

# Cassels

## Payment Under Protest: Payments With No Pride and No Prejudice

*Mark St. Cyr, Zach Flemming-Giannotti, Stephanie Garraway, Emily Di Bratto*  
February 21, 2024

### CCN No. 2024-02-21



**KEY TAKEAWAY:** A payor that has made one or more payments “under protest” during a construction project may recover those monies later, including after completion of the work. To recover such monies, a payor should obtain a formal reservation of rights agreement.

### Application to Your Organization

There may be situations during a construction project when, as a payor, your organization must put ongoing disputes aside and make payments out of necessity – even though such payments may be contrary to your objectives or contractual rights. While better than nothing, simply stating that such payments are made “under protest” will not automatically entitle you to claw back the monies paid out. Courts will examine the context around the payment(s), applicable contract language, the parties’ correspondence, and other relevant evidence to determine whether the payor ought to be entitled to claw back payments made under protest. Accordingly, where possible, the payor’s protest and reservation of rights should be documented by the parties and acknowledged by the payee in a written agreement to ensure that the payor’s ability to claw back is clearly protected.

### What Could Happen?

There are several situations in which payors are forced to make a payment under protest but still want to retain their rights to claw money back. For example:

- Paying increased material costs due to an immediate need for the materials;
- Stepping in to fund additional services, notwithstanding that the additional services are alleged to arise due to the negligence or breach of contract of the payee; and/or
- Paying extra work while disputing whether the work is truly “extra” to the base scope of work.

# Cassels

## Question(s) Considered by the Court?

When considering whether a payor successfully reserved its rights to recover monies paid under protest, the courts will consider the following questions:

- What is the context of the payment being made?
- Do the facts demonstrate that the payor wants to retain its rights to recover?

## What Has the Court Said?

The courts have considered “payments under protest”, “payments without prejudice”, and “payment with reservation of rights”, among other phrasings, as attempts by payors to preserve their right to recover monies paid. In assessing whether the attempt is successful, courts will look at the totality of the circumstances to assess whether the parties intended for the payor to be entitled to claw back.

The general principle in the caselaw is that payments made under protest can be recovered by the payor.<sup>1</sup> However, the fact that a payor expresses, in a unilateral manner, that a payment was made under protest is not in and of itself determinative. For example, where a payment is made grudgingly, but there is no other evidence suggesting that future recovery by the payor was on the minds of the parties, courts have prohibited recovery by the disputing payor.<sup>2</sup> A bald assertion of protest by a payor on its own is not sufficient for establishing entitlement to claw back, it simply acts as “evidence.”<sup>3</sup> Overall, the courts look at a variety of factors including the intention of the payor and the conditions given by the payor at the time of the contested payment being made to ascertain whether or not rights were properly reserved.<sup>4</sup>

As a result, a payor should consider entering into a reservation of rights agreement with a payee, which clearly provides for the payor’s ability to claw payments back, to minimize uncertainty and risk involved in the courts’ analysis of the surrounding circumstances.

## Learn More

<sup>1</sup> *Knutson v. The Bourkes Syndicate*, 1941 CanLII 7 (SCC), [1941] SCR 419

<sup>2</sup> *Brent v. Slegg Construction Materials Ltd.*, 2007 BCSC 661

<sup>3</sup> *Glidurray Holdings Limited v. Qualicum Beach (Village)*, 1981 CanLII 476 (BC CA)

<sup>4</sup> *Domtar Inc. v Univar Canada Ltd.*, 2011 BCSC 1776; *The Queen v. Premier Mouton Products Inc.*, [1961] SCR 361

# Cassels

**Cassels Construction Notes** provides timely updates and strategic insights on hot topics, recent decisions, and construction law fundamentals. As always, we're here to help. Learn more about our Construction Law Group [here](#).

---

*This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.*