



## CONSTRUCTION | INFRASTRUCTURE

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### "BEST EFFORTS" – "REASONABLE EFFORTS" – "COMMERCIALLY REASONABLE EFFORTS" – WHAT DO THESE TERMS MEAN?

BY: E. JANE SIDNELL AND CHRIS KNIGHT

Agreements often refer to obligations being performed to a certain standard. Those standards can be expressed in many different ways, but the terms "best efforts", "reasonable efforts" and "commercially reasonable efforts" are frequently used qualifiers.<sup>1</sup> So what is the difference between these qualifiers and is one more onerous than another?

#### Summary

Performing an obligation with one's "best efforts" is likely the most onerous standard of the three discussed in this article. If a party promises "best efforts", everything that can be done should be done, but not to the point of that party bankrupting itself. Although the "best efforts" qualifier must be set against the context and purpose of the contract in which it is found, the phrase "no stone unturned" exemplifies the "best efforts" standard.

By contrast, "reasonable efforts" implies that what can be done should be done, in the context and purpose of the contract, but without requiring a party to leave "no stone

unturned". "Reasonable efforts" is a less onerous standard than "best efforts".

Another variation is the "reasonable best efforts" phrase. This has not been explicitly considered in Canadian jurisprudence, though one American author opines that "best efforts" and "reasonable best efforts" are likely similar in that 'reasonable' in the latter phrase is largely irrelevant.<sup>2</sup> This is significant in Canada (as in the United States) in that drafting with the phrase "reasonable best efforts" might get you in trouble if you think it means something less than "best efforts", because it may not. The better practice is to use "best efforts" (to mean "no stones left unturned") and "reasonable efforts" (to mean "some stones reasonably left unturned").

Finally, "commercially reasonable efforts" is a standard that has received little judicial consideration and ought to be treated with caution. One possible interpretation is that the market dictates the objective measure of value so as to determine how far the obligation must be taken. However, "commercially reasonable efforts" is ambiguous and ought to be expressly defined if used in contracts.

#### "Best Efforts"

The phrase "best efforts" was considered at length by Justice Dorgan of the British Columbia Supreme Court in *Atmospheric Diving Systems Inc.*<sup>3</sup> Justice Dorgan considered how the term has been interpreted through a century of English and Canadian jurisprudence<sup>4</sup> and distilled the following:

In summary, the principles extracted from the cases on the issue of "best efforts" are:

1. "Best efforts" imposes a higher obligation than a "reasonable effort".
2. "Best efforts" means taking, in good faith, all reasonable steps to achieve the objective, carrying

<sup>1</sup> Other terms that are used are "reasonable best efforts", "good-faith efforts", "diligent efforts", "commercially reasonable best efforts" and "every effort" (see Kenneth A. Adams, *A Manual of Style for Contract Drafting*, 2<sup>nd</sup> ed. (American Bar Association, 2008)) at page 134

<sup>2</sup> Kenneth A. Adams, *supra*, page 136

<sup>3</sup> *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.* (1994), 89 B.C.L.R. (2d) 356 (S.C.)

<sup>4</sup> *Atmospheric Diving Systems Inc.*, *supra*, note 1, at paras. 66 through 74

the process to its logical conclusion and leaving no stone unturned.

3. "Best efforts" includes doing everything known to be usual, necessary and proper for ensuring the success of the endeavour.
4. The meaning of "best efforts" is, however, not boundless. It must be approached in the light of the particular contract, the parties to it and the contract's overall purpose as reflected in its language.
5. While "best efforts" of the defendant must be subject to such overriding obligations as honesty and fair dealing, it is not necessary for the plaintiff to prove that the defendant acted in bad faith.
6. Evidence of "inevitable failure" is relevant to the issue of causation of damage but not to the issues of liability. The onus to show that failure was inevitable regardless of whether the defendant made "best efforts" rests on the defendant.
7. Evidence that the defendant, had it acted diligently, could have satisfied the "best efforts" test is relevant evidence that the defendant did not use its best efforts.

The "no stone unturned" test has been applied to contracts relating to a wide variety of subject matters. Further, courts routinely imply a term in contracts that the parties will make reasonable efforts to fulfil their respective contractual obligations. Where the parties include a "best efforts" clause in a contract, as they did in the case at bar, they must surely intend that something more than "reasonable efforts" be used.

Justice Dorgan determined that the standard of "best efforts" was an onerous standard exemplified by the phrase "no stone unturned", albeit within the overall context and purpose of the contract itself, and is more onerous than "reasonable efforts". Justice Dorgan's analysis of "best efforts" in *Atmospheric Diving* has been endorsed by a number of Canadian decisions<sup>5</sup>.

### "Reasonable Efforts"

"Reasonable efforts" is often used to denote a degree of effort less than "best efforts", and is normally defined by what it does not entail, as in *Ontario (Ministry of Transportation) v. O.P.S.E.U.*<sup>6</sup>:

[R]easonable efforts does not mean "all efforts". It does not mean "efforts to the point of undue hardship". It does not mean "every effort". What it means is efforts that are reasonable in the circumstances all things considered. What is reasonable in the circumstances will, obviously, depend on the facts of particular cases.

The standard of "reasonable efforts" is interpreted against the context and purpose of the contract requiring the obligation to be performed, but without the "no stone unturned" proviso. In *Dobb v. Insurance Corp. of B.C.*<sup>7</sup> the court stated that:

... 'reasonable' in the provision is synonymous with the adjectives 'logical', 'sensible' and 'fair', but does not mean that before resort can be had to the provision the applicant must go to whimsical or unwarranted lengths.

In another British Columbia case, *Armstrong v. Langley (Township)*<sup>8</sup>, the court referred to the *Atmospheric Diving* decision in finding that:

'Reasonable effort' does not require ... all possible steps ... [but rather] reasonable steps. Reasonable efforts does not mean best efforts which imports a higher obligation on persons to accomplish the required task.

In *Logic 2000 Inc. v. CNC Global Ltd.*<sup>9</sup>, the Ontario Court of Appeal provided that "reasonable efforts" is not "best efforts" and includes "all reasonable and measured steps" to complete the obligation.

<sup>5</sup> *Royal Oak Mines Inc. v. C.A.W., Local 2304* (1997), 63 L.A.C. (4th) 346 (Cdn. Arb. Bd.); *Leacock v. Whalen, Beliveau & Associates Inc.*, [1996] B.C.J. No. 2085 (S.C.); *Amonson v. Martin Goldstein Professional Corp.* (1995), 163 A.R. 161 (Q.B.); *Wentworth Development Inc. v. Calgary (City)* (1998), 218 A.R. 1 (Q.B.); *Sherwood Park Mall Ltd. v. Zellers Inc.*, [2001] A.J. No. 885; and *GC Parking Ltd. v. New West Ventures Ltd.*, 2004 BCSC 706

<sup>6</sup> *Ontario (Ministry of Transportation) v. O.P.S.E.U.* (1997), 4 L.A.C. (4th) 38 (Ont. Arb. Bd.)

<sup>7</sup> *Dobb v. Insurance Corp. of B.C.*, [1991] B.C.W.L.D. 1987 (S.C.) at para. 26

<sup>8</sup> *Armstrong v. Langley (Township)* (1997), 42 M.P.L.R. (2d) 34 (B.C. S.C.) para. 34

<sup>9</sup> *Logic 2000 Inc. v. CNC Global Ltd.*, 2002 WL 39094 (Ont. S.C.J.) at para. 26; aff'd 2003 WL 22048651 (Ont. C.A.)

In the context of labour relations, the standard of “every reasonable effort”<sup>10</sup> to accommodate vacation requests has been considered:

[51] In *Re The Crown in Right of Ontario (Ministry of Community & Social Services) and OPSEU*: ... the Ontario Crown Employee’s Grievance Board defined “every reasonable effort” as follows at p. 35:

...First and foremost, as employer counsel argued, making reasonable efforts does not mean “every” effort or “all efforts”. It means making efforts that are reasonable all things considered, and that will, given that this is a broadly worded clause of general application, depend on particular circumstances of individual cases.

[52] What constitutes “every reasonable effort” is a question of fact to be determined in every set of circumstances. In *Re: City of Cornwall and CUPE, Local 3251* ... the arbitrator discussed what must be considered to act reasonably in considering vacation requests ...:

The grievor’s job does not involve the provision of essential services, nor does it apparently require to be performed at any specified time. In order to decide whether a specific vacation request could reasonably be declined, it would be necessary to take into account such factors as the overall expense to the Employer, the reasons for the grievor in requesting a particular vacation schedule, the possibility of adjusting the instructional schedule to accommodate the grievor’s vacation requests without requiring her specific replacement at the City’s expense, and the proportion of the overall agreed schedule of vacation which accommodates the City’s desire for efficiency and financial responsibility with the grievor’s desire for a vacation schedule which accommodates to a reasonable degree her personal preferences.

[53] The case law referred to by counsel indicates that when considering whether an employer has made “every reasonable effort” to accommodate any employee’s vacation request, an arbitration board should consider what the employer did and did not do to respond to the request, and all issues

including operational factors, employee preferences, length of service and why a particular period is being selected. The majority decision in this case did consider all of these factors and found that as the employer had only considered operational issues, it had not made “every reasonable effort”.

### **"Commercially Reasonable Efforts"**

The phrase "commercially reasonable efforts" is frequently used in contract drafting, with several dozen reported decisions considering contracts containing this phrase since 1999. This entire phrase, however, has had little judicial consideration. Given the jurisprudence surrounding "best efforts" and "reasonable efforts", the question to be considered is whether "commercially reasonable" implies a lower or higher standard from "reasonable efforts". That is, are "commercially reasonable efforts" restricted only to steps that might be commercially acceptable, thus making a less onerous standard, or does "commercially" raise the bar such that the standard is closer to "best efforts" but only in a commercial context? This is an open question.

In the context of a security agreement, the standard for a "commercially reasonable" transaction was outlined as follows:

Generally there are two tests that may be applied to the conduct of a sale as referred to by the Court of Appeal in *Wood v. Bank of Nova Scotia* ... One is the less stringent test which is that the creditor who sells must act in good faith. The plaintiff has clearly complied with that test. The other test is the more stringent one, that the creditor must take reasonable care that the proper value is obtained. While it is not a trustee for the debtor it cannot act negligently in the sale. I adopt the principle as stated in *Debor Contracting Ltd.* ... (a Mechanics’ Lien action) that the creditor must "act a role somewhat akin to that of an agent or fiduciary for the purpose of a sale". This is a higher standard than that referred to in *Kimco Steel Sales Ltd.* ... where the test was that the sale be in good faith and not be in a recklessly improvident manner calculated to result in a sacrifice of the equipment.<sup>11</sup>

Based on this decision, “commercially reasonable” incorporates “proper value” as a central consideration of what will be reasonable. In the security agreement context, the “commercially reasonable” standard must be considered objectively from a commercial standpoint, as

<sup>10</sup> *Maritime Electric v. Burns & ors.*, 2004 PE SCTD 19 (CanLII), at paras. 51 to 53

<sup>11</sup> *National Bank of Canada v. Marguis Furs Ltd.*, [1987] O.J. No. 1228 (Ont. H.C.)

opposed to subjectively, as might be expected in most good faith agency relationships.<sup>12</sup>

Based on the Alberta Court of Appeal decision in *Atcor Ltd. v. Continental Energy Marketing Ltd.*<sup>13</sup>, the concept of being "commercially reasonable" plays a major role in the interpretation of *force majeure* clauses. In the *Atcor* case, the appellate court found that, as a general proposition, a party claiming the protection of *force majeure* has a duty to mitigate the effect of a *force majeure* event using a standard of "commercial reasonableness". At paragraph 11, the Court of Appeal stated:

A supplier need not show that the event [of alleged *force majeure*] made it impossible to carry out the contract, but it must show that the event created, in commercial terms, a real and substantial problem, one that makes performance commercially unfeasible.

The Court of Appeal sent the matter back to trial, but the parties ended up settling out-of-court. As a consequence, no judicial consideration of the standard "commercial reasonableness" beyond the phrase "commercially unfeasible" emerged from *Atcor*. It remains undecided as to whether profit is a factor to be considered. It is difficult to predict just what the reference to "commercially unfeasible" means and leads to uncertainty in interpreting the standard of being "commercially reasonable".

"Commercially reasonable efforts" may be tied to efforts required to secure a particular value for a commodity, with the market acting as an objective measure of what a "proper" value might be. If this is the case, the standard is less onerous than "best efforts" in that stones may be left unturned (so to speak) so long as a market can provide a fair valuation. The standard may be less onerous than "reasonable efforts" in that the true measure of the efforts required are those required to satisfy a market based on an independent commercial evaluation, and not "all reasonable and measured steps" required to achieve an objective.

<sup>12</sup> See also *Boychuk v. Hunterline Trucking (B.C.) Ltd.* (1997), 122 Man. R. (2d) 114 (Q.B.): "'commercially reasonable' means... an objective and pragmatic standard of conduct in that it is not fixed and rigid but is shaped by circumstance." Likewise, in *Re: Humby Enterprises Ltd.*, 2007 FC 1085, *National Bank of Canada*, *supra*, and *Thoms v. Louisville Sales & Service Inc.*, [2006] 11 W.W.R. 486 (Sask. Q.B.) were cited in support of the view, on the facts of that case where goods were offered for sale, acting "in a commercially reasonable manner" means that the party must accept whatever is offered and that the price offered is to be accepted as the fair market value of the goods. In this sense, "commercially reasonable" may be based on the concept of "fair market value".

<sup>13</sup> *Atcor Ltd. v. Continental Energy Marketing Ltd.* (1996), 38 Alta. L.R. (3d) 229 (C.A.)

However, it is not difficult for one to imagine a situation where a market valuation of a commodity is so high (or low) that acquiring (or disposing) of the commodity in question might itself be commercially *unreasonable*. Surely obtaining a commodity at a market value that would otherwise bankrupt an enterprise cannot be considered to be "commercially reasonable."

Without further judicial consideration, "commercially reasonable efforts" is ambiguous and should either be used with caution or specifically defined within the contract to which it applies.

## ENGINEER AND OWNER BOTH LIABLE FOR NEGLIGENT DESIGN THAT FAILED TO PROTECT PUBLIC SAFETY

BY: KAREN MARTIN AND MICHAEL KLOSE

In preparing their designs, professional engineers owe a duty to take reasonable care not to create a hazard that will cause physical harm to members of the public. The recent decision from the British Columbia Supreme Court in *Lovely v. Kamloops (City)*<sup>14</sup>, examines the scope of this duty in the context of the design of a waste transfer station, where the design engineers had no prior professional experience with such facilities. The case also addresses the responsibility of the owner for its unsafe facilities. Both design consultants and owners can take important lessons from the case.

The court confirmed that the standard of care for professionals generally is one of "reasonableness and ordinary competence, commensurate with the position of the person or entity in question and prevailing internal professional standards". With respect to professional engineers specifically, the court held that "there is a paramount professional duty to ensure public safety in all designs signed and sealed by a professional engineer", as well as a duty "to remain current on developments in the field of engineering in which they practised." The court noted that other aspects of the duty include the duty to make inquiries regarding how the facility is going to be used, and to communicate any key assumptions or conditions for any designs approved by the engineer. Framing the court's analysis of whether the duty of care was met by the engineer or not, was the fact that neither the retained engineer nor the City's staff involved had any professional experience with waste transfer stations.

The underlying facts of the case are simple. The City of Kamloops retained a professional engineer to assist in the design of their new waste transfer facility. After the facility opened to the public, two serious accidents occurred involving falls off of an unloading platform. One individual sued the City and the engineering firm for negligent design. The court found that the professional engineer breached his duty to ensure public safety by designing the unloading

<sup>14</sup> 2009 BCSC 1359

platform without sufficient safety measures and held the engineer 35% liable for the injuries suffered.

Interestingly, in retaining the professional engineer in this case, the City did not conduct any procurement process. Instead, the City simply asked their current primary engineering consultant if he wanted the work at his current hourly rate. As a result, there was no written contract between the parties regarding the project. This became important because at trial, the City and the engineer disagreed about the scope of the engineer's role in the design of the project, and without a written contract, the court was forced to infer the terms of the engineer's retainer from the sometimes conflicting evidence of the parties. The lack of a written contract, coupled with the fact that neither the professional engineer nor any of the City staff involved had any experience in designing waste transfer stations, played a large role in the court's ultimate decision.

Despite his lack of specific experience with waste transfer stations, the engineer argued he had fulfilled the standard of a reasonable prudent engineer. As part of his defence the engineer relied on his classification of the unloading platform as a "loading dock". Under the *Occupational Health and Safety Regulations*, "loading docks" do not require installation of guardrails. In rejecting that argument, the court held that a fundamental aspect of a design engineer's duty is to communicate any key assumptions or conditions of that design, which the engineer failed to do in this case. More generally, the court held that using the "loading dock" classification as a justification for the absence of fall protection was a failure to meet the duty to ensure public safety.

The engineer also argued that in approving the design, he had assumed that as part of the operation of the facility there would be a site safety plan in place during operations. However, such a key assumption was not written on the drawings or any related documentation and there was no evidence that the engineer attempted to confirm this assumption with the City. The court held that this was a violation of the duty to communicate such a condition to the approval of the drawings and a violation of the duty to inquire as to the use of a facility.

It is worth noting that the City argued that it should not be liable because it had relied on the expertise of the professional engineer it had retained. The court flatly rejected that argument. The court stated that the City knew the engineer had no direct professional experience in waste transfer station design and that the installation of safety

measures was not of an overly technical nature requiring professional training or any special knowledge, but more to do with common sense. Accordingly, the court found the City 55% liable for the injuries suffered.

This decision underscores the fact that an engineer practising without prior professional experience will be held to a high standard of care and can be judged harshly by a court when doing so. In this case, there is no doubt that the professional engineer's lack of specific experience influenced how the court viewed and characterized the engineer's actions.

This decision also confirms that an owner cannot be absolved of design liability simply because a professional engineer was retained and that an owner may be held responsible for aspects of design that are based on common sense.

Finally, this decision is also an example of what can go wrong when parties operate without a written contract to clearly establish the scope of the engagement. While it may initially appear that the parties have reached consensus on the scope of the retainer, once an issue arises, the parties often have divergent opinions. In that case, the court must determine the scope of the retainer, which may lead to unexpected or undesirable results for both parties.

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