

SCC FILE NO.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

VALARD CONSTRUCTION LTD.

APPLICANT
(Appellant)

AND:

BIRD CONSTRUCTION COMPANY

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
(VALARD CONTRACTORS LTD., APPLICANT)
(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended)

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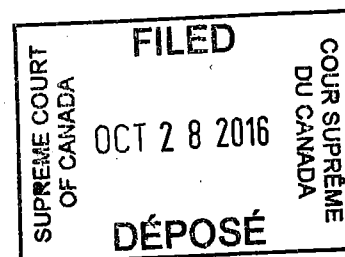


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PART I – ISSUES OF PUBLIC IMPORTANCE AND STATEMENT OF FACTS

A. Overview

1. “This is a business trust case. It presents an important issue that no Canadian appellate court has previously resolved”.¹
2. The issue is both practical and fundamental to the law of trusts: does a trustee have a duty to take reasonable steps to notify beneficiaries of the existence of the trust and their beneficial interest?
3. The corollaries to this issue include two substantive inquiries: what are the guiding principles for ‘reasonable steps’ a trustee must take? In what circumstances, if any, is this duty qualified, shifting the onus to the beneficiaries to make inquiries?
4. As such a duty must rest on the fiduciary relationship between trustee and beneficiary, the Alberta Court of Appeal found itself in conflict. Is there such thing as a trust – such as a business trust or a ‘limited’ trust – where there is no fiduciary duty imposed on the trustee?
5. The trust instrument here was a standard form Labour & Material Payment Bond, which is widely used in the Canadian construction industry. Was the majority correct to conclude this standard instrument creates a ‘limited’ trust where there is no fiduciary relationship between the trustee and the beneficiary? Or was Justice Wakeling correct to find that all trusts, including the standard Labour & Material Payment Bond, impose fiduciary duties on the trustee, including the duty to take reasonable steps to notify beneficiaries of the existence of the trust?
6. The standard Labour & Material Payment Bond is time sensitive: the beneficiary has to act to preserve its interest; it has to provide notice of its claim within 120 days. Here, by the time the beneficiary became aware of the existence of the Labour & Material Payment Bond, it was too late – leaving the beneficiary with nothing.
7. This case presents an opportunity to settle the ‘grey area’ of law in Canada as to a trustee’s fiduciary duty to notify beneficiaries. More particularly, this is an opportunity to set out the trust

¹ Dissenting Reasons of Court of Appeal below, para. 36 [Tab 2C]

requirements that will guide the participants in the construction industry and end the confusion in the industry about the respective obligations of trustees and beneficiaries who rely on these standard Labour and Material Payment Bonds.²

B. The Trust

8. The trust arises from a Labour & Material Payment Bond in the form of the Standard Construction Document CCDC 222-2002, which is a fixture of the Canadian construction industry. Such bonds are used on hundreds of projects per month in common law jurisdictions across the country.³

9. In 1983, this Court in *Johns-Mansville* considered such a Labour & Material Payment Bond and stated the Bond “created a trust relationship between the obligee and the claimants and conferred on the claimants a right to sue directly”.⁴

10. *Johns-Mansville* did not address the scope of the obligee’s duties as trustee. The present case raises that question.

C. The Construction Project

11. The facts are concise and undisputed.

12. The construction project was located in the Alberta oil sands. It was called the Suncor Energy MEM 2 Bay Shop Expansion (the “Project”). Construction began in 2009 and involved building a large garage to be used to repair dump trucks that worked the mine.⁵

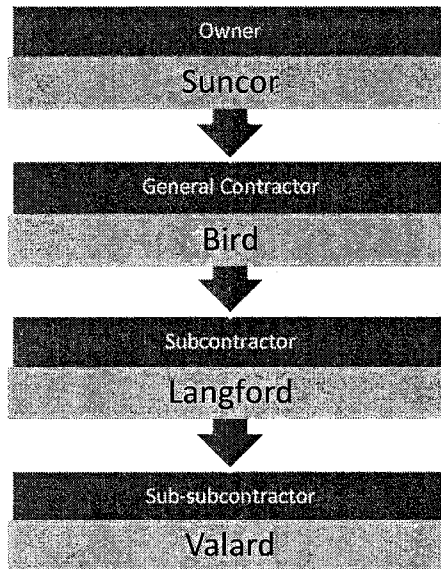
² Affidavit of Norm Streu [Tab 4C]

³ Judgment of Court of Appeal below, para. 14 [Tab 2C]; The L&M Bond [Tab 4A]; Affidavit of Norm Streu [Tab 4C]

⁴ *Citadel General Assurance Company v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513 at para. 5 [Tab 5C]

⁵ Judgment of Court of Queen’s Bench below, paras. 8, 28 [Tab 2A]

13. Suncor was the owner of the mine. Bird Construction Company (“Bird”) was the general contractor. Langford Electric Ltd. (“Langford”) was the subcontractor. Valard Construction Ltd. (“Valard”) was a sub-subcontractor to Langford.



D. The Labour & Material Payment Bond

14. Bird had an internal policy that required Langford to obtain a Labour & Material Payment Bond.⁶

15. The Labour & Material Payment Bond obtained by Langford was issued by the Guarantee Company of North America (“GCNA”) in November 2008 with a penal sum of \$659,671 (the “L&M Bond”).⁷

16. The L&M Bond stated:

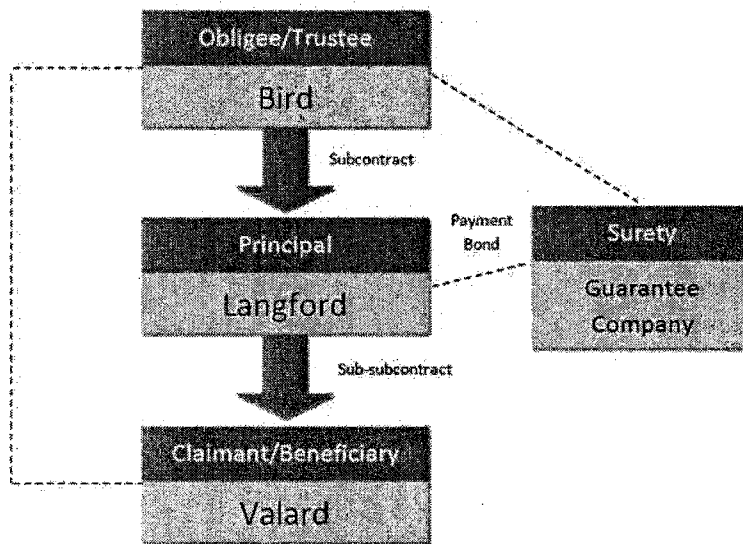
2. [Langford Electric] ... and the ... [Guarantee Company], hereby jointly and severally agree with ... [Bird Construction] as Trustee, that every Claimant who has not been paid as provided for under the terms of its contract with ... [Langford Electric], before the expiration of a period of ninety ... days after the date on which the last of such Claimant’s work or labour as done or performed or

⁶ Judgment of Court of Queen’s Bench below, para. 33 [Tab 2A]; Extracts of Trial Transcript, p. A16, transcript lines 2-3, p. A17, transcript lines 35-36 [Tab 4B]

⁷ Dissenting Reasons of Court of Appeal below, para. 67 [Tab 2C]; The L&M Bond [Tab 4A]

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.⁸

17. Bird received the L&M Bond, signed it as obligee/trustee and then filed it in their records.⁹



E. Valard's Scope of Work

18. Valard became involved in the Project in March 2009 and completed its work in May 2009.

⁸ Reasons of Court of Appeal, para. 183 [Tab 2C]

⁹ Dissenting Reasons of Court of Appeal, para. 67 [Tab 2C]; The L&M Bond [Tab 4A]

19. Once completed, Valard had an outstanding account for its work in the amount of \$660,000.17 plus interest. This was unpaid by Langford.¹⁰

F. Unpaid Accounts: Valard as Claimant under the L&M Bond

20. Valard made numerous inquiries with Langford about payment. Langford made repeated reassurances that it would get the money and that it just needed to further negotiate with Bird. Valard opted not to lien the property or harass Bird because Valard worried this would “rock the boat” and Valard might be blacklisted from future work in the oil sands.¹¹

21. By February 2010, Valard was still unpaid and commenced legal proceedings. On March 9, 2010 Valard obtained default judgment against Langford for \$660,000.17 plus interest; however, it was unable to collect because Langford was insolvent.¹²

22. On the weekend of April 17, 2010, the Valard Project Manager, Mr. Cameron Wemyss, learned coincidentally from a third party that Bird had required a Labour & Material Payment Bond from Langford on another project and may have required one of Langford on the Project.¹³

23. On Monday April 19, 2010, Valard inquired of Bird whether a Labour & Material Payment Bond had been posted by Langford on the Project. Bird immediately responded in the affirmative and provided contact information for the GCNA.¹⁴

24. Valard then immediately made a claim on the L&M Bond.¹⁵

G. Awareness of the Trust: Nothing Done

25. Valard was unaware of the internal Bird policy and had no knowledge of the L&M Bond prior to April 19, 2010.¹⁶

¹⁰ Judgment of Court of Queen’s Bench below, paras. 3, 11 [Tab 2A]

¹¹ Judgment of Court of Queen’s Bench below, para. 24 [Tab 2A]; Extracts of Trial Transcript, p. A3, transcript lines 4-17 [Tab 4B]

¹² Judgment of Court of Queen’s Bench below, para. 11 [Tab 2A]

¹³ Extracts of Trial Transcript, pp. A4 to A5, transcript lines 31-19 [Tab 4B]

¹⁴ Judgment of Court of Queen’s Bench below, para. 12 [Tab 2A]

¹⁵ Judgment of Court of Queen’s Bench below, para. 12 [Tab 2A]

¹⁶ Extracts of Trial Transcript, p. A3, transcript lines 19-31 [Tab 4B]

26. Prior to April 19, 2010:

- No steps were taken by Valard to communicate to Bird that Valard was having a problem with its Langford accounts.¹⁷
- No steps were taken by Valard to ask anyone at Bird if there was a Labour & Materials Payment Bond posted on the Project.¹⁸
- No steps were taken by Bird to post a copy of the L&M Bond at the site office.¹⁹
- No steps were taken by Bird to otherwise provide notice of the L&M Bond.²⁰
- Bird held a daily “toolbox” meeting in the site trailer office and attendance was mandatory for representatives of every subcontractor and sub-subcontractor.²¹
- At the Bird job site trailer there was a notice board that provided information for onsite personnel which included permits, WCB notices, schedules, safety information, and wildlife management information.²² Mr. Wemyss regularly looked at the notice board and saw the materials posted there, but there was no posting about the L&M Bond.²³
- Bird was aware of exactly which contractors and subcontractors were onsite on a daily basis.²⁴
- Bird was aware Valard was a sub-subcontractor to Langford starting when Valard came onsite in March 2009.²⁵
- Bird viewed the L&M Bond as being “for our own protection”.²⁶

H. Denial of Valard’s Claim: Late Notice to Surety

27. On June 14, 2010, GCNA denied Valard’s claim, citing Valard’s failure to provide notice of its claim within 120 days of Valard’s last day of work on the Project. Since Valard’s last day was May 20, 2009, the deadline for the written Notice Period under the L&M Bond was September 17, 2009.²⁷

¹⁷ Judgment of Court of Queen’s Bench below, para. 24 [Tab 2A]

¹⁸ Judgment of Court of Queen’s Bench below, para. 25 [Tab 2A]

¹⁹ Judgment of Court of Queen’s Bench below, para. 34 [Tab 2A]

²⁰ Extracts of Trial Transcript, p. A15, transcript lines 5-10 [Tab 4B]

²¹ Judgment of Court of Queen’s Bench below, para. 29 [Tab 2A]

²² Extracts of Trial Transcript, p. A2, transcript lines 20-23, p. A12, transcript lines 17-27 [Tab 4B]

²³ Extracts of Trial Transcript, p. A7, transcript lines 12-17 [Tab 4B]

²⁴ Extracts of Trial Transcript, p. A14, transcript lines 12-13 [Tab 4B]

²⁵ Judgment of Court of Queen’s Bench below, para. 30 [Tab 2A]

²⁶ Extracts of Trial Transcript, pp. A17 to A18, transcript lines 38-3 [Tab 4B]

²⁷ Judgment of Court of Queen’s Bench below, paras. 12, 13 [Tab 2A]

I. Valard Seeks Damages from Trustee

28. Valard commenced an action against Bird by filing an Amended Statement of Claim in the Alberta Court of Queen's Bench in which Valard sought damages for breach of trust.

29. The Court of Queen's Bench dismissed the action. The Court held that Bird, as trustee under the L&M Bond, did not have any obligation to protect the interests of Valard, qua beneficiary, by providing notice to Valard of the existence of the L&M Bond.

30. Rather, the Court held that Valard was obliged to inquire whether a Labour & Materials Payment Bond existed.

31. It was a factor in the decision that Valard was a large sophisticated company with five or six hundred employees in Canada and with its own surety or bonding facility.²⁸

J. Divided Court of Appeal

32. The majority of the Court of Appeal agreed with the Trial Judge and dismissed Valard's appeal. The majority held that Bird, as obligee and trustee under the L&M Bond, owed no fiduciary duty to Valard.²⁹

33. In contrast, the dissenting opinion by Justice Wakeling held that trustees, whether under a business trust or any other kind, had fiduciary obligations. There was no principled basis on which to hold this trustee to a lower standard. Therefore, in the absence of any limiting language in the L&M Bond, there was a fiduciary relationship and Bird as trustee was under a:

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.³⁰

²⁸ Judgment of Court of Queen's Bench below, para. 85 [Tab 2A]

²⁹ Reasons of Court of Appeal, paras. 19, 27 [Tab 2C]

³⁰ Dissenting Reasons of Court of Appeal below, para. 36 [Tab 2C]

PART II - STATEMENT OF ISSUES

34. This leave application raises the following issues of national and public importance:

Issue 1: Does a trustee have a duty to take reasonable steps to notify beneficiaries about the trust's existence?

Is there an onus on the trustee to try to notify the beneficiary of the existence of the trust, or is the onus on the beneficiary to make inquiries about the existence of the trust? If there is a duty, what are the guiding principles for 'reasonable steps'? What circumstances will excuse a trustee from the duty?

Issue 2: Is the trust created by the Standard Construction Document CCDC 222-2002 a trust where the trustee has no fiduciary duties and no 'duty to try to notify'?

In what circumstances will a trust be considered a 'limited' trust? Does such a 'limited' or business trust excuse the trustee from the fundamental duties? Was the majority of the Alberta Court of Appeal correct to apply the criteria in Hodgkinson v. Simms? Does this mean the trustee of a 'limited' or business trust may or may not be in a fiduciary position depending on the vulnerability of the particular beneficiary or the 'reliance' placed on the trustee?

PART III - STATEMENT OF ARGUMENT

Issue 1: Does a trustee have a duty to take reasonable steps to notify beneficiaries about the trust's existence?

35. If the trustee does nothing to notify the beneficiaries of the existence of the trust, and the beneficiaries are thereby left in the dark, then the trustee may ignore its duties and the entire purpose of the trust is lost.

36. There are only two ways in which a beneficiary can learn of the existence of a trust:

- The trustee, who accepted the role and has knowledge of the trust and the class of beneficiaries, takes reasonable steps to draw the beneficiaries' attention to the existence of the trust; or
- The intended beneficiaries happen to make inquiries to determine if there is a trust (which will not occur if the beneficiaries have no reason to believe a trust exists).

37. If neither the trustee nor the beneficiary does anything, the trust becomes meaningless – the property is lost or the trust expires.

38. In this case, a majority of the Court of Appeal found that the trustee “was not in a fiduciary relationship with” the beneficiary and the trustee did not owe a legal duty to inform the beneficiary of the existence of the L&M Bond.³¹

39. In contrast, in dissent, Justice Wakeling found that a trustee, as a fiduciary, has an obligation to “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”³². As explained by Justice Wakeling, “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.”³³

40. The test proposed to determine obligations and reasonable steps was set out as follows:

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.³⁴

41. In this case, as set out by Justice Wakeling, Bird as the trustee named in the L&M Bond, was required to take reasonable measures to make available, to a sufficiently large segment of the potential beneficiaries, information about the existence of the L&M Bond. Three methods for doing this were proposed:

- 1) A copy of the L&M Bond could have been posted at the project site office where meetings attended by contractors were regularly held;
- 2) Bird could have insisted that Langford include in its contracts with subcontractors, a provision that disclosed the existence of the L&M Bond and required all subcontractors to notify Bird in writing, acknowledging receipt of notice with respect to the existence of the L&M Bond; or

³¹ Reasons of Court of Appeal below, paras. 27 , 30 [Tab 2C]

³² Dissenting Reasons of Court of Appeal below, para. 50 [Tab 2C]

³³ Dissenting Reasons of Court of Appeal below, para. 50 [Tab 2C]

³⁴ Dissenting Reasons of Court of Appeal below, para. 50 [Tab 2C]

- 3) Bird could have demanded that Langford provide it, in a timely manner, with a list of all subcontractors that were retained to work on the project, following which Bird could have taken reasonable steps to communicate to this group the existence of the L&M Bond.

42. After noting that the cost of such measures would have been negligible, Justice Wakeling pointed out that Bird took no steps whatsoever to notify Valard of the existence of the L&M Bond. Accordingly, Justice Wakeling found that Bird failed to discharge its fiduciary obligations as trustee and was responsible for the damages that Valard, a beneficiary under the L&M Bond, suffered as a result of Bird's failure to discharge its fiduciary obligations.

43. In the end, Justice Wakeling even proposed the following solution to avoid the obligation inherently created by the L&M Bond:

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.³⁵

A. The Case Law

44. The question of whether a trustee has a duty to notify beneficiaries of the existence of a trust is a surprisingly novel one. This Court has never directly addressed the issue.

45. In 1941, the British Columbia Supreme Court stated in a trite manner there is a duty on the trustee to attempt to provide notice. In *Short Estate, Re*, the trustee of an estate did nothing to seek out one of the beneficiaries. It was only by coincidence that the beneficiary learned of the

³⁵ Dissenting Reasons of Court of Appeal below, para. 165 [Tab 2C]

trust, and by that time the estate was significantly depleted. The Court held the trustee was in breach of a fiduciary duty for failing to seek out the beneficiary:

After all, 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.³⁶

46. Fast forward to 1970. In *Dominion Bridge Co. v. Marla Construction*³⁷ the Ontario County Court stated in an unreserved oral decision that a trustee under a Labour & Material Payment Bond did not owe a duty to notify beneficiaries. This decision conflicts in principle with *Short Estate, Re*.

47. *Dominion* was recently adopted without scrutiny in the decision of *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*³⁸

48. These decisions from Ontario enable the obligee/trustee to sit back and wait to see if any beneficiary makes an inquiry. This undermines the intended purpose of a Labour & Materials Payment Bond; it reduces the exposure of the bonding company to the risk it has assumed and been paid for. These decisions foster a questionable practice and offend fundamental principles of trust law.

B. Fundamentals of Trust Law

49. The L&M Bond creates:

- a trust;
- trust property;
- a trustee; and
- a class of beneficiaries.

None of this is disputed. At trial Bird admitted “it was a trustee and accordingly had fiduciary duties”.³⁹

³⁶ *Short Estate, Re*, [1941] 1 W.W.R. 593 at para. 5 [Tab 5J]

³⁷ *Dominion Bridge Co. v. Marla Construction*, [1970] 3 O.R. 125 (Ct. Crt.) [Tab 5E]

³⁸ *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*, 2014 ONSC 918 [Tab 5D]

50. So, what obligations are placed upon the trustee?

51. There are three fundamental duties which apply to all trustees:

First, no trustee may delegate his office to others; secondly, no trustee may profit personally from his dealings with the trust property, with the beneficiaries, or as a trustee; thirdly, a trustee must act honestly and with the skill and prudence which would be expected of the reasonable man of business administering his own affairs. These might be called the “substratum” duties, to which the duties associated with the particular trust are added.⁴⁰

41. These fundamental duties form the foundation for the judicial imposition of trustee duties. With this foundation, the courts have created various specific duties and, depending on the circumstances, have placed those specific duties on trustees in order to fulfill the purpose of the given trust.

52. Most importantly, a trustee owes a fiduciary duty to the beneficiaries. Professor Waters states:

The hallmark of a trust is the fiduciary relationship which the trust creates between the trustee and the beneficiary. The whole purpose of a trustee's existence is to administer property on behalf of another, to hold it exclusively for the other's enjoyment. The express trustee is expected to put the interests of the trust and the beneficiaries first in his thinking whenever he is exercising the powers, or performing the duties of, his office. His duty is one of selfless service.⁴¹

53. In light of the fiduciary relationship which applies to all trustees, was the judge in *Re Short* correct in stating the first of many duties placed on a trustee is to let the beneficiary know of the trust?

54. In the present case, were the majority in the Court of Appeal wrong to conclude Bird was not a fiduciary *vis-a-vis* Valard? Was the majority wrong to find Bird had no obligation whatsoever to bring the trust to the attention of Valard?

³⁹ Judgment of Court of Queen's Bench below, para. 38 [Tab 2A]

⁴⁰ D. Waters, M. Gillen & L. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Carswell, 2012) at 906 [Tab 5N]

⁴¹ Waters, 4th ed., at 42 [Tab 5N]

C. The English Cases

55. On prior occasions when Canadian courts have considered this issue, they have looked to English jurisprudence.

56. In *Hawkesley v. May* a trust was created for two children. When the children came of age, the trustee did nothing to inform them of the trust. Over the ensuing years the trust property was depleted.

57. The English Court of Queen's Bench noted a trust deed was a private document of which the beneficiary would have no knowledge. The Court then concluded:

I hold, therefore, that there was a duty upon the defendants Tidy and Collins, as 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.⁴²

58. This authority was cited in argument in the 1970 *Dominion* case. The Ontario County Court stated (inaccurately) the *ratio* was that trustees had a duty to inform minor beneficiaries who are vulnerable. That is incorrect; that is not what *Hawkesley* stands for. Rather, it was minors whom the trustee did not have to notify. It was only when they became adults that the duty to notify engaged because how else would they learn of a trust (created by private document) for their benefit.

D. The Academics Try to Fill the Void

59. While there has been a dearth of jurisprudence on this issue, the academic community has provided commentary.

⁴² *Hawkesley v. May*, [1956] 1 Q.B. 304 at 322 [Tab 5G]

60. Prof. David Steele states:

The protections that equity affords the beneficiary of a trust are only meaningful if the beneficiary is advised of his or her interest and provided with information regarding the assets of the trust and the activities of the trustees.⁴³

61. While Prof. Steele notes that, in Canada, the extent of a trustee's duty to volunteer information is not as clear as one might wish, he offers the following proposition:

a trustee is under a duty to volunteer to an adult beneficiary information as to the existence of and details regarding the beneficiary's interest under the trust.⁴⁴

62. In the United Kingdom, the author Geraint Thomas writes in "Thomas on Powers" that:

Trustees are obliged to inform adult beneficiaries of the existence and terms of a trust (which will indicate the interests and rights of the beneficiaries created by the trust instrument), whether or not those beneficiaries have requested the information.⁴⁵

63. As authority for this proposition, Prof. Thomas points to cases such as *Hawkesley v. May* where the duty to notify a minor is delayed until that minor becomes an adult. In other words, it is only when the minor becomes an adult that the trustee's general duty to provide notice to the beneficiaries is engaged.⁴⁶

64. The practice of waiting until beneficiaries make inquiries runs counter to the foundational principles of the law of trusts:

Unaccountability to the beneficiaries arising from the trustees not letting them know that they are beneficiaries is inconsistent with, and repugnant to, the purposes for which the settlor transferred the trust property to the trustees or the fundamental

⁴³ David A. Steele, "The Beneficiary's Right to Know" (Paper delivered at the Law Society of Upper Canada CLE Program, Fourth Annual Estates and Trusts Forum, November 2001) [unpublished] at 1 [Tab 5K]

⁴⁴ Steele at 10 [Tab 5K]

⁴⁵ Geraint Thomas, *Thomas on Powers*, 2nd ed. (Oxford: Oxford University Press, 2012) at 639 [Tab 5P]

⁴⁶ See *Hawkesley v. May*; *Re Emmet's Estate* (1881), 17 Ch D 142; *Burrows v. Walls* (1855), 5 De GM & G 233 at 253; *Brittlebank v. Goodwin* (1868), LR 5 Eq 545 at 550 [Tabs 5G, 5F, 5B, 5A, respectively]

requirement of accountability to beneficiaries before there can be duties of trusteeship.⁴⁷

65. In the United States, George T. Bogert states:

[If] reasonable regard for the interests of the beneficiaries requires it, the trustee is under a duty to volunteer information to the beneficiary and not merely wait until the beneficiary asks for it.⁴⁸

E. Notification Required?

66. The principle extracted from these cases and commentary is basic: the law of trusts is meaningless if the beneficiary never learns of the existence of the trust. Reasonable effort by the trustee to inform the beneficiaries increases the likelihood that a beneficiary will be able to take the necessary steps to protect any interest they may have and realize the purpose of the trust. Does this not require a duty on the trustee to attempt to inform beneficiaries?

67. This fundamental concept appeared to be presumed by most courts and academics until the Court of Appeal rendered its decision in this case.

68. The New Zealand Law Commission notes:

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 the trustees, and the right of beneficiaries to request a copy of the trust deed or trust information.⁴⁹

69. Common sense presumption or not, whether a trustee has a duty to try to notify remains a grey area:

Ultimately, the extent of a trustee's duty to *volunteer* information to a beneficiary is not as clear as one might wish.⁵⁰

⁴⁷ David Hayton, "The Irreducible Core Content of Trusteeship" in A.J. Oakley, ed., *Trends in Contemporary Trust Law* (New York: Oxford University Press, 1996) at 5 [Tab 5L]

⁴⁸ George T. Bogert, *Trusts*, 6th ed (St. Paul: West Publishing Co., 1987) at 495 [Tab 5O]

⁴⁹ New Zealand Law Commission, *Review of the Law of Trusts: A Trusts Act for New Zealand* 103 (2013) at 21 [Tab 5Q]

⁵⁰ Steele at 10 [Tab 5K]

Issue 2: Is the trust created by the Standard Construction Document CCDC 222-2002 a trust where the trustee has no fiduciary duties and no 'duty to try to notify'?

70. A trustee's duty to make information available to beneficiaries is imposed by equity because of the trustee's fundamental obligations to the beneficiary: to act solely in the interest of the beneficiary when dealing with the property, to treat the beneficiary with the utmost fairness and frankness, protect the interests of the beneficiary, and to follow the standard of care and diligence of a man of ordinary prudence in managing his own affairs.

71. In short, the trustee must do what is required to advance the interests of the trust and its beneficiaries.⁵¹

72. So, the question arises: do these same fundamental requirements apply to business trusts, or are business trusts inherently different? Further, if the business trust is created for the 'limited' purpose of circumventing the third party beneficiary rule of contract, does this excuse the trustee from any fiduciary obligations?

A. Business Trusts Are Trusts

73. As business trusts are not inherently different from other types of trusts, it would seem that general trust rules should apply. As stated in "Business Applications for the Express Trust", "[i]f the trust form is selected, the general rules of trust law apply".⁵² Since the content of general trust law applies, any modification of the trustee's standard duties should be done by specific reference in the trust instrument itself.

Only One Modification in the Express Instrument

74. In this case, the trust instrument (the CCDC 222-2002 L&M Bond) expresses only one modification to the trustee duties: Bird need not take any act, action or proceeding *against the Surety* on behalf of beneficiaries. This means Bird does not have to claim against GCNA on behalf of Valard.

⁵¹ *Ontario v. Ballard Estate* (1994), 119 D.L.R. 4th 750 (Ont. Ct. Gen. Div.) at para. 9 [Tab 5I]

⁵² R. Flannigan, "Business Applications for the Express Trust", 36 Alta. L. Rev. 630 (1998) at 636 [Tab 5M]

The Conflicting Conclusions Within the Court of Appeal

75. In his dissenting judgment, Justice Wakeling states, a “trustee, whether under a business trust or any other kind of trust, is a fiduciary”.⁵³

76. In contrast, the majority of the Alberta Court of Appeal concludes this trustee was not a fiduciary.⁵⁴

77. For the majority, the trust provision in the L&M Bond created a business trust or a trust for a “limited” purpose, which meant it differed from other trusts. The majority held there was no reliance-based relationship between Bird and Valard. In other words, this particular beneficiary was not vulnerable. Valard therefore failed to meet the criteria set out in *Hodgkinson v. Simms* to establish a fiduciary relationship. Since the fiduciary obligation was absent, there could be no duty imposed on Bird to notify Valard of the L&M Bond’s existence.⁵⁵

B. What Now?

78. Was the majority of the Court of Appeal correct to find this is a trust without fiduciary duties? Or was the dissenting judgment correct to find that all trusts – business or otherwise – place fiduciary duties on the trustee?

79. If the majority was correct, what criteria must a trustee consider to determine whether they have fiduciary obligations and attendant duties such as the duty to try to notify?

80. Does the majority’s conclusion not mean beneficiaries under the same trust will be treated differently? Some will have the benefit of a fiduciary relationship with the trustee while others will not.

81. Is the trustee required to investigate the relative sophistication of each potential beneficiary in order to determine whether there is a fiduciary relationship with that particular beneficiary? Is this obligation to investigate a more onerous duty than the duty to try to notify as contemplated by Justice Wakeling?

⁵³ Dissenting Reasons of Court of Appeal below, para. 49 [Tab 2C]

⁵⁴ Judgment of Court of Appeal below, para. 27 [Tab 2C]

⁵⁵ Judgment of Court of Appeal below, para. 27 [Tab 2C]; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 [Tab 5H]

82. Currently, trustees and beneficiaries under CCDC 222-2002 Labour & Material Payment Bonds across Canada are unsure as to their obligations. Some trustees are making efforts to provide notice, while others do nothing. Guidance from this Court on the proper practice in light with the applicable trust principles would provide much sought after certainty to the industry.⁵⁶

Conclusion: Interaction of Construction and Trustee/Fiduciary Law

83. Do contractors have a duty to tell sub-subcontractors about the existence of a Labour & Material Payment Bond so that a timely claim can be made, particularly when the contractor is shown in the bond to be a trustee for the sub-subcontractor?

84. The decision of the majority of the Court of Appeal in this case side-steps and does away with the trustee obligation that contractors assume when they require that a Labour & Material Payment Bond be obtained. Guidance from this Court is required to determine the extent, if any, of the fiduciary obligation.

85. If the decision below stands and there are no fiduciary obligations, then the essence of the trust is undermined. Practically, this results in there being no incentives for contractors to notify anyone below them in the construction pyramid of the existence of a Labour & Material Payment Bond.

86. The dissenting reasons of Justice Wakeling addresses this problem in a manner that ensures the contractor – the party with knowledge of the trust – has the responsibility to ensure the sub-subcontractor is informed. This approach provides for an incremental clarification of the law of business trusts which is in line with this Court's jurisprudence on trusts and fiduciary obligations of trustees to beneficiaries.

PART IV – SUBMISSIONS ON COSTS

87. The Applicant seeks costs in the cause.

⁵⁶ Affidavit of Norm Streu [Tab 4C]

PART V – ORDER REQUESTED

88. The Applicant respectfully requests that leave to appeal be granted, with costs.

89. ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of October, 2016.



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