

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

BETWEEN:

VALARD CONSTRUCTIONS LTD.

APPLICANT
(Appellant)

- AND -

BIRD CONSTRUCTION COMPANY

RESPONDENT
(Respondent)

**RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(BIRD CONSTRUCTION COMPANY, RESPONDENT)
(Pursuant to R. 27 of the Rules of the Supreme Court of Canada)**

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RESPONDENT'S MEMORANDUM OF ARGUMENT

PART I – OVERVIEW and STATEMENT OF FACTS

A. Overview

1. The issue in this proposed appeal is whether the majority of the Alberta Court of Appeal was correct in dismissing the Applicant's appeal from the Trial Judge's decision which held that the CCDC 222-2002 labour and material payment bond ("the Bond") created a limited trust which only required the obligee ("the Respondent") to notify the Applicant of the existence of the Bond when asked.
2. The proposed appeal does not raise any question of public importance that warrants the intervention of the Supreme Court of Canada. Further, the proposed appeal does not raise novel issues regarding the law of trusts or the scope of the trustee's duties under a labour and material payment bond.
3. The factual matrix of this proposed appeal deals with a non-reliance based fiduciary relationship¹ arising in a commercial context. The parties are at arm's length. The Applicant, a "large, experienced and sophisticated contractor",² familiar with bonds and builders' liens, deliberately failed to take any reasonable and proactive steps to protect its unpaid account. The Respondent acted honestly at all material times and provided the requested information about the Bond when asked.³
4. Generally, labour and material payment bonds are a form of risk management directed at mitigating the financial risks associated with non-payment. Labour and material payment bonds require the Surety who issued the bond, to pay unpaid suppliers of labour and material in the event of the Principal's default, thereby keeping the construction project free from liens and minimizing delays.⁴

¹ Majority Reasons of Court of Appeal below, at para. 27 [Tab 2C, Leave Application]

² Majority Reasons of Court of Appeal below, at para. 19 [Tab 2C, Leave Application]

³ Majority Reasons of Court of Appeal below, at paras. 21-22 [Tab 2C, Leave Application]

⁴ Kenneth W. Scott, *Scott and Reynolds on Surety Bonds*, loose-leaf (2015-Rel 2) (Toronto: Carswell, 2015) at p. 11-10.8 [Tab 3E]

5. The Bond which is the subject matter of this proposed appeal, is a “private bond” that is sometimes required for certain construction projects. It is by no means mandatory for all construction projects. The Bond is also different than the labour and material payment bonds used on federal government projects⁵. The Bond has certain unique characteristics which distinguish it from a business or reliance based fiduciary trust.
6. The law dealing with a trustee’s obligations under a labour and material payment bond is well-established. Specifically, the law regarding whether an obligee is required to notify a potential claimant of the existence of a labour and material payment bond, even before the potential claimant inquires about its existence, has been clear for 45 years.⁶

B. Statement of Facts

7. The Respondent does not generally dispute the assertion of facts set out in paragraphs 12-27 of the Applicant’s Memorandum of Argument. However, the Respondent relies on additional relevant facts.
8. The Applicant is a large sophisticated construction company with between 500 to 600 employees. The Applicant is active across Canada and has its own surety and bonding facility.⁷
9. The Applicant’s project manager, namely, John Cameron Wemyss (“Wemyss”), was aware at all relevant times of how labour and material payment bonds worked; he had prior experience with labour and material payment bonds; he was aware of the terms and notice provisions in labour and material payment bonds; and he had previously made a claim on such a bond.⁸

⁵ Kenneth W. Scott, *Scott and Reynolds on Surety Bonds*, loose-leaf (2015-Rel 2) (Toronto: Carswell, 2015) at p. 11-12 to 11-14 [Tab 3E]

⁶ Judgment of Court of Queen’s Bench below, at para. 89 [Tab 2A, Leave Application]

⁷ Respondent’s Extract of Key Evidence, p. R1, Trial Transcript p. 69, lines 9-33 [Tab 2A]; Judgment of Court of Queen’s Bench below, at para. 85 [Tab 2A, Leave Application]

⁸ Judgment of Court of Queen’s Bench below, at para. 22 [Tab 2A, Leave Application]; Applicant’s Extract of Key Evidence, p. A1, transcript lines 30-37 [Tab 4B, Leave Application]; Respondent’s Extract of Key Evidence, p. R2-R3, Trial Transcript p. 69, line 41 and p. 70, lines 1-6 [Tab 2]

10. During his management of the Applicant's outstanding account with Langford, Wemyss failed to take certain reasonable and prudent proactive steps that would have protected the Applicant's account, including, but not limited to the following:

- a. Wemyss chose not to file a builders' lien in order to avoid "rocking the boat".⁹
- b. Wemyss failed to require Langford to complete a credit application, nor did he request details from Langford about its contract with the Respondent.¹⁰
- c. Wemyss never contacted the Respondent regarding issues with Langford's account and didn't escalate the dispute to the Respondent or Suncor because he didn't want to "rock the boat".¹¹
- d. Wemyss never told the Respondent that the Applicant was having a problem with its outstanding Langford account and didn't ask if there was a bond until April 19, 2010.¹²
- e. Wemyss failed to request a copy of the prime contract between the Respondent and Suncor, or a copy of the contract between the Respondent and Langford and he failed to ask whether or not payment security had been provided.¹³
- f. Wemyss was not prevented in any way from asking the Respondent about its contract with Suncor or its subcontract with Langford.¹⁴
- g. Wemyss never sent to the Respondent any of the Applicant's time and material sheets or invoices, nor did he advise the Respondent of the magnitude of the Applicant's outstanding account with Langford.¹⁵

⁹ Judgment of Court of Queen's Bench below, at para. 24 [Tab 2A, Leave Application]

¹⁰ Judgment of Court of Queen's Bench below, at para. 23 [Tab 2A, Leave Application]

¹¹ Applicants Extract of Key Evidence, p. A3, transcript lines 4-17 [Tab 4B, Leave Application]

¹² Judgment of Court of Queen's Bench below, at para. 25 [Tab 2A, Leave Application]

¹³ Respondent's Extract of Key Evidence, p. R4, Trial Transcript p. 44, lines 1-9 [Tab 2]

¹⁴ Respondent's Extract of Key Evidence, p. R5, Trial Transcript p. 71, lines 3-29 [Tab 2]

¹⁵ Respondent's Extract of Key Evidence, p. R7, Trial Transcript p. 75, lines 16-28; p. R8, Trial Transcript p. 87, lines 23-31; p. R9, Trial Transcript, p. 74, lines 23-32 [Tab 2]

- h. Wemyss was under internal pressure since 2009 due to the outstanding account owing by Langford and yet, did not take any steps to inform the Respondent and/or Suncor. He instead, did not want to “rock the boat”.¹⁶

11. The Applicant does not dispute the fact that it had the means to legally compel the Respondent to provide information about the existence of a bond under section 33 of the *Alberta Builders' Lien Act*.¹⁷
12. The Respondent only requires that a sub-contractor obtain a labour and material payment bond when the sub-contract amount is over \$100,000.00.¹⁸
13. Contrary to paragraph 17 of the Applicant's Memorandum of Argument, the Respondent did not sign the Bond as obligee/trustee.

C. The New Affidavit Evidence

14. As a preliminary matter, the Applicant has introduced new affidavit evidence that was not brought before the courts below.
15. In particular, the Applicant has introduced the Affidavit of Norm Streu, who, according to the Affidavit, is a businessman purporting to give expert opinion as to the state of affairs in the Canadian construction industry in respect of disclosure practices for labour and material payment bonds.
16. Pursuant to section 62(3) of the *Supreme Court Act*, RSC 1985, c S-26 (the “Act”) and rules 3 and 47 of the *Rules of the Supreme Court of Canada*, SOR/2002-156 (the “Rules”), and as required by these provisions, the Applicant did not bring a motion before this Court or a judge to admit new evidence.
17. There is no proper basis for the introduction of this new affidavit evidence. This is mainly opinion evidence to support counsel's leave argument that there is confusion in the

¹⁶ Respondent's Extract of Key Evidence, p. R10, Trial Transcript p. 78, lines 23-35; p. R11, Trial Transcript, p. 79, lines 1-21; p. R12-R16; P. R17, Trial Transcript p. 81, lines 1-25; p. R18, Trial Transcript p. 83, lines 7-10 [Tab 2]

¹⁷ Majority Reasons of Court of Appeal below, at para. 26 [Tab 2C, Leave Application]

¹⁸ Judgment of Court of Queen's Bench below, at para. 33 [Tab 2A, Leave Application]

construction industry. It should not be admitted or relied on by this Court in its determination of the proposed appeal as it exceeds the nature and scope of such affidavits under Rule 25.

18. Furthermore, this Court, as it stated in *Aecon Buildings v. Stephenson Engineering Ltd.*, 2011 SCC 33, held that the question of whether a proposed appeal raises an issue of public importance, within the meaning of s. 43 of the *Act*, is a matter for the Court to determine and not a matter on which affidavit evidence is helpful.
19. Lastly, to the extent there are new facts in the Affidavit of Norm Streu, unaccompanied by any motion to adduce new evidence, the Respondent submits such facts are either not relevant or unreliable for the following reasons:
 - a. Generally, the Affidavit is replete with bald assertions lacking in any specificity;
 - b. For example, in paragraph 8 of the Affidavit, there is no evidence to support the assertion that there are some trustees who are making efforts to disclose the existence of labour and material payment bonds and there are some who are not;
 - c. Further, the identity of the “trustees” referenced in paragraph 8 of the Affidavit is not disclosed;
 - d. There is no evidence in which sector or region of the Canadian construction industry this alleged uncertainty lies;
 - e. Even if this uncertainty is accepted as existing, and the Respondent does not accept it, there is no causal connection between this uncertainty and any actual harm caused to the beneficiaries/claimants under the labour and material payment bonds; and
 - f. As per paragraph 11 of the Affidavit, the content therein appears to represent the views and experience of Mr. Streu solely rather than the views and experiences of a broader representative cross section of the Canadian construction industry.

D. The Courts Below

20. The Trial Judge made the following important factual determinations:

- a. The sub-contract between Langford and the Respondent required Langford to obtain and deliver a labour and material payment bond for the Respondent's own protection.¹⁹
 - b. The Bond expressly states that the obligee was not required to take any act against the surety on behalf of the claimants to enforce the provisions of the bond.²⁰
 - c. The Applicant is a large sophisticated company with five or six hundred employees in Canada, which has its own surety or bonding company.²¹
 - d. Nothing prevented Wemyss from asking whether a bond existed much earlier and well within the 120 day notice period, as the Applicant had already encountered problems with invoices rendered to Langford at the time it left the project on May 20, 2009.²²
 - e. The Respondent at all material times acted honestly and had no knowledge of the fact that the Applicant was a claimant who had not been paid as provided for under the contract with Langford, the Principal. On April 19, 2010, and upon being asked for the first time by the Applicant about the existence of the Bond, the Respondent immediately provided the Applicant with the necessary information.²³
21. The Trial Judge considered the issue of whether an obligee/trustee under a labour and material payment bond had a positive duty to provide notice to potential claimants of the existence of the labour and material payment bond. In answering this question in the negative, the Trial Judge concluded that the trust wording in the Bond served a limited purpose, namely, to "address the difficulties that the identities of the claimants cannot be

¹⁹ Judgment of Court of Queen's Bench below, at para. 79 [Tab 2A, Leave Application]

²⁰ Judgment of Court of Queen's Bench below, at para. 79 [Tab 2A, Leave Application]

²¹ Judgment of Court of Queen's Bench below, at para. 85 [Tab 2A, Leave Application]

²² Judgment of Court of Queen's Bench below, at para. 86 [Tab 2A, Leave Application]

²³ Judgment of Court of Queen's Bench below, at para. 87 [Tab 2A, Leave Application]

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.”²⁴

22. The majority of the Court of Appeal noted critical findings of fact that were made by the Trial Judge:
- a. It was not significant that the Respondent knew in August of 2009 that the Applicant wanted additional money from Langford because the Respondent was not made aware until April 19, 2010 that the Applicant had not been paid; and
 - b. Having heard nothing further from Langford, the Respondent was entitled to assume that Langford and the Applicant had worked out their differences.²⁵
23. The majority of the Court of Appeal agreed with the Trial Judge and dismissed the Applicant’s appeal, holding that the Respondent, as obligee under the Bond, did not owe a legal duty to inform the Applicant of the existence of the Bond until such time as the Respondent was specifically asked about the existence of the Bond by the Applicant.
24. The majority of the Court of Appeal accepted the case law cited by the Respondent as sound in law and principle.
25. Furthermore, the majority of the Court of Appeal distinguished the trust caselaw relied on by the Applicant on the grounds that the Applicant and the Respondent were not in a reliance-based relationship. The Applicant was not akin to an infant beneficiary who remained ignorant of a trust until informed otherwise. Rather, both the Trial Judge and the majority of the Court of Appeal noted that the Applicant remained ignorant of the existence of the Bond because the Applicant “elected not to make inquiries”.²⁶

²⁴ Judgment of Court of Queen’s Bench below, at paras. 79-80 [Tab 2A, Leave Application]

²⁵ Majority Reasons of Court of Appeal below, at para. 12 [Tab 2C, Leave Application]

²⁶ Majority Reasons of Court of Appeal below, at para. 26 [Tab 2C, Leave Application]

PART II – STATEMENT OF ISSUES

26. The Applicant advances two issues in paragraph 34 of its Memorandum of Argument. Each will be addressed by the Respondent.
27. However, the true issue before this Court is not whether broader business trust principles dealing with a trustee's notification obligations apply to the Bond.
28. The true issue is whether the narrow limited trust created by the Bond, which trust has a limited purpose, compels the trustee to take a positive step, namely to seek out potential beneficiaries under the Bond and to notify them of the existence of the Bond even before being asked.

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?

29. There is a widely held conclusion that, while trustees must always respond to a request by a beneficiary, there is no general obligation to seek out and supply knowledge of the trust or its terms to beneficiaries.²⁷
30. This principle is also reflected in the decisions of *Dominion Bridge Co. v. Marla Construction and Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*
31. However, the Applicant submits, in paragraph 46 of its Memorandum of Argument, that these decisions conflict with the decision in *Short Estate, Re*.
32. In order to properly consider whether the decision of the *Short Estate, Re* applies to the proposed appeal before this Court, and whether the *Short Estate, Re* case and other caselaw that deals with testamentary trusts, assist this Court in determining the extent of the trustee's obligations under a trust document, this Court has held that "...the precise legal and equitable duties that the law will enforce in any given relationship are tailored to the

²⁷ D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters Law of Trusts in Canada* (4th ed.) (2012) at p. 1126 [Tab 3D]

legal and practical incidents of the particular relationship...[and] that there is no substitute in this branch of the law for a meticulous examination of the facts”.²⁸ In other words, the duties of a trustee and the scope of those duties must be determined in light of a specific factual context.

33. Firstly, the proposed appeal involves an arm’s length commercial relationship that is characterized by self-interest rather than a fiduciary or reliance based trust relationship.²⁹ By contrast, *Short Estate, Re*, involves a specific testamentary trust for a specifically named infant beneficiary.
34. Secondly, the Supreme Court of Canada and the majority of the Alberta Court of Appeal have held that the trust created by the Bond is limited in its purpose—to avoid the third party beneficiary rule.³⁰ By contrast, the purpose of the trust in *Short Estate, Re* was to provide for the maintenance of the infant beneficiary until she attained the age of 21 years.
35. These are critical factual differences which are sufficient to distinguish the *Short Estate, Re* case from the issues raised by the proposed appeal.
36. Further, as a corollary to the limited purpose of the trust in the Bond, the trustee’s obligations are also limited. Specifically, this limited scope only requires the trustee to provide information about the existence of the trust when asked. This limited scope of the trustee’s obligations is well settled law.³¹ Further it is an important and prudent practice, in the construction industry, for potential claimants to make a request as to the existence of a labour and material payment bond.³²
37. This passive obligation on the part of a trustee, to only respond when asked, is further reflected in the caselaw which holds that a trustee does not have an independent proactive

²⁸ *Hodgkinson v. Simms*, [1994] 3 SCR 377 at para. 37 (“*Hodgkinson*”) [Tab 5H, Leave Application]

²⁹ *Hodgkinson* at para. 40 [Tab 5H, Leave Application]; Majority Reasons of Court of Appeal below, at para. 27 [Tab 2C, Leave Application]

³⁰ Majority Reasons of Court of Appeal below, at para. 14 [Tab 2C, Leave Application]; *Johns-Manville Canada Inc v John Carlo Ltd*, 1983 CanLII 52 (SCC), [1983] 1 SCR 513 [Tab 3B]

³¹ *Dominion Bridge Co v Marla Construction Co*, 1970 CanLII 274 (ONSC) (“*Dominion*”) [Tab 5E, Leave Application]; *Dolvin Mechanical Contractors Ltd v Trisura Guaranty Co*, 2014 ONSC 918 (CanLII) (“*Dolvin*”) [Tab 5D, Leave Application]

³² Kenneth W. Scott, *Scott and Reynolds on Surety Bonds, loose-leaf (2015-Rel 2)* (Toronto: Carswell, 2015) at p. 11-10.8- 11-10.9 [Tab 3E]

obligation to provide details of the content of a labour and material payment bond to a potential claimant.³³

38. Fourthly, there are certain aspects of the Bond, and the relationship matrix created by the Bond, which differentiate the Bond from other trust documents. These aspects include:

- a. At the time that the Principal requests a labour and material payment bond, the Surety conducts an underwriting exercise of the Principal;
- b. In order to secure its position, the Surety will typically require an indemnity agreement with the Principal which protects the Surety in the event that any payments are made by the Surety under a labour and material payment bond;
- c. As a precondition to any payment by the Surety under a labour and material payment bond, the Principal must have failed to pay a Claimant as per the terms of the contract between the Claimant and the Principal;
- d. A Claimant has no absolute entitlement to be paid under a labour and material payment bond as any claim is subject to compliance with the notice requirements in the labour and material payment bond and the claim is subject to investigation and analysis by the Surety;
- e. If the Surety makes a payment to a claimant, the Surety can be subrogated to the Claimant's claim; and
- f. The Trustee under the labour and material payment bond is not required to take any steps, on behalf of the Claimant, to commence an action against the Surety.³⁴

39. All of these aspects make a labour and material payment bond very different than a business or testamentary trust. As a result, broader trust principles should not apply to the determination of a trustee's obligations and the scope of those obligations under a labour and material payment bond.

40. The majority of the Alberta Court of Appeal came to its conclusion, regarding the non-applicability of broader trustee principles, by examining existing tools/remedies available to

³³ *Ford Glass Ltd. v. R* 1983 CarswellNat 97 [Tab 3A]

³⁴ Canadian Construction Documents Committee, *A Guide to Construction Surety Bonds*, CCDC 22 – 2002 at p. 6-7, and 18-19 [Tab 3C]; See also Kenneth W. Scott, *Scott and Reynolds on Surety Bonds, loose-leaf (2015-Rel 2)* (Toronto: Carswell, 2015) at p. 6-34.8 [Tab 3E]

a beneficiary/claimant. The majority of the Alberta Court of Appeal noted that there is a reasonable expectation that a potential beneficiary/claimant under a labour and material payment bond would avail itself of statutory remedies that would assist any potential beneficiary/claimant to easily discover the existence of a labour and material payment bond.

41. The majority of the Alberta Court of Appeal declined to impose proactive disclosure obligations on a trustee where statutory remedies were available. In this regard, after citing the *Dominion* and *Dolvin* decisions with approval in paragraphs 23 to 25, the majority of the Alberta Court of Appeal stated:

[26] The Applicant 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 Applicant'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 Applicant was aware of the possibility that such a bond may exist, wholly distinguishes the Applicant'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 Applicant remained ignorant of the existence of its entitlement to claim under this specific labour and material payment bond because the Applicant 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 Applicant did.³⁵

(emphasis added)

42. Statutory tools/remedies under s. 33 of Alberta's *Builders' Lien Act* do not exist in the context of business or testamentary trusts. Therefore, it understandable that a trustee, in scenarios dealing with business or testamentary trusts, would have different obligations than a trustee under a labour and material payment bond.
43. Construction lien legislation across Canada contains similar provisions to s. 33 of Alberta's *Builders' Lien Act*.³⁶ In all instances, a potential claimant under the labour and material

³⁵ Majority Reasons at para. 26 [Tab 2C, Leave Application]

³⁶ Alberta *Builders' Lien Act*, RSA 2000, c B-7 s. 33(1); British Columbia *Builders' Lien Act*, SCB 1997, c 45 s. 41(1); Manitoba *Builders' Lien Act*, CCSM c B91 s. 58(1); New Brunswick *Mechanics' Lien Act*, RSNB 1973, c M-

payment bond bears the onus of requesting such information. Imposing a common law proactive obligation to inform would usurp the clear intent of the Provincial Legislatures that enacted lien legislation.

44. Furthermore, certain provincial statutes that apply to the construction industry do in fact require certain documents to be posted. For example, section 19 of the Alberta *Builders' Lien Act*, RSA 2000, c B-7 requires a certificate of substantial performance to be posted on the job site.³⁷ However, there is no requirement to post a labour and material payment bond on the job site. Similarly, the Alberta *Public Works Act*, RSA 2000, c P-46 does in fact require a contractor to display at the public work job site, a copy of a labour and material payment bond.³⁸ However, the project at issue in this proposed appeal is not a "public works" project.
45. The separate and distinct treatment of notification/posting requirements under the Alberta *Builders' Lien Act* and the *Public Works Act* evidence clear legislative intent. To impose an obligation on a trustee under a labour and material payment bond to post a labour and material payment bond on a project site would usurp legislative intent.
46. If any of Mr. Justice Wakeling's measures raised in his dissenting decision, as further described in paragraphs 41 and 43 of the Applicant's Memorandum of Argument, were to be implemented (e.g. imposing contractual disclosure requirements; disclosure of a list of the Principal's sub-contractors to the Trustee; changing the wording of the labour and material payment bond), all of these would represent an unprecedented incursion into private contractual arrangements.
47. The current approach, which respects the legislated protection of trades and suppliers without unduly encroaching on private contractual relations in the construction pyramid, simply relies on clear triggering events that alert the trustee to the need to disclose the existence of the labour and material payment bond to a beneficiary/claimant. The clear triggering event could be a specific inquiry about the existence of a bond, or a formal demand under applicable lien legislation, or a formal notice of an unpaid account sent to the

6 s. 32(1); Nova Scotia *Builders' Lien Act*, RSNS 1989, c 277 s. 32; Ontario *Construction Lien Act*, RSO 1990, c C.30 s. 39(1); Prince Edward Island *Mechanic's Lien Act*, RSPEI, 1988, c M-4 s. 32(5); Saskatchewan's *The Builders' Lien Act*, SS 1984-85-86, c B-7.1 s. 82(1)

³⁷ *Builders' Lien Act*, RSA 2000, c B-7 s. 19

³⁸ *Public Works Act*, RSA 2000, c P-46 s. 17(1)

trustee. All of these triggering events are clear, logical, practical and consistent with the realities of the construction industry. As was observed by the Trial Judge "...if you never ask you never know."³⁹

48. By contrast, the imposition of any of the suggestions made by Mr. Justice Wakeling, raised in his dissenting decision, would add unnecessary uncertainty and inefficiency in contractual relations and undoubtedly attract recurring litigation claims by those who have failed to pursue timely lien or trust claims or by those who have failed to avail themselves of other statutory remedies including the right to information.

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"?

49. The trust created by the Bond is not a traditional reliance based trust. Rather, the trust is a limited trust designed to allow the beneficiary to be able to claim under the Bond when it would not otherwise be able to due to the operation of the third party beneficiary rule.

50. Both the Trial Judge and the majority at the Alberta Court of Appeal recognized this critical distinguishing characteristic of the Bond which exempted the Bond from the application of broader reliance based trust principles.

51. The Trial Judge found:

[56] In order to avoid the application of the third party beneficiary rule, the standard bond wording provided, and still provides, that the obligee is "trustee" for the benefit of all beneficiaries/claimants. Significantly, the bond expressly states that the obligee is not obliged to do or take any act, action or proceeding against the surety on behalf of any of the claimants to enforce the provisions of the bond. It provides, however, that claimants may use the name of the obligee to sue on and enforce the provisions of the bond.

[57] The express negation of any requirement on the part of the trustee to take action on behalf of the beneficiaries, combined with the ability of claimants to sue in the name of the trustee support the conclusion that the trustee wording is used in the Bond in order to avoid the obstacle raised by the third party beneficiary rule.⁴⁰

³⁹ Judgment of Court of Queen's Bench below, at para. 86 [Tab 2A, Leave Application]

⁴⁰ Judgment of Court of Queen's Bench below, at paras. 56-57 [Tab 2A, Leave Application]

52. The majority of the Alberta Court of Appeal held:

[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 CanLII 52 (SCC), [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 17.⁴¹

53. At paragraphs 23-25, the majority of the Alberta Court of Appeal also held:

[23] Canadian courts have rejected the Applicant'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 CanLII 274 (ONSC), [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 (CanLII), 2014 CarswellOnt 4708, recently applied *Dominion*, in a case that is factually analogous to this appeal.⁴²

⁴¹ Majority Reasons of Court of Appeal below, at paras. 14-15 [Tab 2C, Leave Application]

⁴² Majority Reasons of Court of Appeal below, at paras. 23-25 [Tab 2C, Leave Application]

54. *Dominion* and *Dolvin* dealt with facts and issues virtually identical to those raised by the Applicant in the proposed appeal. These decisions remain good law.
55. In *Dominion*, the Court expressly rejected the argument that the Trustee under a labour and material payment bond had a duty to seek out potential claimants and notify them of the existence of the bond. The Court did however find that the Trustee was required to provide the information when asked.
56. *Dominion* was adopted and relied upon in *Dolvin*. In *Dolvin*, the Court expressly rejected the argument that the Trustee owed a claimant a duty to notify it of the existence of a labour and material payment bond before being asked.⁴³
57. Considering the limited trust that arises by virtue of the Bond and the purpose of the Bond, the decisions in both *Dominion* and *Dolvin* are sensible, practical and workable. They provide clear guidance to the industry.
58. To treat this limited trust in the same fashion as all other business and testamentary trust and to impose broader trust obligations only creates confusion where there is none. Rather than providing guidance for the construction industry, the imposition of broader trust obligations would leave a trustees asking the following questions, as were raised by the Court in *Dominion*:
- a. When does the duty arise?
 - b. At what point in time?
 - c. Must [the Obligee] embark upon inquiries?
 - d. Who were the labourers?
 - e. Who were the creditors?
 - f. Who were the suppliers?
 - g. Must [the Obligee] seek out the creditors and suppliers?⁴⁴

⁴³ *Dolvin* at para. 62 [Tab 3D, Leave Application]

⁴⁴ *Dominion* at para. 20 [Tab 3E, Leave Application]

CONCLUSION

59. The law in relation to a trustee's obligation to disclose the existence of a labour and material payment bond is clear. The trust is a limited one with a limited purpose. Accordingly, the trustee is obliged to provide information only when asked.
60. There have been only three cases in 45 years that have involved similar facts and virtually identical arguments. The decisions in these three cases come to the same conclusions regarding a trustee's obligations under a bond. This consistency reflects clarity in the law and in the industry. There is no confusion.
61. Any changes to the law, as suggested by the Applicant, would alter contractual relations, would impose greater obligations on all parties in the administration of a construction contract, and would alter the wording of labour and material payment bonds. These are not incremental changes. Rather, these changes would lead to unnecessary confusion and uncertainty in the construction industry.
62. Lastly, any changes, as suggested by the Applicant, as they relate to a trustee's obligation to post a bond, would directly undermine the clear legislative intent of builders'/construction lien statutes.

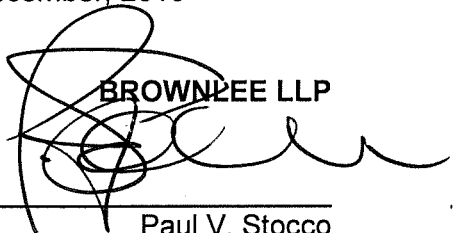
PART IV – SUBMISSIONS ON COSTS

63. The Respondent submits that the within proposed appeal does not address any issue of public or national importance which warrants consideration by this Court and, as such, that costs of this application should be paid by the Applicant.

PART V – ORDER REQUESTED

64. The Respondent requests that the Application for Leave to Appeal be denied, with costs to the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of December, 2016


BROWNEE LLP

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PART VI — TABLE OF AUTHORITIES

TAB

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