Langford to obtain the Bond for Bird's own protection. While trust relationships undoubtedly take many forms, it is clear from the case law, and the terms of the Bond itself, that the trust wording serves a limited purpose. Unlike other trust relationships, there is no suggestion in the standard wording, or in the case law, that the Bond creates duties on the obligee to protect the interests of potential claimants. It expressly states that the obligee is not required to take any act against the surety on behalf of the claimants to enforce the provisions of the bond.
>
> [80] I conclude that the sole purpose of the trust wording in the Bond is to address the difficulties that the identities of the claimants cannot be ascertained at the time the bond is entered into, and that the third party beneficiary rule would otherwise prevent a claimant from suing the surety.
>
> ...
>
> [84] Valard argues that Bird could easily have posted the Bond on the bulletin board in Bird's office trailer on the site, distributed copies of the Bond, or required Langford to take reasonable steps to notify its subcontractors and material suppliers of the existence of the Bond.
>
> [85] While this may be true, Bird was not obliged to provide notice.

[168] The trial judge made three other important observations. First, Valard Construction is a sophisticated business and should have protocols designed to ascertain the existence of labour and material payment bonds.[124] Second, the *Dominion Bridge* case, even though it is an oral judgment of a lower court in another jurisdiction, "has reflected the state of the law for 45 years on the issue of whether the obligee under a standard form performance and materials bond is required to notify potential claimants of the existence of the bond".[125] Third, *Dominion Bridge* was correctly decided.[126]

---

[124] Id. ¶ 85.

[125] Id. ¶ 89.

[126] Id.

[169] I will first address the trial judge's *obiter* comments and then review the merits of the basis on which he decided the case.

[170] For the reasons set out above, I reject the proposition that *Dominion Bridge* was correctly decided. Nothing more need be said on that topic.

[171] I accept Justice Verville's statement that an oral decision has the force of law in the jurisdiction in which it is pronounced.[127] But it does not have the force of law elsewhere. The usual law governing the precedential value of decisions from other jurisdiction applies.[128] To my mind, the persuasiveness of a nonbinding precedent is a function of the cogency of its reasons. A judgment – whether oral or written – may display a compelling foundation for the outcome. Or it may not.

[172] Justice Verville's statement that *Dominion Bridge* has been good law for forty-five years and should be followed[129] merits review. That view may be true for Ontario. It is not obvious to me that Alberta courts have ever applied *Dominion Bridge* and that Alberta's construction community has proceeded on the assumption that a labour and material performance bond trustee has no obligation to take reasonable measures to bring the bond's existence to the attention of beneficiaries or potential beneficiaries. My research has not disclosed any other Alberta case besides Justice Verville's judgment.

---

[127] On occasion the Supreme Court of Canada has given an important decision orally. E.g., *Sauvé v. Canada*, [1993] 2 S.C.R. 438 (prisoners have the right to vote in federal elections).

[128] E.g., *The Queen v. Barrett*, 54 C.C.C. 2d 75, 79 (Alta. C.A. 1980) (the Court declined to follow a unanimous decision of the Saskatchewan Court of Appeal on the same point).

[129] The doctrine of *stare decisis* and judicial comity promotes certainty. *Sheddon v. Goodrich*, 32 Eng. Rep. 441, 447 (Ch. 1803) ("it is better that the law should be certain, than that every Judge should speculate upon improvements in it"). The business community may order its affairs on the assumption that the law will continue unchanged for the period the consequences of business decisions will be in effect. *Canada v. Craig*, [2012] 2 S.C.R. 489, 499 (the failure of the Federal Court of Appeal to follow a previous tax decision introduces undesirable consequences – uncertainty – into tax law); *London Street Tramways v. London County Council*, [1898] A.C. 375, 380 (H.L.) ("it is totally impossible ... to disregard the whole current of authority upon this subject ... [and to relitigate that] which has already been decided. ... [T]here may be a current of opinion in the profession that ... a judgment was erroneous but what is that occasional interference with what is perhaps abstract justice as compared with the ... disastrous inconvenience ... of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and fact there would be no real final Court of Appeal?"); *Midland Silicones Ltd. v. Scruttons Ltd.*, [1962] A.C. 446, 467-68 (H.L. 1961) (Viscount Simonds rebuked Lord Denning for attempting to alter the privity of contract principle: "Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent"). See Holmes, "The Path of the Law", 10 Harv. L. Rev. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past").

[173] Nor does Standard Construction Document CCPC 222-2002 limit the trustee's duty to exclude this equitable obligation.

[174] As well, I suspect that this problem seldom arises because very few contractors in Bird Construction's position would not take reasonable measures to bring a labour and material payment bond to the attention of bond beneficiaries. A construction company utilizing best industry practices would publicize the existence of a labour and material payment bond. Why would a trustee that insists in a contract that another secure a bond that benefits both the trustee and beneficiaries not disseminate information about its existence to those who may benefit from it?

[175] I also agree with the trial judge's statement that Valard Construction is a sophisticated business and that it is surprising it finds itself in this predicament. I suspect that Valard Construction now has in place mechanisms designed to reduce the risk that this ever happens again.

[176] The trial judge and I part company on the proper interpretation of the standard form bond text.[130] He has proceeded on the understanding that unless the bond text states that the trustee must discharge a duty of loyalty to the beneficiaries no such duty exists. This is not my understanding of the law. It is the other way around.[131] Unless the trust instrument text abridges[132] the duties of a trustee, those duties that the law of equity imposes on a trustee apply.[133]

---

[130] *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, ¶ 51; [2014] 2 S.C.R. 633, 659 ("One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute"); *Municipal District of Bighorn No. 8 v. Bow Valley Waste Management Commission*, 2015 ABCA 127, ¶ 7; 13 Alta. L.R. 6th 342, 345 ("correctness remains the appropriate standard of review when interpreting standard form contracts since the results would be expected to have an impact beyond the parties to a particular dispute and be of precedential value") & *Vallieres v. Vozniak*, 2014 ABCA 290, ¶ 13; 377 D.L.R. 4th 80, 89 ("[the] interpretation [of this standard form contract] is of general importance beyond this dispute, any decision on its proper interpretation has great precedential value, and the primary objective should be certainty. It is untenable for this contract to be given one interpretation by one trial judge, and another by a different one").

[131] New Zealand Law Commission, Review of the Law of Trusts: A Trusts Act for New Zealand 93-94 (2013) (some duties of a trustee are paramount, will be incorporated into every trust, and cannot be diminished by a trust instrument; other trustee duties, although important, may be modified by unequivocal provisions in the trust instrument). This is also the norm in other aspects of trust law. For example, as a general rule, a settlor has no power to revoke a trust unless the trust instrument expressly bestows this right on the settlor. G. Bogert, Trusts 47 (6th ed. 1987). Nor may the settlor, trustee and beneficiaries alter the trust terms unless the trust instrument sanctions revisions. G. Bogert, Trusts 514 & 527 (6th ed. 1987). But cf *Segelov v. Ernst & Young Pty Ltd.*, [2015] NSWCA 156, ¶ 113 (the trustee has no obligation to inform a beneficiary or potential beneficiary of a trust unless the trust instrument imposes this obligation).

[132] E. Gillese, The Law of Trusts 187 (3d ed. 2014) ("exoneration clauses ... excuse ... trustees for losses caused by any reason except fraud, wilful dishonesty, and knowing breaches of trust"); D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 982 (4th ed. 2012) ("In the absence of legislative intervention in England and Canada ... [exculpatory clauses] are valid, almost without doubt") & G. Bogert, Trusts 337 (6th ed. 1987) ("A settlor may reduce

[177] I also disagree with the trial judge's interpretation of the bond text.

[178] While he correctly explains why a labour and material payment bond incorporates the trust concept – a trust allows nonparties to the bond contract to enforce the trust,[134] he erred when he then held that the trust concept did not impose on Bird Construction the duties equity assigns to a trustee:[135] "[T]he sole purpose of the trust wording in the Bond is to address the difficulties that the identities of the claimants cannot be ascertained at the time the bond is entered into, and that the third party beneficiary rule would otherwise prevent a claimant from suing the surety".

[179] In the absence of unequivocal text in a bond reducing a trustee's fundamental duty to take reasonable measures to make available to a sufficiently large segment of beneficiaries or potential beneficiaries information about the trust's existence and the criteria identifying a beneficiary,[136] a bond trustee must discharge this obligation.

---

the amount of skill and prudence required of his trustee by a provision in the trust instrument, as where he excludes liability for errors of judgment or for any conduct other than a willful breach").

[133] Flannigan, "Business Applications of the Express Trust", 36 Alta. L. Rev. 630, 632 (1998) ("The settlor and trustee remain free, in every case, to negotiate specific modifications to the general default content of the obligation to accommodate their particular arrangement"); D. Waters, M. Gillen & L. Smith, Waters' Law of Trusts in Canada 912 (4th ed. 2012) ("the 'substratum' obligations which attach to every trustee are fundamental duties arising out of the essence of the relationship of trustee and beneficiary. They ... can be displaced only to the extent to which the legislature of the jurisdiction so decrees or a settlor in his trust modifies their operation") & G. Bogert, Trusts 79, 334 (6th ed. 1987) ("the trustee is a fiduciary, whose obligations are not only those which he has voluntarily assumed by express agreement, but also those which the law imposes on him. ... Ordinary care, skill and prudence are normally required of trustees in the performance of all their duties, unless the trust instrument provides otherwise").

[134] Flannigan, "Business Applications of the Express Trust", 36 Alta. L. Rev. 630, 631 (1998) ("A trust will also be effective to avoid difficulties created by the operation of the doctrine of privity of contract"); D. Dal Pont & D. Chalmers, Equity and Trusts in Australia and New Zealand 420 (2d ed. 2000) ("Under the doctrine of privity of contract, only the parties to the contract can sue or be sued, whereas a beneficiary may enforce a trust despite not being a party to the trust's creation") & G. Bogert, Trusts 4 (6th ed. 1987) ("if A declares himself a trustee of property for C, C everywhere may enforce the trust against A, regardless of privity or of knowledge or consent by C").

[135] *Valard Construction Ltd. v. Bird Construction Co.*, 2015 ABQB 141, ¶ 80.

[136] New Zealand Law Commission, A Review of the Law of Trusts: A Trusts Act for New Zealand 106-14 (2013) (some trustee duties are so important that the trust instrument may not lawfully abridge them; some trustee duties are so important that they must be discharged unless the trust instrument expressly abridges them); Flannigan, "Business Applications of the Express Trust", 36 Alta. L. Rev. 630, 636 (1998) ("If the trust form is selected, the general rules of trust law apply") & *Mucklow v. Fuller*, 37 Eng. Rep. 824, 825 (Ch. 1821) (an executor who proves the will accepts the trusts that the testator imposed on the executor and "must do all which he is directed to do as executor").

[180] A trustee cannot both assert that the bond features a trust and that the trustee has none of the duties of a trustee.[137] A trust cannot function without a trustee.[138] This is a blatant violation of the equitable principle against approbation and reprobation.[139]

[181] Second, the trial judge misconstrued the import of the term that relieves Bird Construction of the obligation to initiate any proceedings against the Guarantee Company on behalf of a beneficiary. While this term relieves the trustee of its obligation to commence, on its own initiative, an action against the surety, it does not strip Bird Construction of its duty of loyalty or protect it from any action for breach of trust. All its other obligations as the bond trustee remain and must be honoured.

[182] The bond provision that Justice Verville used to buttress his conclusion that Bird Construction had no obligation to notify Valard Construction of the bond's existence had a very limited purpose. It recognizes that a beneficiary may commence an action against the Guarantee Company independently or name the trustee as a plaintiff or co-plaintiff in an action against the Guarantee Company for enforcement of the bond. If a beneficiary adopted the latter course it must indemnify Bird Construction for any costs the trustee incurred in acting as a plaintiff or co-plaintiff.

[183] The bond text could not be clearer on this point:

---

[137] Flannigan, "Business Applications of the Express Trust", 36 Alta. L. Rev. 630, 636 (1998) ("Breaches of trust will attract the usual equitable remedies").

[138] G. Dal Pont & D. Chalmers, Equity and Trusts in Australia and New Zealand 403 (2d. ed. 2000) ("a trust must have a *trustee* who holds legal title to the trust property") & G. Bogert, Trusts 90 (6th ed. 1987) ("a trustee is needed to administer a trust").

[139] *Re Tremblay*, 48 O.L.R. 321, 323 (H.C. 1920); *In re Hotchkys*, 32 Ch. D. 408, 418 (C.A. 1886) & *Guthrie v. Walrond*, 22 Ch. D. 573, 577 (H.C. 1883) (a legatee cannot accept the beneficial aspects of single gift and reject the burdensome aspect of the single gift) & *Federal Trust Co. v. Damron*, 124 Neb. 655, 665; 247 N.W. 589, 593 (Sup. Ct. 1933) ("A man shall not be allowed to blow hot and cold – to affirm at one time and deny at another"). See generally *Shreem Holdings Inc. v. Barr Picard*, 2013 ABQB 257, ¶ 49; 49 C.P.C. 7th 419, 431 ("The propriety of a party invoking a statutory process and then taking a position before the adjudicator who administers the process which deprives the adjudicator of his jurisdiction is in doubt"); *Iron v. Saskatchewan*, 103 D.L.R. 4th 585 (Sask. C.A. 1993) (a party seeking leave to appeal cannot take the position before the appeal chambers judge that leave is not required because the party has an appeal as of right); *Canada v. Toombs*, [1946] 4 D.L.R. 516, 519 (Ont. Cty. Ct.) ("Having requested the Court to decide the action upon the provisions of the *Highway Traffic Act* it is not open to the Crown to contend that the provisions of the Act are not binding upon it. It cannot approbate and reprobate") & *Dussault v. Brazeau Transport Inc.*, 33 di 520, ¶ 4 (Can. L.R.B. 1978) (an employer cannot take inconsistent positions on the constitutional jurisdiction of provincial and federal boards). See also G. Bogert, Trusts 355 (6th ed. 1987) ("Generally, the court will not permit the trustee to attack the trust") & *In re Strange's Estate*, 7 Wis. 2d 404, 407; 97 N.W. 2d 199, 200 (Sup. Ct. 1959) ("As trustee, respondents have the obligation of loyalty to their trust which is required of fiduciaries unafflicted with split personalities").

> 2. [Langford Electric] ... and the ... [Guarantee Company], hereby jointly and severally agree with ... [Bird Construction] as Trustee, that every Claimant who has not been paid as provided for under the terms of its contract with ... [Langford Electric], before the expiration of a period of ninety ... days after the date on which the last of such Claimant's work or labour as done or performed or materials were furnished by such Claimant, may as a beneficiary of the trust herein provided for, sue on this Bond, prosecute the suit to final judgment for such sum or sums as may be justly due to such Claimant under the terms of its contract with ... [Langford Electric]. Provided that ... [Bird Construction] is not obliged to do or take any ... action or proceeding against the ... [Guarantee Company] on behalf of the Claimants, or any of them, to enforce the provisions of this Bond. If any ... action or proceeding is taken either in the name of ... [Bird Construction] or by joining ... [Bird Construction] as a party to such proceeding, then such ... action or proceeding, shall be taken on the understanding and basis that the Claimants ... who take such ... action or proceeding shall indemnify and save harmless the Obligee [Bird Construction] against all costs, charges and expenses or liabilities incurred thereon and any loss or damage resulting to the Obligee [Bird Construction] by reason thereof.

[184] The text of the bond does not support the interpretation the trial judge gave it. This interpretation was not one that the words may bear.[140] It is implausible.[141]

[185] Bird Construction is a trustee and subject to the duty of loyalty.

F. Bird Construction Committed a Breach of Trust

[186] It is obvious that Valard Construction would have derived a benefit from knowing that a labour and material payment bond existed. Had Valard Construction known of the bond within the

---

[140] *Rickman v. Carstairs*, 110 Eng. Rep. 931, 935 (K.B. 1833) ("in ... cases of construction of written agreements [the question] is not what was the intention of the parties, but what is the meaning of the words they have used"); *Lubberts Estate*, 2014 ABCA 216, n. 21; [2014] 10 W.W.R. 41, 66 n. 21 ("Multiparty documents cannot have multiple meanings which are a function of the subjective understandings of each party. ... There must be an enforceable meaning attached to the oral or written language which the parties acknowledge captures their consensus. It must be the product of an objective inquiry") per Wakeling, J.A.; A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 30 (2012) ("Objective *meaning* is what we are after"); G. Hall, Canadian Contractual Interpretation Law 33 (2d ed. 2012) ("It is a fundamental precept of the law of contractual interpretation that the exercise is objective rather than subjective") & S. Waddams, The Law of Contracts 105 (6th ed. 2010) ("The principal function of the law of contracts is to protect reasonable expectations engendered by promises").

[141] *Lenz v. Sculptoreanu*, 2016 ABCA 111, ¶ 4 ("[A court may never] give the text an implausible meaning") & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 31 (2012) ("A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear").

120-day period after it last performed work under its contract with Langford Electric it would have submitted a claim to the Guarantee Company for $659,671.[142]

[187] This determination triggers Bird Construction's obligations as a trustee under the general rule to take reasonable measures to make available to a sufficiently large segment of subcontractors of Langford Electric information about the trust's existence and the markers of a beneficiary.

[188] Given the ease of identifying potential beneficiaries – subcontractors with contracts in excess of $100,000 and holding accounts receivables for at least ninety days, the potential benefit to Valard Construction of being a beneficiary – a payment of $659,671 by the Guarantee Company – and the low cost of bringing the bond's existence to all Langford Electric's subcontractors, Bird Construction, as the bond trustee, had an obligation to take reasonable measures to bring the bond's existence to the attention of all of Langford Electric's subcontractors.

[189] Reasonable communication measures are not onerous. Bird Construction would have met this test if it had posted the bond at a conspicuous place at the Suncor project to which Langford Electric's subcontractors had access and required Langford Electric to include in its contract terms with subcontractors a notice term.

[190] The evidence indicated that there were bulletin boards in Bird Construction's on-site office where toolbox meetings attended by businesses, including Valard Construction, working at the Suncor project site occurred.[143]

[191] Bird Construction, undoubtedly, could have extracted a contractual commitment from Langford Electric to include a provision in all its contracts with subcontractors disclosing the existence of the bond and requiring the subcontractors to notify Bird Construction in writing within a stipulated period that they were aware of the bond's existence. Or Bird Construction could have required Langford Electric to provide it with a list of its subcontractors so that Bird Construction could have given them written notice of the bond's existence. This would have been a reasonably effective manner of bringing the bond's existence to the attention of the subcontractors who discharged their contractual commitments to Langford Electric without coming to Suncor's site.

[192] Bird Construction undertook neither of these measures.

[193] Bird Construction cannot successfully argue that the general rule is inapplicable because it had reasonable grounds to believe that Valard Construction was aware of the bond's existence.[144]

---

[142] L. Simpson, Handbook on the Law of Suretyship 2 (1950) ("With a surety liable for the debt, the creditor has two parties against whom he may go for its collection, instead of the debtor alone").

[143] *Valard Construction Ltd. v. Bird Construction Co.*, 2015 ABQB 141, ¶ 25.

[194] There is no evidence that representatives of Bird Construction ever considered whether Valard Construction was aware of the bond and its status under it. Its officers did not put their mind to it.

[195] Had there been such evidence Bird Construction would still have failed to establish reasonable grounds.

[196] No witness swore that labour and material payment bonds were a standard feature of oil sands construction projects. Just the opposite – Mr. Wenyss, a person with ten years in the construction industry, had never worked on a private project that had a labour and material payment bond.[145] Nor was there any evidence that a representative of Bird Construction believed that Valard Construction had inquired of Bird Construction or Langford Electric about the existence of a labour and material payment bond.

[197] Bird Construction breached the trust and is responsible for the damages that Valard Construction suffered as a result of Bird Construction's failure to discharge its obligations as the bond trustee.

[198] The bond text does not relieve Bird Construction of its fundamental obligation to take reasonable measures to make available to Valard Construction and other similarly situated businesses information about the existence of the bond.[146] If there was an exculpatory or immunity clause to this effect, a beneficiary may ask the court to consider whether its existence strips the trust of an essential central element and is unenforceable.[147] Bird Construction did not rely on s. 41 of the *Trustee Act*.[148]

---

[144] *Segelov v. Ernst & Young Services Pty Ltd.*, [2015] NSWCA 156, ¶¶ 36, 43 & 152 (the trustee may reasonably have concluded that Ms. Segelov would have been aware of her status as a beneficiary – her husband would have informed her of her status as a beneficiary or her tax reporting obligations with respect to the trust payments would have informed her that she received trust payments and must have been a beneficiary) & *Mulford v. Mulford*, 53 A. 79 (N.J. Super Ct. 1902) (the Court relieved the trustee of its obligation to take reasonable measures to bring the trust's existence to the attention of the beneficiary because the trustee had reasonable grounds to believe the beneficiary's parents had informed the beneficiary of her status).

[145] *Valard Construction Ltd. v. Bird Construction Ltd.*, 2015 ABQB 141, ¶ 22.

[146] *Armitage v. Nurse*, [1998] Ch. 241, 253-54 (C.A. 1997) (the Court upheld as enforceable a term that exempted "the trustee from liability for loss or damage to the trust property no matter how indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he did not act dishonestly") & Flannigan, "Business Applications of the Express Trust", 36 Alta. L. Rev. 630, 632 (1998) ("as between the trustees and the beneficiary, a 'trustee' fiduciary obligation will operate unless expressly excluded by the trust deed").

[147] *Armitage v. Nurse*, [1998] Ch. 241, 253 (C.A. 1997) ("there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust"); *Segelov v. Ernst & Young Services Pty Ltd.*, [2015] NSWCA 156, ¶ 146 (a trustee cannot be relieved of the obligation to "act honestly and in good faith"); *Birmingham Trust & Savings Co. v. Ansley*, 234 Ala. 674, 678, 176 So. 465, 469 (Sup. Ct. 1937)

G. It Is Irrelevant Whether Valard Construction Could Have Discovered the Existence of the Bond by Exercising Due Diligence or Any Right Under the *Builders' Lien Act*

[199] A determination that Bird Construction committed a breach of trust and is responsible to the beneficiary for any loss arising from its breach of trust, in the absence of a statutory direction to the contrary, concludes this controversy.

[200] Bird Construction did not plead laches as a defence or invoke s. 41 of the *Trustee Act*. This means that the reasons why Valard Construction failed to discover before April 19, 2010 the existence of the bond are not relevant.[149]

[201] Unless there is a statutory direction to the contrary, it is irrelevant whether Valard Construction could have discovered the existence of the bond by exercising due diligence.

[202] Is there a clear statutory direction to the contrary?[150]

("Whether such stipulations [a trustee only responsible for 'wilful disregard of duty'] are void against public policy, we need not decide in this case"); J. Glister & J. Lee, Hanbury and Martin Modern Equity 479 (20th ed. 2015) ("19th century English and Scottish authorities indicated that exemption clauses ... would not protect ... [trustees] in cases of bad faith, recklessness or deliberate breach of duty"); Millett, "Equity's Place in the Law of Commerce", 114 Law Q. Rev. 214, 216 (1998) ("The view is widely held that [exculpatory] ... clauses have gone too far, and that trustees ... should not be able to rely on a trustee exemption clause which excludes liability for gross negligence") & G. Bogert, Trusts 340 (6th ed. 1987) ("To permit a trustee to hide behind an exculpatory clause and to avoid liability for bad faith, dishonesty, willful breach, and gross negligence would be against public policy, since it would encourage highly reprehensible or even criminal conduct"). See generally New Zealand Law Commission, Review of the Law of Trusts: A Trusts Act for New Zealand 103-04, 107-08 & 114 (2013).

[148] Section 41 of the *Trustee Act* allows a court to relieve a trustee from liability for breach of trust if "the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court". See *Hawkesley v. May*, [1956] 1 Q.B. 304, 325 (1955) & *Segelov v. Ernst & Young Services Pty Ltd.*, [2015] NSWCA 156, ¶ 60.

[149] G. Bogert, Trusts 634 (6th ed. 1987) (a plaintiff-beneficiary faced with a laches defence by the defendant-trustee can only rely on ignorance of the existence of a cause of action if it took reasonable steps to protect its interests as a beneficiary") & *Redford v. Clarke*, 100 Va. 115, 123; 40 S.E. 630, 633 (Sup. Ct. 1902) ("Indolent ignorance and indifference will no more avail than will voluntary ignorance of one's rights").

[150] A statute does not alter the common law unless a fair reading supports the contrary conclusion. *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, ¶ 43; [2004] 1 S.C.R. 60, 75; *District of Parry Sound Social Services Administration Board v. Ontario Public Services Employee Union*, 2003 SCC 42, ¶ 39; [2003] 2 S.C.R. 157, 181; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1077; *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, 614; *Hammond v. DeWolfe*, 2014 ABCA 81, ¶¶ 7 & 27; *Coulter v. Co-operators Life Insurance Co.*, 2013 ABCA 295, ¶ 58; 367 D.L.R. 4th 724, 740 & *Devon Canada Corp. v. PE-Pittsfield, LLC*, 2008 ABCA 393, ¶ 29; 303 D.L.R. 4th 460, 469; R. Sullivan, Sullivan on the Construction of Statutes 538-39 (6th ed. 2014) & A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 318 (2012).

[203] No.

[204] There is nothing in the *Builders' Lien Act*[151] that remotely relates to the obligation a trustee under a labour and material bond payment has. Nor is the *Builders' Lien Act* an exhaustive statement of the rights contractors have to collect unpaid accounts.[152]

[205] The *Builders' Lien Act* does nothing more than catalogue the rights that Valard Construction has as a potential lienholder and the obligations Bird Construction has if a potential lienholder exercises its rights under the enactment and demands copies of the construction contracts between Bird Construction and Suncor and Bird Construction and Langford Electric.[153]

[206] That the *Public Works Act*[154] compels a contractor to display at a conspicuous place on a public work site a copy of any labour and material payment bond does not affect the obligations

---

[151] R.S.A. 2000, c. B-7.

[152] E.g., *Foley v. Imperial Oil Ltd*., 2011 BCCA 262, ¶ 29 ("The [*Occupiers Liability*] *Act* provides a complete code regarding the duty of an occupier of land. Reference to earlier common law cases ... may ... result in legal error if the wrong standard of care (one based on the common law categories) is applied, rather than the statutory standard of care").

[153] See *Canadian Bank of Commerce v. T. McAvity & Sons Ltd*., [1959] S.C.R. 478, 482 & 484 (remedies under the lien and trust provisions of the *Mechanics' Lien Act*, R.S.O. 1950, c. 227 are independent of each other: a supplier may have no lien rights but be a beneficiary of a statutory trust); *Minneapolis-Honeywell Regulator Co. v. Empire Brass Manufacturing Co.*, [1955] S.C.R. 694, 703 (a contractor may be a beneficiary under the statutory trust created by s. 19 of the *Mechanics' Lien Act*, R.S.B.C. 1948, c. 205 even if it is not entitled to lien protection under the *Act*); *Harding Carpets Ltd. v. Saint John Tile & Terrazo Co*., 24 C.L.R. 71, 88 (N.B.Q.B. 1987) ("the right to claim against a so-called s. 3 [trust] fund [under the *Mechanics' Lien Act*, R.S.N.B. 1973, c. M-6] is independent of the existence of an enforceable lien under the Act") aff'd 31 C.L.R. 135 (C.A. 1988) leave to appeal denied 51 D.L.R. 4th vii (1988); *Prince Edward Island Housing Corp v. Linkletter Welding Ltd.*, 2 C.L.R. 297, 299 (P.E.I. Sup. Ct. 1983) (the Court declared that the Crown held the holdback funds under a constructive trust for the benefit of contractors unable to file a lien against Crown property); *Requip (Niagara Falls) Ltd. v. Municipality of Fort Erie*, 7 C.L.R. 134, 138 (Ont. H.C. 1984) ("[Under Ontario's *Mechanic's Lien Act*, R.S.O. 1980, c. 261] the ... supplier has two remedies ..., one in the nature of an interest in moneys impressed with a trust in the hands of the owner or contractor ..., the other [a lien] in the nature of a real interest in the lands which have directly benefited from his work or materials. ... Both remedies are distinct and can be called into play independently") & McGuinness, "Trust Obligations Under the *Construction Lien Act*", 15 C.L.R. 208, 232-33 (1994) ("Although [trust and lien rights under the *Construction Lien Act*, R.S.O. 1990, c. C.30] are related, the trust and lien rights ... are separate and distinct").

[154] Section 17 of the *Public Works Act*, R.S.A. 2000, c. P-46 is in this form:

> 17(1) Every contractor shall, where practicable, display and keep displayed in a conspicuous place on the public work to which the contract relates
>
> (a) a copy of section 14, and
> (b) where a labour and material payment bond has been provided to the Minister, a copy of the bond.

Bird Construction has as a trustee under the labour and material payment bond on which Valard Construction bases its case. The two obligations arise from independent sources – one statutory and one equitable in nature – and the exercise of one duty does not affect the continued existence of the other.

[207] Nor would Valard Construction's statutory right under the *Builders' Lien Act* to inspect the construction contracts between Bird Construction and Langford Electric serve as a foundation for a conclusion on Bird Construction's part that it is more likely than not that Valard Construction would be aware of the existence of the bond. If that was the case, then Bird Construction would be able to claim that it had reasonable grounds to conclude that it is probable Valard Construction knew of the bond's existence. There was no evidence that any representative of Bird Construction concluded that it was more likely than not that Valard Construction exercised its rights under the *Builders' Lien Act* and was aware of the bond's existence. Had Valard Construction made a written request under the *Builders' Lien Act* to Bird Construction different considerations would have come into play.[155]

[208] Bird Construction led no evidence to suggest that labour and material payment bonds were a common feature of oil sands projects.

[209] Nor does the bond text support the argument that Valard Construction may only claim under the bond if it exercises any rights it may have under the *Builders' Lien Act* or any related legislation.[156]

H. The Bond Indemnification Provision Does Not Require Valard Construction To Indemnify Bird Construction for the Costs Bird Construction Has Incurred in Defending Valard Construction's Breach-of-Trust Action

[210] Bird Construction claims that it is entitled to a full indemnity costs award. It relies on the indemnification provision in the bond.

[211] I assume that Bird Construction takes this position even if this appeal is successful.

---

(2) The fact that a labour and material payment bond does or does not exist is to be considered public information and, if a bond does exist, any particulars of that bond are to be considered public information and that information may be made known to any person who requests the information.

[155] This fact may have allowed Bird Construction to argue that it had reasonable grounds to believe that Valard Construction was aware of the bond.

[156] See *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513, 525 ("the respondent points out, correctly in my view, that there is no requirement in the bond itself that a claimant must have recourse to other remedies before claiming on the bond") & *LaRiviére Inc. v. Canadian Surety Co.*, [1973] C.A. 150, 155 (Que.) ("I do not read this bond ... as imposing on appellant the duty of subrogating respondent in the rights which it might have had under ... [the Civil Code], and I consider as irrelevant the fact that it did not or could not do so"].

[212] The trial judge granted Bird Construction full-indemnity costs. His reasons follow:[157]

> [92] The Bond provides in paragraph 2 that if any action or proceeding is taken by joining the obligee [Bird Construction] as a party, the claimant who takes such action or proceeding shall indemnify and save harmless the obligee against all costs, charges and expenses or liabilities incurred thereon and any loss or damage resulting therefrom.
>
> [93] Valard discontinued its suit as against ... [the Guarantee Company] in October 2013. However, the entire lawsuit has turned on Valard's ability to claim by virtue of the Bond. Therefore, it was an action taken on the Bond, joining the obligee, Bird [Construction], as party. In my view, the action falls within paragraph 2, and Bird [Construction] is therefore entitled to costs on a full indemnity basis.

[213] The bond indemnity provision that Bird Construction relies on does not apply to this fact pattern.

[214] It only applies if a beneficiary names Bird Construction in its capacity as the bond trustee as the sole or co-plaintiff in an action to enforce the bond against the Guarantee Company.

[215] Valard Construction is the sole plaintiff in this action. It has not named Bird Construction either as a sole plaintiff or co-plaintiff.

[216] In addition, Valard Construction has sued Bird Construction for breach of trust. This is not a lawsuit against the Guarantee Company.

[217] This determination makes it unnecessary to resolve the other issue raised by Bird Construction's indemnity claim. Can a contract impose obligations on a third party?

VII. Conclusion

[218] I would have allowed the appeal, set aside the trial judgment and awarded Valard Construction $659,671, the amount of the labour and material payment bond, plus interest.

[157] *Valard Construction Ltd. v. Bird Construction Co.*, 2015 ABQB 141.

[219] I acknowledge the exceptionally high quality of counsel's written and oral submissions. This was a novel problem and counsel's excellent submissions assisted me considerably.

Appeal heard on April 5, 2016

Reasons filed at Edmonton, Alberta
this 29th day of August, 2016

Wakeling J.A.

Appearances:

M.D. Preston/C.J. Moore
for the Appellant

P.V. Stocco
for the Respondent