



**Ryan Wilson**  
Associate  
Commercial Litigation  
416.748.4191  
[rwilson@loonix.com](mailto:rwilson@loonix.com)

Ryan has experience in a broad range of civil, commercial and construction litigation matters. He has represented clients in the Ontario Court of Appeal, Superior Court of Justice, Small Claims Court and a variety of tribunals.

---

Loopstra Nixon LLP  
Woodbine Place  
135 Queen's Plate Drive  
Suite 600, Toronto, Ontario  
M9W 6V7  
[www.loopstranixon.com](http://www.loopstranixon.com)

## THE ANTI-DEPRIVATION RULE

Construction and Contracting Parties Cannot Rely on Liquidated Damages Clauses that are Triggered by Bankruptcy or Insolvency

By Ryan Wilson

On October 2, 2020, the Supreme Court of Canada rendered its decision upholding the anti-deprivation rule in the context of a dispute between two construction parties. Construction companies and commercial parties must be mindful that liquidated damages clauses and other payment clauses will be unenforceable if they are triggered by events of bankruptcy or insolvency.

The Decision: [\*Chandos Construction Ltd. v. Deloitte Restructuring Inc., 2020 SCC 25\*](#)

Chandos Construction Ltd. ("Chandos"), a general construction contractor, entered into a subcontract with Capital Steel Inc. ("Capital Steel"). A provision of their subcontract provided that Capital Steel would pay Chandos 10% of the subcontract price as a fee for the inconvenience of completing and monitoring the work in the event of Capital Steel's bankruptcy.

Part way through completing its work, Capital Steel filed an assignment in bankruptcy. In reliance on the bankruptcy triggered provision, Chandos sought to set off the costs it had incurred to complete Capital Steel's work and to set off 10% of the subcontract price.

Capital Steel's trustee in bankruptcy applied to the Court for advice and directions as to whether the provision was valid. The application Judge found the provision to be a valid liquidated damages clause. The Court of Appeal of Alberta reversed the decision, holding that the provision was invalid and unenforceable because of the anti-deprivation rule. The Supreme Court of Canada upheld the Court of Appeal's decision and dismissed the appeal.

**The anti-deprivation rule invalidates provisions that remove value and are triggered upon bankruptcy or insolvency**

The Supreme Court of Canada upheld the common law anti-deprivation rule, which renders void contractual provisions that upon insolvency or bankruptcy remove value that would otherwise have been available to an insolvent person's creditors. The rule is an effects-based, two-part test: first, the relevant clause

must be triggered by an event of insolvency or bankruptcy; and second, the effect of the clause must be to remove value from the insolvent's estate. The purpose of the rule is to help maximize global recovery for all creditors and prevent frustration of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3.

As an effects-based test, the relevant consideration is whether the effect of the provision was to deprive the estate of assets upon bankruptcy, not whether the intention of the contracting parties was commercially reasonable. In other words, the anti-deprivation rule is not a purpose-based test, which would require courts to determine the intention of contracting parties long after the fact and which would detract from the efficient administration of corporate bankruptcies.

The Supreme Court of Canada further commented that the law of set-off does not apply to these debts owed by the insolvent person that were triggered by bankruptcy or insolvency because the law of set-off applies only to enforceable debts; these debts are rendered unenforceable by the anti-deprivation rule.

In [\*Chandos Construction Ltd. v. Deloitte Restructuring Inc.\*, 2020 SCC 25](#), the provision in the contract between Chandos and Capital Steel violated the anti-deprivation rule and was therefore invalid and unenforceable.

#### **Dissenting Opinion:**

The dissent in [\*Chandos Construction Ltd. v. Deloitte Restructuring Inc.\*, 2020 SCC 25](#) remarked that the anti-deprivation rule should not apply to transactions or contractual provisions that serve a *bona fide* commercial purpose. As such, the provision in the contract between Chandos and Capital Steel is enforceable and does not offend the anti-deprivation rule because it furthers a *bona fide* commercial purpose.

---

#### About Loopstra Nixon LLP

Loopstra Nixon is a full-service Canadian business and public law firm dedicated to serving clients involved in business and finance, litigation and dispute resolution, municipal, land use planning and development, and commercial real estate. Major financial institutions, insurance companies, municipal governments, and real estate developers along with corporate organizations and individuals are among the wide range of clients we are proud to serve.

---

The foregoing has been prepared for clients of Loopstra Nixon LLP. While every effort has been made to ensure accuracy, the information contained herein should not be relied on as legal advice; specific advice should be obtained in each individual case. No responsibility for any loss occasioned to any person acting or refraining from action as a result of material herein is accepted by the authors or Loopstra Nixon LLP. If advice concerning specific circumstances is required, we would be pleased to be of assistance.

©2017 Loopstra Nixon LLP. All rights reserved.

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.