

**SUPREME COURT OF CANADA**

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| **Citation:** Valard Construction Ltd.*v.*Bird Construction Co., 2018 SCC 8, [2018] 1 S.C.R. 224 | **Appeal Heard:** November 7, 2017  **Judgment Rendered:** February 15, 2018  **Docket:** 37272 |

Between:

**Valard Construction Ltd.**

Appellant

and

**Bird Construction Company**

Respondent

- and -

**Surety Association of Canada**

Intervener

**Coram:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Rowe JJ.

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| **Reasons for Judgment:**  (paras. 1 to 32) | Brown J. (McLachlin C.J. and Abella, Moldaver and Rowe JJ. concurring) |

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| **Reasons Concurring in the Result:**  (paras. 33 to 41) | Côté J. |

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| **Dissenting reasons:**  (paras. 42 to 72) | Karakatsanis J. |

Valard Construction Ltd. *v.* Bird Construction Co., 2018 SCC 8, [2018] 1 S.C.R. 224

Valard Construction Ltd. Appellant

*v.*

Bird Construction Company Respondent

and

Surety Association of Canada Intervener

**Indexed as:** Valard Construction Ltd. ***v.*** Bird Construction Co.

2018 SCC 8

File No.: 37272.

2017: November 7; 2018: February 15.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown and Rowe JJ.

on appeal from the court of appeal for alberta

*Trusts — Fiduciary duty — Bonds — Whether trustee of trust contained in labour and material payment bond owes duty to disclose existence of bond to potential beneficiaries of trust — If duty is owed, whether conduct of trustee discharged it.*

Bird was a general contractor for a construction project in the oilsands. Bird subcontracted with Langford and required Langford to obtain a labour and material payment bond naming Bird as trustee. The bond allows for a provider of work who has not received payment from Langford to sue a company acting as a surety for that unpaid sum, subject to a condition that it give notice of its claim within 120 days of its last provision of work. Langford contracted with Valard to provide work on the project. Langford became insolvent and some of Valard’s invoices went unpaid. Valard was never notified of the bond’s existence. After the 120-day notice period had expired, it asked Bird whether a bond had been obtained. Bird replied affirmatively and Valard filed a claim. The surety denied the claim. Valard sued Bird for breach of trust. The trial judge dismissed Valard’s action. A majority of the Court of Appeal dismissed Valard’s appeal.

*Held* (Karakatsanis J. dissenting): The appeal should be allowed and the matter of quantum of damages should be remitted to the trial judge for adjudication.

*Per* McLachlin C.J. and Abella, Moldaver, Brown and Rowe JJ.: Wherever a beneficiary would be unreasonably disadvantaged not to be informed of a trust’s existence, the trustee’s fiduciary duty includes an obligation to disclose the existence of the trust. In the circumstances of this appeal, where the evidence was that labour and material payment bonds were uncommon in the pertinent sector and where the trustee’s failure to disclose the existence of the trust prevented the beneficiary from making a claim within the prescribed notice period, that duty was breached. The bond created an express trust. The beneficiary of a trust has a right to hold the trustee to account for its administration of the trust property and to enforce the terms of the trust. In some cases, the beneficiary’s right to enforce the trust can be meaningfully exercised only if he or she is first informed of the trust’s existence. In general, wherever it could be said to be to the unreasonable disadvantage of the beneficiary not to be informed of the trust’s existence, the trustee’s fiduciary duty includes an obligation to disclose the existence of the trust. Whether a particular disadvantage is unreasonable must be considered in light of the nature and terms of the trust and the social or business environment in which it operates, and in light of the beneficiary’s entitlement thereunder. Valard was unreasonably disadvantaged by Bird’s failure to inform it of the trust’s existence. The expiry of the notice period before Valard learned of the bond effectively prevented it from enforcing the trust.

The standard to be met by a trustee in respect of the duty to disclose the trust’s existence is that of honesty, and reasonable skill and prudence. The specific demands of that standard are informed by the facts and circumstances of which the trustee ought reasonably to have known at the material time. What a trustee must do to discharge it is highly sensitive to the context in which the particular trust relationship arises. An honest, reasonably skillful and prudent trustee would have known that labour and material payment bonds were uncommon on private oilsands construction projects. Conversely, Bird could not have known of all potential beneficiaries when the bond was procured. Its obligation extended only to taking reasonable steps to notify potential beneficiaries of the trust. Bird had an on-site trailer in which notices were normally posted and where Valard was required to attend daily meetings. It could have posted a notice of the bond in its trailer. Instead, it did nothing. Something more than nothing was required. Bird therefore committed a breach of trust.

*Per* CôtéJ.: In general, there is no proactive duty on the part of a trustee to take steps to inform potential claimants of a bond’s existence, although a trustee does have an equitable obligation to accurately answer all requests from potential claimants for information pertaining to the existence and particulars of any labour and materials payment bond.

On the facts of the present case,Bird had a duty to inform Valard of the bond’s existence when it was first notified by email of problems Valard was experiencing in obtaining payment from Langford. That email, from Langford and copied to Valard, ended with a clear request for guidance from Bird. At this point, Bird was alive to the very real possibility of Valard not being paid. As one of the recipients of this email (and part of this conversation), Valard was entitled to expect that, if a bond were available, its existence would have been disclosed by Bird at this time.

Rather than disclosing the existence of the bond, however, Bird instead removed Valard from the email chain and replied directly to Langford. Bird therefore breached the equitable duty it owed to Valard. Had Valard been informed of the available bond, it would still have been within the 120-day window within which to make a claim against the surety.

*Per* Karakatsanis J. (dissenting): Bird was not under an obligation to inform potential claimants of the existence of the bond. For over 45 years, labour and material payment bonds have been commonly used in the construction industry. The industry understanding and practice is that claimants are expected to enquire as to the existence of a bond. General trust law principles do not imply the obligation to notify potential claimants in this commercial context.

Trust language is used in the labour and material bond to avoid the third-party beneficiary rule. In light of this, the bond itself narrowly defines the obligations placed on the trustee. Bird is not obliged to do or take any act, action or proceeding against the surety to enforce the bond. Bird is under an obligation to maintain and deliver the trust property, the right to claim on the bond, but this does not necessarily imply the obligation to provide notice to potential claimants. Given the narrow purpose and scope of the trust, the limited obligations of the trustee, and industry use of these trusts, it is sufficient if the trustee responds to any enquiries about a bond.

The obligations imposed upon a trustee are first and foremost determined by the terms of the trust instrument itself, but can be supplemented or modified by general principles of equity. Equity imposes different obligations depending on the particular context. In determining the duties of a trustee, it is important to consider the nature and terms of the trust and the social or business environment in which the trust operates. Given the narrow purpose of the trust created here, and the practice in the construction industry, Bird was entitled to assume that such bonds were sufficiently known in the industry and it was therefore under no duty to determine whether potential claimants required notice and how to provide reasonable notice.

The chambers judge did not make a finding that labour and material payment bonds were uncommon in the oilsands. Further, imposing different obligations depending on the particular sector or geographic region within the construction industry introduces uncertainty and instability where there was none.

**Cases Cited**

By Brown J.

**Referred to:** *Dominion Bridge Co. v. Marla Construction Co.*, [1970] 3 O.R. 125; *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*, [2014] I.L.R. I‑5595; *Beaudette Estate, Re*, 1998 ABQB 689, 229 A.R. 259; *In re**Londonderry’s Settlement*, [1965] 1 Ch. 918; *Schmidt v. Rosewood Trust Ltd.*, [2003] UKPC 26, [2003] 2 A.C. 709; *Breakspear v. Ackland*, [2008] EWHC 220, [2009] Ch. 32; *Ballard Estate (Re)* (1994), 20 O.R. (3d) 350; *Hawkesley v. May*, [1956] 1 Q.B. 304; *Brittlebank v. Goodwin* (1868), L.R. 5 Eq. 545; *In re Short Estate*, [1941] 1 W.W.R. 593; *Hamar v. The Pensions Ombudsman*, [1996] IDS P.L.R. 1; *Segelov v. Ernst & Young Services Pty. Ltd.*, [2015] NSWCA 156, 89 N.S.W.L.R. 431; *Citadel General Assurance Co. v. Johns‑Manville Canada Inc.*, [1983] 1 S.C.R. 513; *Ironside v. Smith*, 1998 ABCA 366, 223 A.R. 379; *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302; *In re Manisty’s Settlement*,[1974] 1 Ch. 17; *Hartigan Nominees Pty. Ltd. v. Rydge* (1992), 29 N.S.W.L.R. 405; *In re Baden’s Deed Trusts (No. 2)*, [1973] 1 Ch. 9.

By Karakatsanis J. (dissenting)

*Dominion Bridge Co. v. Marla Construction Co.*, [1970] 3 O.R. 125; *Tobin Tractor (1957) Ltd. v. Western Surety Co.* (1963), 40 D.L.R. (2d) 231; *Citadel General Assurance Co. v. Johns‑Manville Canada Inc.*, [1983] 1 S.C.R. 513; *Harris Steel Ltd. v. Alta Surety Co.* (1993), 119 N.S.R. (2d) 61; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Segelov v. Ernst & Young Services Pty. Ltd.*, [2015] NSWCA 156, 89 N.S.W.L.R. 431; *Hawkesley v. May*, [1956] 1 Q.B. 304; *Brittlebank v. Goodwin* (1868), L.R. 5 Eq. 545; *In re Short Estate*, [1941] 1 W.W.R. 593; *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*, 2014 ONSC 918, 36 C.L.R. (4th) 126.

**Statutes and Regulations Cited**

*Builders’ Lien Act*, R.S.A. 2000, c. B‑7, s. 33.

*Construction Lien Act*, R.S.O. 1990, c. C.30, s. 69(1).

*Financial Administration Act*, R.S.C. 1985, c. F‑11.

*Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 48.

*Public Works Act*, R.S.A. 2000, c. P‑46, s. 17.

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APPEAL from a judgment of the Alberta Court of Appeal (Rowbotham, Wakeling and Schutz JJ.A.), 2016 ABCA 249, [2017] 2 W.W.R. 46, 57 C.L.R. (4th) 171, 42 Alta. L.R. (6th) 223, [2016] A.J. No. 859 (QL), 2016 CarswellAlta 1584 (WL Can.), setting aside the decision of Verville J., 2015 ABQB 141, 41 C.L.R. (4th) 51, [2015] A.J. No. 237 (QL), 2015 CarswellAlta 342 (WL Can.). Appeal allowed, Karakatsanis J. dissenting.

Mike Preston, Chris Moore and Chris Armstrong, for the appellant.

Paul V. Stocco and *Jeffrey Beedell*, for the respondent.

Richard H. Shaban, James W. MacLellan and G. L. Sonny Ingram, for the intervener.

The judgment of McLachlin C.J. and Abella, Moldaver, Brown and Rowe JJ. was delivered by

Brown J. —

1. Introduction
2. The questions presented by this appeal are (1) whether a trustee of a trust contained in a labour and material payment bond owes a duty to disclose the existence of the bond to potential beneficiaries of the trust; and (2) if such a duty is owed, what conduct by the trustee would discharge it, and whether it was discharged here. The trial judge concluded that no duty to disclose exists in such a case, and the majority at the Court of Appeal of Alberta agreed.
3. For the reasons that follow, I respectfully disagree with the courts below. In general, wherever a beneficiary would be unreasonably disadvantaged not to be informed of a trust’s existence, the trustee’s fiduciary duty includes an obligation to disclose the existence of the trust. In the circumstances of this appeal, where the evidence was that labour and material payment bonds were uncommon in the pertinent sector (private oilsands construction), and where the trustee’s failure to disclose the existence of the trust prevented the beneficiary from making a claim within the prescribed notice period, that duty was breached. I would therefore allow the appeal.
4. Facts and Judicial History
5. Suncor Energy Inc. hired the respondent, Bird Construction Company, as a general contractor for a construction project on one of Suncor’s worksites near Fort McMurray, Alberta. Bird subcontracted with Langford Electric Ltd. for certain electrical work. As required by its contract with Bird, Langford obtained a labour and material payment bond, issued by the Guarantee Company of North America for $659,671, naming Bird as Obligee, Langford as Principal, and the Guarantee Company as Surety. Upon receiving its copy of the bond, Bird immediately “filed it” at its offices in Edmonton, Alberta.[[1]](#footnote-1)
6. The text of the relevant terms of the bond are attached as an appendix to this judgment. It is common ground between the parties that, by those terms, the bond allows for a “beneficiary”, being a provider of work/labour or materials who has not received payment from Langford within 90 days of the last day upon which it provided work/labour or materials, to sue the Guarantee Company on the bond for that unpaid sum. This is achieved by designating Bird as a trustee, holding in trust for the beneficiaries their right to claim against and recover from the Guarantee Company. A beneficiary’s ability to exercise that right is, however, subject to a condition that it give notice of its claim to Langford, the Guarantee Company and Bird within 120 days of its last provision of work/labour or materials.
7. On March 2, 2009, Langford contracted with the appellant, Valard Construction Ltd., to provide directional drilling work on the project. Valard began its work on March 17, 2009 and finished on May 20, 2009.
8. The evidence of Bird’s interaction with Valard is sparse. While working on the project, Bird required a Valard representative to attend daily “toolbox meetings” in Bird’s on-site trailer, where Bird kept a bulletin board displaying various notices that it would post there. The parties agree that neither the bond, nor notice of it, was posted there. Further, during Valard’s work on the project and the ensuing 120-day notice period, neither Bird nor anyone on its behalf notified Valard of the bond’s existence. Valard was, therefore, unaware of the bond throughout the entire window of time during which it would have benefitted from it.
9. Ultimately, some of Valard’s invoices went unpaid by Langford and, on March 9, 2010, it was granted default judgment against Langford for $660,000.17. As Langford was by then insolvent, Valard has not been paid.
10. In April 2010 — approximately seven months after the 120-day notice period had expired — Valard’s project manager, John Cameron Wemyss, learned that Bird had recently required a labour and material payment bond on a different project. Mr. Wemyss asked Bird whether a labour and material payment bond had been obtained for the project on which Valard had not been paid. Bird replied affirmatively and directed Mr. Wemyss to the Guarantee Company. Mr. Wemyss was “surprised” by this response. In his 10 years of experience, he had never encountered a labour and material payment bond on a privately owned oilsands project. On Valard’s behalf, he immediately filed a claim with the Guarantee Company for the full amount of the bond.
11. The Guarantee Company denied Valard’s claim, citing Valard’s failure to give timely notice. Valard sued (*inter alia*) Bird for breach of trust, alleging that it had breached its duty as a trustee “to fully inform the [b]ond beneficiaries of the existence of the [b]ond and its terms [and of] their right of action provided by the [b]ond”.[[2]](#footnote-2)
    1. Court of Queen’s Bench of Alberta, 2015 ABQB 141, 41 C.L.R. (4th) 51
12. The trial judge dismissed Valard’s action, finding Bird owed no duty to notify Valard of the existence of the bond. The purpose of the bond was for Bird’s protection. “Unlike other trust relationships”, he observed, “there is no suggestion in the standard wording, or in the case law, that the [b]ond creates duties on [Bird as Obligee] to protect the interests of potential claimants.” Rather, the “sole purpose of the trust wording” employed in the bond was to permit beneficiaries, whose identities may be unknown at the time that the bond was obtained, to overcome the third-party beneficiary rule which would otherwise prevent them from suing on it. [[3]](#footnote-3)
13. In so finding, the trial judge relied upon two Ontario trial decisions.[[4]](#footnote-4) Further, he found that a “simple standard inquiry” by Valard would be a “more reliable means” of learning of the bond’s existence.[[5]](#footnote-5)
    1. Court of Appeal of Alberta, 2016 ABCA 249, [2017] 2 W.W.R. 46
14. A majority at the Alberta Court of Appeal dismissed Valard’s appeal, affirming that Bird had “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”.[[6]](#footnote-6) Valard could, it held, have demanded such information under s. 33 of Alberta’s *Builders’ Lien Act*, R.S.A. 2000, c. B-7. This distinguishes Valard from other trust beneficiaries who have no way to compel trustees to disclose the existence of a trust, and therefore distinguishes this case from other cases in which a duty to disclose the existence of a trust has been recognized.
15. Justice Wakeling, in dissent, would have allowed the appeal. Bird, as a trustee, owed fiduciary duties to potential beneficiaries, which duties required Bird to protect their interests without being asked to do so. As a general rule, Wakeling J.A. found that if potential beneficiaries would derive a benefit from knowing about the existence of the trust, the trustee must undertake reasonable measures to disclose the trust’s existence to a sufficiently large segment of the class of potential beneficiaries. While this duty may be abridged by the terms of the trust document, nothing in the text of the bond indicated an intention do so. Therefore, Bird should have taken reasonable measures to inform Valard about the existence of the trust. As it did not, it is liable to pay Valard $659,671, being the amount which it would have recovered under the bond had it known about the bond’s existence in time to give notice of its claim within the 120-day notice period.
16. Analysis
    1. The Duty to Disclose the Existence of the Trust
17. The bond was issued in standard form CCDC 222-2002, which was published by the Canadian Construction Documents Committee. It has been in use since 2002. Its text creates an express trust, naming Bird as trustee of the trust property, which is the beneficiaries’ ability to claim and recover from the Guarantee Company such sums owed to them under a contract with Langford.
18. It is true, as the trial judge observed, and as the Ontario cases upon which he relied emphasized, that the bond did not expressly impose a duty on Bird as trustee “to protect the interests of [beneficiaries]” by, for example, disclosing the bond’s existence to them. The absence of an express term imposing a duty on Bird to disclose the trust’s existence is not, however, fatal to Valard’s appeal. While the “main source” of a trustee’s duties is the trust instrument, the “general law” which sets out a trustee’s duties, rights and obligations continues to govern where the trust instrument is silent.[[7]](#footnote-7)
19. As to that general law, first principles are instructive. At its core, a “trust” refers to:

. . . the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property . . . for the benefit of some persons . . . or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the truste[e], but to the beneficiaries or other objects of the trust.[[8]](#footnote-8)

1. Because a trust divides legal and beneficial title to property between a trustee and a beneficiary, respectively, the “hallmark” characteristic of a trust is the fiduciary relationship existing between the trustee and the beneficiary, by which the trustee is to hold the trust property solely for the beneficiary’s enjoyment.[[9]](#footnote-9) As a matter of law, this fiduciary relationship, in turn, impresses the office of trustee with certain duties. In particular, three duties have been recognized in Canadian law as fundamental. First, a trustee must act honestly and with that level of skill and prudence which would be expected of the reasonable person of business administering his or her own affairs. Secondly, a trustee cannot delegate the office to another. And thirdly, a trustee cannot profit personally from its dealings with the trust property or with the beneficiaries of the trust.[[10]](#footnote-10)
2. Correspondingly, the beneficiary of a trust has a right to hold the trustee to account for its administration of the trust property and to enforce the terms of the trust.[[11]](#footnote-11) Absent such a right, both the trustee’s obligation to act in accordance with its fiduciary duty and the terms of the trust itself would be substantially unenforceable. In effect, the trustee would hold beneficial as well as legal ownership of the trust property[[12]](#footnote-12) — which would, of course, be contrary to the division of legal and beneficial ownership upon which the trust relationship is premised.[[13]](#footnote-13)
3. The extent of a trustee’s duty to account is usually considered in circumstances where a beneficiary who is *already aware* of the trust’s existence requests disclosure of information pertaining to the terms or administration of the trust.[[14]](#footnote-14) In some cases, however, the beneficiary’s right to enforce the terms of the trust can be meaningfully exercised only if he or she is first informed of the trust’s existence. While this arises most frequently in cases where the beneficiary’s interest under the trust is conditional upon attaining the age of majority,[[15]](#footnote-15) equity imposes upon trustees a duty to disclose to beneficiaries the existence of the trust in a variety of circumstances.[[16]](#footnote-16) In general, wherever “it could be said to be to the unreasonable disadvantage of the beneficiary not to be informed” of the trust’s existence,[[17]](#footnote-17) the trustee’s fiduciary duty includes an obligation to disclose the existence of the trust. Whether a particular disadvantage is *unreasonable* must be considered in light of the nature and terms of the trust and the social or business environment in which it operates,[[18]](#footnote-18) and in light of the beneficiary’s entitlement thereunder. For example, where the enforcement of the trust requires that the beneficiary receive notice of the trust’s existence, and the beneficiary would not otherwise have such knowledge, a duty to disclose will arise.[[19]](#footnote-19) On the other hand, “where the interest of the beneficiary is remote in the sense that vesting is most unlikely, or the opportunity for the power or discretion to be exercised is equally unlikely”,[[20]](#footnote-20) it would be rare to find that the beneficiary could be said to suffer unreasonable disadvantage if uninformed of the trust’s existence.
4. In my view, Valard was unreasonably disadvantaged by Bird’s failure to inform it of the trust’s existence. Valard’s interest under the trust was not so “remote” that vesting was unlikely — indeed, Valard’s interest vested 90 days after its final day of work on the project. And, Valard required knowledge of the trust in order to enforce it. The expiry of the 120-day notice period before Valard learned of the bond effectively prevented it from enforcing the trust by making a claim against the Guarantee Company and recovering sums owed under its contract with Langford. I would therefore find that Bird, as trustee, had a duty to disclose the bond’s existence to Valard.
5. Throughout these proceedings, however, Bird has maintained that, while it is a trustee with fiduciary duties to beneficiaries, those duties do not require Bird to disclose the existence of the bond containing the trust. In support of its position, Bird says that the sole purpose of labour and material payment bonds is to protect *the trustee* — be it an owner or a general contractor — from the risk and expense of liens and work stoppages. A duty to disclose the existence of the bond to potential trust beneficiaries would therefore be inconsistent with its sole purpose of protecting Bird.
6. I acknowledge that labour and material payment bonds serve the purpose of protecting owners and general contractors such as Bird from the risk of work stoppages, liens and litigation over payment.[[21]](#footnote-21) For that purpose to be properly realized, however, a beneficiary such as Valard must be capable of enforcing the bond by claiming against the surety to recover for unpaid invoices. Put another way, where a beneficiary is unaware of its right to claim under the bond within the notice period, the bond’s trustee is susceptible to the very risks which Bird says the bond was intended to avoid. At the risk of stating the obvious, a general contractor who “has taken the benefit of the goods and the services provided by the subtrades does . . . have a genuine interest in ensuring that suppliers are compensated and the labour and material payment bond is intended to serve this purpose”.[[22]](#footnote-22) While, therefore, I do not dispute that labour and material payment bonds may be secured for the protection of the trustee, their proper operation tends to affirm rather than negate the necessity of disclosing their existence.
7. In disputing the foregoing, my colleague Karakatsanis J. says that “for over 45 years, the understanding and practice in the construction industry in Canada has been that the trustee of a labour and material payment bond is not required to take steps to notify potential claimants of the existence of the bond” [[23]](#footnote-23) and that “claimants are expected to enquire as to the [bond’s] existence”.[[24]](#footnote-24) Questions of industry understanding, practice, and expectations are, however, matters of *fact*. And as I discuss below, the *fact* here was that labour and material payment bonds were uncommon on private oilsands construction projects. To the extent my colleague relies[[25]](#footnote-25) on the oral reasons given from the bench at the York County Court in *Dominion Bridge Co. v. Marla Construction Co.*,and on *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.* (which relied on *Dominion Bridge*), as somehow establishing the “understanding and practice in the construction industry in Canada”,[[26]](#footnote-26) I say respectfully that these case authorities from a single province neither displace the uncontradicted evidence of Mr. Wemyss nor support my colleague’s broad factual claims.
8. Additionally, I do not agree with Bird that the existence of s. 33 of Alberta’s *Builders’ Lien Act* eliminates the unreasonable disadvantage that arises from beneficiaries being uninformed about the trust. Section 33 provides that a lienholder, being any individual who has provided work or materials on a project, may at any reasonable time request a copy of a contract between an owner and a contractor or a contractor and subcontractor. While a trustee’s duties may be abridged or modified by statute,[[27]](#footnote-27) nothing in s. 33 indicates that Alberta’s Legislature intended to do so here. The ability of a lienholder to request a copy of a contract between two parties on any project, including those projects which do not involve labour and material payment bonds, is hardly tantamount to a statement that a trustee is absolved of its fiduciary duty to disclose the existence of a trust contained within the bond.
9. I would also reject Bird’s suggestion that it was merely a “bare trustee” and that, as such, it had no obligation to disclose the existence of the trust until expressly requested to do so.[[28]](#footnote-28) At law, a bare trust arises where the trustee holds property “without any duty to perform except to convey it to the beneficiary or beneficiaries upon demand”.[[29]](#footnote-29) This definition assumes, *inter alia*, “that the beneficiary or beneficiaries are able to call for the property on demand”.[[30]](#footnote-30) In my view, a finding that a beneficiary is able to call for the trust property on demand assumes that the beneficiary *knows* of the trust’s existence. As Valard had no such knowledge until the notice period had expired, it is obvious that Valard was unable to call for the trust property at the material time. This trust was not, therefore, a bare trust.
   1. The Content of the Duty Generally, and in the Circumstances of This Appeal
10. Having found that Bird, as trustee, had a duty to disclose the existence of the trust to its beneficiaries, I must now consider what action on Bird’s part would have discharged that duty. Like all duties imposed upon trustees, the standard to be met in respect of this particular duty is not perfection, but rather that of honesty, and reasonable skill and prudence.[[31]](#footnote-31) And the specific demands of that standard, so far as they arise from the duty to disclose the existence of a trust, are informed by the facts and circumstances of which the trustee ought reasonably to have known at the material time.[[32]](#footnote-32) In considering what was required in a given case, therefore, a reviewing court should be careful not to ask, in hindsight, what could *ideally* have been done to inform potential beneficiaries of the trust. Rather, the proper inquiry is into what steps, *in the particular circumstances* of the case — including the trust terms, the identity of the trustee and of the beneficiaries, the size of the class of potential beneficiaries and pertinent industrial practices — an honest and reasonably skillful and prudent trustee would have taken in order to notify potential beneficiaries of the existence of the trust. But, where a trustee can reasonably assume that the beneficiaries knew of the trust’s existence, or where practical exigencies would make notification entirely impractical,[[33]](#footnote-33) few, if any, steps may be required by a trustee.
11. It will be readily apparent that what a trustee must do to discharge its duty to disclose the existence of the trust to beneficiaries is highly sensitive to the context in which the particular trust relationship arises. In this case, an honest and reasonably skillful and prudent trustee would have known, as recounted in the uncontradicted evidence of Mr. Wemyss, that labour and material payment bonds were uncommon on private oilsands construction projects. Conversely, Bird could not have known of all potential beneficiaries when the bond was procured, since (1) Valard (and presumably other subcontractors) had not yet contracted with Langford, and (2) under the terms of this particular trust, a beneficiary’s interest would not vest until 90 days after the last day upon which it provided labour or materials on the project. It is well established that, where all potential beneficiaries cannot be identified at the time of the trust’s creation, the trustee’s obligation to disclose the existence of the trust extends *not* to *ensuring* that every potential beneficiary knows of the trust, but only to taking reasonable steps to that end.[[34]](#footnote-34)
12. As Wakeling J.A. observed in this regard, the evidence before the trial judge was that Bird had an on-site trailer in which notices were normally posted.[[35]](#footnote-35) The evidence also indicated that at least some of the potential beneficiaries (such as Valard) worked on-site and were required to attend daily “toolbox meetings” in Bird’s trailer.[[36]](#footnote-36) I agree with him that, in the circumstances of this appeal, Bird could have satisfied its duty to inform beneficiaries of the trust by posting a notice of the bond in its on-site trailer. This would have provided a significant portion of potential beneficiaries with notice of the bond’s existence. The cost of doing so would have been negligible to Bird, and this method of notice would not have been otherwise onerous. I note that this method of notice is already statutorily required on public worksites in Alberta: *Public Works Act*, R.S.A. 2000, c. P-46, s. 17.
13. This does not mean, however, that taking such steps will always be necessary in order to resist every claim for breach of trust made by a disappointed beneficiary of a labour and material payment bond. It is also possible that some other method of giving notice — had the evidence disclosed it — might have sufficed. To reiterate: the question is not what Bird *could* have done in this case, but what Bird should *reasonably* have done in the circumstances of this case to notify beneficiaries such as Valard of the existence of the bond. Here, Bird did nothing. It filed the bond offsite, did not post it, and told nobody about it. In some circumstances (where, for example, the industrial practice is such that the use of labour and material payment bonds to offset the risks arising from unpaid subcontractors are common), it may well be that very little, or even nothing, will be required on the part of a trustee to notify potential beneficiaries of the trust’s existence. In the circumstances of this appeal, however, where the evidence was that labour and material payment bonds were uncommon, something more than nothing was required from Bird to discharge its duty. Bird therefore committed a breach of trust.
14. Conclusion and Remedy
15. It follows from the foregoing that I would allow the appeal, with costs in this Court and in the courts below.
16. Normally, where a trustee breaches a duty in the course of its administration of the trust, it will be “liable to pay monetary compensation for the losses caused [to the trust] by his breach of duty”.[[37]](#footnote-37) This generally entails the trustee making restitution for the loss suffered by the trust itself, not paying damages for the loss suffered by individual beneficiaries. Where, however, the breach of trust “is not likely to result in any loss to the trust fund”, an individual beneficiary may “recover compensation for [the] breach of an equitable duty [owed] to himself”.[[38]](#footnote-38)
17. Such an order is clearly appropriate here. Valard is entitled to be compensated for the sum that it could have obtained under the terms of the trust had it been aware of its right to claim thereunder. The record, however, does not disclose the sum of money that was available on the bond at any time during Valard’s 120-day notice period which followed its last day on the project — or even whether other claims had been made against that sum.[[39]](#footnote-39) I would therefore direct that the matter of quantum of damages be remitted to the trial judge for adjudication.

The following are the reasons delivered by

1. Côté J. — I agree with the position taken by my colleague Justice Karakatsanis with respect to the duties that a trustee under a labour and materials payment bond owes to potential claimants. My colleague would hold that there is, in general, no proactive duty on the part of a trustee to take steps to inform potential claimants of a bond’s existence. While such a trustee “is under an obligation to respond accurately” to enquiries made by potential claimants, “equity does not generally demand more in the context of the construction industry” (reasons of Justice Karakatsanis, at para. 66). I concur.
2. Applying the law to the facts of the present case, my view is that Bird Construction Company — as obligee/trustee under the Labour and Materials Payment Bond (“L&M Bond”) — had a duty to inform Valard Construction Ltd. of the L&M Bond’s existence when it was first notified by email of the problems Valard was experiencing in obtaining payment from Langford Electric Ltd. for the work it performed on the jobsite. That email ended with a clear request for guidance from Bird on how Langford and Valard should proceed with their dispute. I would conclude that, by failing to inform Valard of the L&M Bond’s existence at that time, Bird breached the fiduciary obligation that it owed to Valard, and I would allow the appeal on this basis.
3. On August 10, 2009, an employee of Langford sent an email to Bird’s project manager, advising him of a “serious problem” that Langford was having in paying Valard’s invoices. This email, which was also sent to Valard’s project manager, reads as follows:

Hi Chris

We have a serious problem with Valard.

After we sent in the summary indicating the $258,000.00 costs for the limestone work we thought that was the total for the billings. When I spoke to Cameron from Valard this AM, regarding the payment Suncor offered he indicated the payment Suncor offered of $215,000.00 was not adequate as he had further invoices totaling another $190,000.00 which they incurred from April 19th to April 30th which never appeared on the summary sheet and were never sent on. I had never received an email from him with these costs and I have just received copies of all these invoices this afternoon and am trying to access how this happened.

Chris let me know how you think we should proceed.

--

Sincerely,

Milt Sterling

LANGFORD ELECTRIC

1. Bird’s project manager replied to the Langford employee on that same day, but removed Valard’s project manager from the email chain. The reply email reads as follows:

Milt,

Suncor is already upset with us about the extra costs and it took months to get this first $215,000 approved only as a favor to Bird. Anyone else wouldn’t have received near that amount. It is impossible for us to go back to the owner. I’m not sure how Valard could rack up a bill like this, even being as disorganized as they were on site. We would help you if we could, but Suncor was already upset with our last claim.

Regards,

Chris von Klitzing

Project Manager

1. The trial judge considered this evidence. He found that Bird had no knowledge of the fact that Valard was a claimant that had not been paid by Langford until it was notified of this by Valard on April 19, 2010 (2015 ABQB 141, 41 C.L.R. (4th) 51, at para. 87), and that Bird’s employees had acted honestly at all material times (*ibid.*).
2. While I accept the factual finding of the trial judge that Bird’s employees had acted honestly at all material times, my view is that this is not dispositive of the issue. Upon receiving Langford’s email, Bird was informed of “serious problem[s]” between Valard and Langford Electric, and was alive to the very real possibility of Valard not being paid in full for its services — especially since it knew that additional funds from Suncor Energy Inc. would not be forthcoming. Moreover, Bird was expressly asked to advise on how the parties should proceed with their dispute. Valard, as a recipient of the email, had full knowledge of this. Indeed, it was Valard’s issue with the payment offered by Langford up to that point which prompted Langford to email Bird in the first place.
3. As noted above, I accept that a trustee has an equitable obligation to accurately answer all requests from potential claimants for information pertaining to the existence and particulars of any labour and materials payment bond. As I see it, the August 10, 2009 email effectively amounted to such a request. Although the email was not sent by Valard, and did not *explicitly* raise questions regarding the existence of any bond, I do not see this as particularly significant. In my view, it is not necessary that a potential claimant articulate a particular set of words before being entitled to information about any existing bond from the trustee. Similarly, it was not necessary for Bird’s employees to have known conclusively that Valard “was a claimant who had not been paid as provided for under the terms of its contract with Langford” (2015 ABQB 141, at para. 87). On the facts of this case, it is sufficient that Langford’s email alerted Bird to the payment problems between Valard and Langford, and ended with a clear request that Bird outline how the parties should proceed with this payment dispute. As one of the recipients of this email (and part of this conversation), Valard was entitled to expect that, if a labour and materials payment bond were available, its existence would have been disclosed by Bird (as trustee/obligee) at this time.
4. Rather than doing so, Bird removed Valard from the email chain and informed Langford that additional funds from Suncor would not be forthcoming. It is my view that, by failing to notify Valard of the L&M Bond’s existence upon receiving what effectively amounted to a request for guidance as to how this payment dispute could be resolved and with knowledge that additional money from Suncor was unavailable, Bird breached the equitable duty it owed to Valard. Valard was entitled to assume that this request would have triggered a duty on the part of the trustee to advise it of any available bond, and that it therefore did not need to make any further requests in this regard.
5. Had Valard been so informed, it would still have been within the 120-day window within which to make a claim against the surety. I would therefore allow the appeal and direct that the matter be remitted to the trial judge for adjudication on the quantum of damages, as ordered by Justice Brown.

The following are the reasons delivered by

1. Karakatsanis J. (dissenting) — For over 45 years, labour and material payment bonds have been commonly used to secure contractual obligations in the construction industry. Owners (and their general contractors) often seek to protect their projects by requiring subcontractors to obtain such bonds. By guaranteeing that suppliers of labour and material will be paid (up to the limit of the bond), the bonds help ensure that construction work will be completed without interruption and without liens being filed on the project.
2. The standard form bond published by the Canadian Construction Documents Committee (CCDC) uses trust language in order to avoid problems associated with the third-party beneficiary rule. This gives unknown future claimants the right to sue on a bond to which they are not a party. Essentially, the bond provides that the owner (or general contractor) holds the right to claim under the bond as trustee for future claimants (the labour and material suppliers). The obligations of the owner under the terms of the bond are narrowly directed solely to that purpose.
3. For decades, the industry understanding and practice has been that the trustee is under no obligation to inform the beneficiaries of the existence of the trust and that claimants are expected to enquire as to the existence of a bond. My colleague would hold otherwise. I cannot agree.
4. In my view, general trust law principles do not imply the obligation to notify potential claimants in this commercial context. Equity imposes different obligations depending on the context. In the circumstances of the construction industry, Bird Construction Company was not under an obligation to inform potential claimants of the existence of the bond. Rather, it was required to respond accurately when asked. Imposing a mandatory obligation on the trustee to inform potential claimants of the bond’s existence transforms what was a beneficial risk-management tool into a significant liability. I would dismiss the appeal.
5. Background
   1. Facts and Decisions Below
6. Bird was the general contractor for Suncor Energy Inc. on a project in the Alberta oilsands, near Fort McMurray. Bird entered into a contract with Langford Electric Ltd. for some electrical work. The contract required Langford to obtain a labour and material payment bond.
7. The bond was issued in the amount of nearly $660,000. It was a standard form bond published by the CCDC (Standard Construction Document 222-2002). The bond provided that Bird was a “trustee” for every claimant who had not been paid under their contract with Langford. A claimant was required to provide notice of its claim within 120 days of completing its work or last furnishing materials.
8. One of Langford’s subcontractors, Valard Construction Ltd., was not paid for its work and obtained a default judgment against Langford for approximately $660,000.
9. Valard’s project manager subsequently asked Bird whether there was a labour and material payment bond. When Bird confirmed the existence of the bond, Valard sought recourse from the bond issuer. Its claim was denied on the basis that the 120-day notice period had expired. In the action before us, Valard seeks compensation from Bird, on the basis that Bird, as a trustee, was obligated to fully inform the bond beneficiaries of the existence of the bond and its terms.
10. The chambers judge dismissed Valard’s claim against Bird, holding that Bird had no such obligation: 2015 ABQB 141, 41 C.L.R. (4th) 51. The majority of the Court of Appeal of Alberta agreed with the chambers judge, concluding that Bird did not owe a duty to inform Valard of the existence of the bond until Valard specifically asked Bird about the existence of a bond: 2016 ABCA 249, 57 C.L.R. (4th) 171.
    1. Labour and Material Payment Bonds
11. Labour and material payment bonds have been used in the construction industry in Canada for at least 45 years: see, e.g., *Dominion Bridge Co. v. Marla Construction Co.*, [1970] 3 O.R. 125 (Co. Ct.). They are usually required by governments and are increasingly common in the private sector: L. Ricchetti and T. J. Murphy, *Construction Law in Canada* (2010), at p. 171, and K. W. Scott and R. B. Reynolds, *Scott and Reynolds on Surety Bonds* (loose-leaf), at p. 11-10.8.
12. Labour and material payment bonds require the surety to pay the labour and material suppliers on a project if the principal (usually the general contractor or a subcontractor) does not: Scott and Reynolds, at p. 11-10.8. These bonds benefit owners (or general contractors) by ensuring they do not need to spend time and money dealing with a defaulting contractor’s unpaid labour and material suppliers. They also reduce the number of liens against a project and may help ensure the project’s timely completion: Ricchetti and Murphy, at p. 172. Bird’s project manager testified that Bird, primarily for its own protection, required labour and material payment bonds for all contracts over $100,000.
13. Prior to the use of trust language, there was a legal obstacle that prevented labour and material payments bonds from serving their intended purpose. Since the unknown potential claimants were not parties to the bond, they were not entitled to enforce it under the traditional third-party beneficiary rule: see, e.g., *Tobin Tractor (1957) Ltd. v. Western Surety Co.* (1963), 40 D.L.R. (2d) 231 (Sask. Q.B.). To avoid this problem, modern labour and material payment bonds frequently use trust language: Ricchetti and Murphy, at p. 171; Scott and Reynolds, at p. 11-10.8; *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513, and *Harris Steel Ltd. v. Alta Surety Co.* (1993), 119 N.S.R. (2d) 61 (S.C. (App. Div.)); see also R. Flannigan, “Business Applications of the Express Trust” (1998), 36 *Alta. L. Rev.* 630, at pp. 631-32.
14. As another way of avoiding this problem, some legislatures have chosen to create a statutory right of action. In Ontario, s. 69(1) of the *Construction Lien Act*, R.S.O. 1990, c. C.30, creates the right of a claimant to sue directly on the labour and material bond. British Columbia has a similar provision: *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 48. Similarly, the federal *Financial Administration Act*, R.S.C. 1985, c. F-11, assigns to claimants the right of the Crown to recover under a labour and material payment bond. As result of this legislation, the federal government uses its own standard form labour and material payment bond. Unlike the CCDC 222-2002 bond, the federal government’s bond does not provide that the Crown is a trustee for potential claimants: Scott and Reynolds, at p. 3-4.
15. In light of the fact that the trust language was only used to circumvent the third-party beneficiary rule, the bond itself narrowly defines the obligations placed on the trustee. Under the generic terms of the CCDC 222-2002 bond, Bird, as trustee, “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”. Further, if an action is taken in Bird’s name or by joining Bird as a party, then the claimants are required to indemnify Bird for “all costs, charges and expenses or liabilities incurred thereon and any loss or damage resulting to [Bird] by reason thereof”.
16. Analysis
17. As a trustee under the bond, Bird is under an obligation to maintain and deliver the trust property — here, the right to claim on the bond. As I shall explain, I do not agree with my colleague that, under trust law principles, that obligation *necessarily implies* the obligation to provide notice to potential claimants. Such a result in this case means that Bird, who obtained the bond to protect itself from claims and construction delays, is liable for a claim by virtue of the bond. There is no compelling reason to interpret the trustee’s narrowly drawn obligations under a labour and material payment bond in such a way. Doing so would run counter to how these routine bonds have been understood and used by the construction industry for many decades. Given the narrow purpose and scope of the trust, the limited obligations of the trustee, and industry use of these trusts, it is sufficient if the trustee responds to any enquiries about a bond.
    1. Does the Use of Trust Language in the Bond Necessarily Impose an Obligation on Bird to Inform Potential Beneficiaries of the Bond?
18. Valard submits that because the fundamental core of a trust is the right of beneficiaries to enforce it, the trustee is necessarily obliged to inform beneficiaries of the existence of the trust. Since, as Valard submits, this obligation is fundamental to a trust, the settlor cannot oust this duty: D. Hayton, “The Irreducible Core Content of Trusteeship”, in A. J. Oakley, ed., *Trends in Contemporary Trust Law* (1996), 47, at p. 49. In response, Bird submits that the bond is a bare trust, and the bare obligation to convey the trust property (the right to claim under the bond) does not entail an obligation to give notice of the bond to potential claimants.
19. A trust is a relationship whereby the trustee holds property and owes obligations to the beneficiaries of the trust with respect to that property: *Oosterhoff on Trusts: Text, Commentary and Materials* (8th ed. 2014), by A. H. Oosterhoff, R. Chambers and M. McInnes, at p. 19; *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th ed. 2010), by D. Hayton, P. Matthews and C. Mitchell, at para. 1.1. The obligations imposed upon a trustee are first and foremost determined by the terms of the trust instrument itself, but can be supplemented or modified by general principles of equity: *Waters’ Law of Trusts in Canada* (4th ed. 2012), by D. W. M. Waters, M. R. Gillen and L. D. Smith, at p. 912. Under general trust principles, trustees must act with honesty and competence and are required to obey the terms of the trust, preserve the trust assets for the benefit of the beneficiaries and account to them for their performance of the trust: Oosterhoff et al., at p. 123; Waters et al., at p. 906. In the case of a bare trust, the trustee’s only obligation is to dispose of the trust property as directed by the beneficiary: Oosterhoff et al., at p. 20; Waters et al., at p. 33. The question in this appeal is whether the beneficiaries’ rights to hold the trustee to account for its administration of the trust property and to enforce the terms of the trust necessarily imply an obligation on the trustee to notify potential claimants of the trust’s existence.
20. In my view, it is not necessary to determine whether the bond is a bare trust. As I shall explain, this is not a case where the beneficiary’s right to enforce the terms of the trust can be meaningfully exercised only if he or she is first informed of the trust’s existence, nor where the potential beneficiaries would be unreasonably disadvantaged were they not informed of the bond’s existence.
21. Equity imposes different obligations depending on the particular context. As this Court recognized in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 413, “the 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”. In determining the duties of a trustee, it is important to consider “the nature and terms of the relevant trust and the social or business environment in which the trust operates”: *Segelov v. Ernst & Young Services Pty. Ltd.*, [2015] NSWCA 156, 89 N.S.W.L.R. 431, at para. 130.
22. Courts have imposed an obligation on a trustee to notify beneficiaries of the trust’s existence in the context of a family trust or a trust for minors: see, e.g., *Hawkesley v. May*, [1956] 1 Q.B. 304; *Brittlebank v. Goodwin* (1868), L.R. 5 Eq. 545; and *In re Short Estate*, [1941] 1 W.W.R. 593 (B.C.S.C.). The dual rationales offered for imposing such a duty on the trustee are that absent this duty, the beneficiaries would have no way of knowing of their entitlement under the trust and they could not ensure the trustee respected the obligations and terms of the trust. See also D. Hayton (1996), at p. 49, and G. Lightman, “The Trustees’ Duty to Provide Information to Beneficiaries”, [2004] P.C.B. 23, at pp. 24-25 and 34-37.
23. Neither rationale for imposing such a duty on a trustee exists with the same force here. Unlike an infant beneficiary who has no idea that a trust may exist, labour and material payment bonds are regularly used in the construction industry. Further, the terms of the trust and obligations of the trustee are very narrow and do not require oversight by a beneficiary. The trust property is simply the right of suit under the bond: D. W. Glaholt, *Construction Trusts: Law & Practice* (1999), at p. 83. The text of the bond itself does not impose any obligations on the trustee. Under the CCDC 222-2002 bond, the trustee has no obligation to commence an action on behalf of the claimants.
24. The issue of whether a trustee under a labour and material bond is required to notify claimants of the existence of the bond was first considered in 1970: the Ontario County Court held that there was no duty on the trustee to notify claimants of the existence of the labour and material payment bond (*Dominion Bridge*). This decision was recently followed by the Ontario Superior Court: *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance Co.*, 2014 ONSC 918, 36 C.L.R. (4th) 126. We were referred to no other cases in Canada addressing this issue.
25. Thus, for over 45 years, the understanding and practice in the construction industry in Canada has been that the trustee of a labour and material payment bond is not required to take steps to notify potential claimants of the existence of the bond. The authors of a leading treatise on surety bonds advise potential claimants accordingly, writing that “it is critical for either the potential claimant or their solicitors to demand a copy of any labour and material payment bond posted by the contractor with the owner”: Scott and Reynolds, at pp. 11-10.8 and 11-10.9.
26. Finally, although Valard submits and my colleague accepts that notice is not an onerous obligation and could easily be satisfied by displaying a copy of the bond in Bird’s on-site work trailer, I am not persuaded that this is the case. What would Bird be required to do if there were multiple worksites? How could Bird satisfy its obligations to those labour and material suppliers who may not be on the worksite? My colleague suggests that what is reasonable will depend on the circumstances (including the particular sector of the construction industry or geographic area), but in my view, this introduces unnecessary uncertainty and may well undermine the value of having such a bond in the first place.
27. Given the narrow purpose of the trust created here, and the practice in the construction industry in using these bonds for more than 45 years, Bird was entitled to assume that such bonds were sufficiently known in the industry and it was therefore under no duty to determine whether potential claimants required notice and how to provide reasonable notice. In this context, it would not be to the unreasonable disadvantage of potential claimants not to be informed of the trust’s existence. Knowledge of the bond is available through general knowledge about industry practice or by the claimant making enquiries. The trustee is under an obligation to respond accurately to these enquiries. I conclude that equity does not generally demand more in the context of the construction industry. That being said, I do not foreclose the possibility that a trustee may breach its equitable duty if it receives actual notice of the claim within the time permitted for a claim under the bond and does not advise the claimant of the bond. In this case, the chambers judge specifically found that at all material times, the employees of Bird did not know that Valard was a claimant who had not been paid under its contract with Langford (para. 87). I see no palpable and overriding error that would permit me to disturb this finding.
    1. Does the Fact That This Labour and Material Payment Bond Was for an Oilsands Project Change the Analysis?
28. My colleague writes that “an honest and reasonably skillful and prudent trustee would have known . . . that labour and material payment bonds were uncommon on private oilsands construction projects” (para. 27). He concludes that Bird was obligated to do something to satisfy its duty (for instance, posting a notice of the bond in the on-site trailer), but in other circumstances, a trustee may be able to satisfy its duty by doing nothing (paras. 28-29). I have several serious concerns about such an approach.
29. First, requiring a trustee to take positive steps in only some sectors of the construction industry has the potential to create instability and uncertainty. Claimants in different sectors, or geographic regions, would argue that bonds are not commonly used or known to be used in their segment of the construction industry or region.
30. Second, I am not convinced that the chambers judge made a finding that labour and material payment bonds were uncommon in the oilsands. Instead, the chambers judge noted the evidence of Valard’s project manager that he had not encountered a bond on any oilsands project in his 10 years of experience in the oilsands and commented that such belief may have been due to the fact that the project manager never asked (para. 86). Obviously, despite the project manager’s failure to enquire in this case, such a bond existed.
31. Thus, I cannot accept that it was necessary for Bird to take steps to inform labour and material suppliers of the bond’s existence because this bond was obtained for an oilsands construction project.
32. Conclusion
33. The trust at issue here is very different from a normal family or other trust — it was created solely to circumvent the third-party beneficiary rule and, accordingly, has a very narrow scope. For decades, labour and material payment bonds have been frequently used in the construction industry on the understanding (based upon the jurisprudence) that notice was not necessary. My colleague’s position holds Bird — a general contractor that obtained a bond for its own benefit — liable for perhaps the full amount of the bond. The result of his decision is to undermine the value of labour and material payment bonds for owners and general contractors. Further, imposing different obligations depending on the particular sector or geographic region within the construction industry introduces uncertainty and instability where there was none.
34. For these reasons, I would dismiss the appeal.

**APPENDIX**

LABOUR AND MATERIAL PAYMENT BOND

. . .

2. 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.

3. It is a condition precedent to the liability of the Surety under this Bond that such Claimant shall have given written notice . . . . Accordingly, no suit or action shall be commenced hereunder by any Claimant;

(a) unless such notice shall be served by mailing the same by registered mail to the Principal, the Surety and the Obligee . . . .

. . .

ii. in respect of any claim other than for the holdback, or portion thereof, referred to above, within one hundred and twenty (120) 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 the Principal;

*Appeal* *allowed,* Karakatsanis J. *dissenting.*

Solicitors for the appellant: McLean & Armstrong, West Vancouver.

Solicitors for the respondent: Brownlee, Edmonton; Gowling WLG, Ottawa.

Solicitors for the intervener: Borden Ladner Gervais, Toronto.

1. Trial reasons, 2015 ABQB 141, 41 C.L.R. (4th) 51, at para. 34. [↑](#footnote-ref-1)
2. Further Amended Statement of Claim, A.R., at p. 74, at para. 19. [↑](#footnote-ref-2)
3. Trial reasons, at paras. 79-80. [↑](#footnote-ref-3)
4. *Dominion Bridge Co. v. Marla Construction Co.*, [1970] 3 O.R. 125 (Co. Ct.); *Dolvin Mechanical Contractors Ltd. v. Trisura Guarantee Insurance* *Co.*, [2014] I.L.R. I-5595 (Ont. S.C.J.). [↑](#footnote-ref-4)
5. Trial reasons, at para. 85. [↑](#footnote-ref-5)
6. C.A. reasons, at para. 28. [↑](#footnote-ref-6)
7. *Snell’s Equity* (33rd ed. 2015), by J. McGhee, at para. 21-004. [↑](#footnote-ref-7)
8. *Waters’ Law of Trusts in Canada* (4th ed. 2012), by D. W. M. Waters, M. R. Gillen and L. D. Smith, at p. 3, citing L. A. Sheridan, *The Law of Trusts* (12th ed. 1993), at p. 3. [↑](#footnote-ref-8)
9. *Waters’ Law of Trusts*, at pp. 9 and 42; *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009), by A. H. Oosterhoff et al., at p. 1047; *Snell’s Equity*,at paras. 21-001 and 21-002; *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th ed. 2010), by D. Hayton, P. Matthews and C. Mitchell, at paras. 1.50 and 2.1; *Lewin on Trusts* (19th ed. 2015), by L. Tucker, N. Le Poidevin and J. Brightwell, at paras. 1-001 to 1-004; *Beaudette Estate, Re*, 1998 ABQB 689, 229 A.R. 259, at para. 26. [↑](#footnote-ref-9)
10. *Beaudette Estate*, at para. 26; *Waters’ Law of Trusts*, at pp. 43-44 and 906; see also *Oosterhoff on Trusts*, at p. 1049. [↑](#footnote-ref-10)
11. *Waters’ Law of Trusts*, at pp. 43 and 1119; *Oosterhoff on Trusts*,at p. 49; *Snell’s Equity*, at paras. 22-028 and 22-029; D. Hayton, “The Irreducible Core Content of Trusteeship”, in A. J. Oakley, ed., *Trends in Contemporary Trust Law* (1996), 47, at p. 47. [↑](#footnote-ref-11)
12. *Snell’s Equity*, at para. 22-028. [↑](#footnote-ref-12)
13. *Waters’ Law of Trusts*, at p. 1127, fn. 580. [↑](#footnote-ref-13)
14. *In re* *Londonderry’s Settlement*,[1965] 1 Ch. 918 (C.A.); *Schmidt v. Rosewood Trust Ltd.*, [2003] UKPC 26, [2003] 2 A.C. 709; *Breakspear v. Ackland*, [2008] EWHC 220, [2009] Ch. 32; *Ballard Estate (Re)* (1994), 20 O.R. (3d) 350 (Gen. Div.). [↑](#footnote-ref-14)
15. *Hawkesley v. May*, [1956] 1 Q.B. 304; *Brittlebank v. Goodwin* (1868), L.R. 5 Eq. 545; *In re Short Estate*, [1941] 1 W.W.R. 593 (B.C.S.C.), at pp. 595-96. [↑](#footnote-ref-15)
16. *Underhill and Hayton*, at paras. 50.2 and 56.9 to 56.12; *Lewin on Trusts*, at paras. 23-007 and 23-008; Hayton, at p. 49; *Hamar v. The Pensions Ombudsman*, [1996] IDS P.L.R. 1 (Q.B.D.). [↑](#footnote-ref-16)
17. *Waters’ Law of Trusts*, at pp. 1125-26. [↑](#footnote-ref-17)
18. *Segelov v. Ernst & Young Services Pty. Ltd.*,[2015] NSWCA 156, 89 N.S.W.L.R. 431, at para. 130. [↑](#footnote-ref-18)
19. See *Hawkesley*; *Brittlebank*; *In re Short Estate*. [↑](#footnote-ref-19)
20. *Waters’ Law of Trusts*, at p. 1132; see also *Lewin on Trusts*, at para. 23-008; *Underhill and Hayton*, at para. 50.2. [↑](#footnote-ref-20)
21. *Citadel General Assurance Co. v. Johns-Manville Canada Inc.*, [1983] 1 S.C.R. 513, at p. 521. [↑](#footnote-ref-21)
22. J. V. O’Donnell, L. Poudrier-LeBel and K. W. Scott, “Construction Bonds in Canada” (1985), 52 *Ins. Counsel J.* 482, at p. 484. [↑](#footnote-ref-22)
23. Reasons of Justice Karakatsanis, at para. 64 (emphasis added), see also paras. 42, 44, 56, 66 and 71. [↑](#footnote-ref-23)
24. Reasons of Justice Karakatsanis, at para. 44 (emphasis added). [↑](#footnote-ref-24)
25. Reasons of Justice Karakatsanis, at para. 71. [↑](#footnote-ref-25)
26. Reasons of Justice Karakatsanis, at para. 64. [↑](#footnote-ref-26)
27. *Waters’ Law of Trusts*, at p. 912. [↑](#footnote-ref-27)
28. *Ironside v. Smith*, 1998 ABCA 366, 223 A.R. 379, at para. 71. [↑](#footnote-ref-28)
29. *Waters’ Law of Trusts*, at p. 33. [↑](#footnote-ref-29)
30. *Ibid.*, at p. 34. [↑](#footnote-ref-30)
31. *Ibid.*, at p. 906; see also *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315; *Beaudette Estate*, at para. 26; *Oosterhoff on Trusts*, at p. 1058. [↑](#footnote-ref-31)
32. *Fales*,at p. 317; *Underhill and Hayton*,at para. 48.1. [↑](#footnote-ref-32)
33. *Segelov*, at paras. 138-41. [↑](#footnote-ref-33)
34. Hayton, at p. 49, citing *In re Manisty’s Settlement*,[1974] 1 Ch. 17, at p. 25; *Hartigan Nominees Pty. Ltd. v. Rydge* (1992), 29 N.S.W.L.R. 405 (C.A.); *In re Baden’s Deed Trusts (No. 2)*, [1973] 1 Ch. 9 (C.A.), at pp. 20 and 27; see also G. Lightman, “The Trustees’ Duty to Provide Information to Beneficiaries”, [2004] P.C.B. 23, at pp. 37-38. [↑](#footnote-ref-34)
35. C.A. reasons, at para. 190. [↑](#footnote-ref-35)
36. C.A. reasons, at para. 55. [↑](#footnote-ref-36)
37. *Snell’s Equity*,at para. 30-014; see also *Waters’ Law of Trusts*,at p. 1279; *Fales*, at p. 320. [↑](#footnote-ref-37)
38. *Lewin on Trusts*, at para. 23-013. [↑](#footnote-ref-38)
39. Before the trial judge, Valard’s counsel explained that its claim against the Guarantee Company was discontinued because “after the notice period for Valard had expired, more bonds were issued by the surety to Langford, and claims were made on those bonds to the point that the surety was out millions of dollars” (A.R., at p. 195). That does not tell us, however, whether claims were made on the bond before or during the 120-day notice period which followed Valard’s work. [↑](#footnote-ref-39)