



**Darrell Gold LLB**  
 Property Biz Canada  
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## ‘Reasonable Efforts’, ‘Commercially Reasonable Efforts’, ‘Best Efforts’ – Choose Your Words Wisely

This article has been contributed by Darrell Gold LLB with Robins Appleby & Taub LLP

Typically, commercial agreements include conditions precedent to the agreement (i.e. conditions that must be satisfied for a binding un-conditional agreement to arise). Those conditions tend to contain expressions requiring a party to expend “reasonable efforts”, “commercially reasonable efforts”, “best efforts” etc. in attempting to satisfy the condition. An example would be a buyer’s proposed property use being conditional on the buyer getting municipal approvals. The intent of adding an “efforts” standard is to clarify the parties’ expectations as to what a party needs to do in attempting to satisfy a condition under an agreement, before that party is in a position to then terminate the agreement if the condition was not satisfied.

The “efforts” phrases are intended to create a standard clarifying or exceeding the minimum otherwise applicable at common law on a party. If the party with the duty cannot show that it used the requisite efforts implied or provided for, then any purported termination may be an anticipatory breach of the agreement leading to a damages claim.

The point to understand is that “reasonable efforts”, “commercially reasonable efforts”, “best efforts” and similar phrases differ in terms of what is required of the party with the performing duty. This has ramifications should that party want to terminate the agreement if it believes it made the efforts but was unable to achieve what it needed to. So, what does the law in Ontario provide regarding efforts to be expended? Below is a summary for some guidance.

**Minimum Standard** – A party who decides it wants out of a conditional agreement cannot sit-back and do nothing, allow the condition to expire without satisfaction and then successfully terminate the agreement for non-satisfaction, absent express language to the contrary (and who would accept that?). Absent express “efforts” language in an agreement, our courts have held that the minimum standard is to act reasonably in carrying out rights and obligations. It is an objective test that assesses what other reasonable persons would have done in the same circumstances.

**“Reasonable Efforts”** – This phrase is often added to conditions in agreements for clarification. Our courts have held that it means: “using sound judgment - exercising a logical, fair and sensible view”. Again, an objective test that assesses what other reasonable persons would have done in the same circumstances. However, “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.”

**“Commercially Reasonable Efforts”** – This phrase is also commonly used but it is unclear as to whether it creates a higher or lower standard than “reasonable efforts” since what may be commercially unreasonable to do in the circumstances may, for other purposes be reasonable, i.e. what is reasonable or not, is dependant upon the commercial realities in the

situation in question which may also include a subjective element and business judgment in the circumstances. It seems to me that “commercially reasonable efforts” is a qualified “reasonable efforts” and thus less onerous. It is certainly not as onerous a standard as “best efforts” given its qualification. However, there is some uncertainty from the cases so it should be used with caution.

**“Best Efforts”** – Not surprisingly, recent case law confirms that “best efforts” imposes a higher level of obligation than “reasonable efforts” or “commercially reasonable efforts”. In those cases it has been confirmed that, amongst other things, “best efforts”:

1. imposes a higher obligation than “reasonable efforts”.
2. means taking in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and “leaving no stone unturned”;
3. includes doing everything known to be usual, necessary and proper for ensuring the success of the endeavour; and
4. “best efforts” must be approached in the light of the particular contract, the parties and the contract’s overall purpose as reflected in its language.

There is conflicting case law on whether or not “best efforts” means you need to sacrifice your own economic interests in carrying out your obligations. While it does not seem reasonable that a performing party should have to sacrifice itself entirely to the economic interests of the party to whom the duty is owed, it does remain a risk where “best efforts” language is used.

Finally, it is important to note that courts have implied both “reasonable efforts” and “best efforts” obligations on parties fulfilling conditions under agreements, in the absence of such language. Examples where “best efforts” have been read into the agreement include conditions requiring independent third-party approval, such as financing, or municipal approvals.

1. Ontario (Ministry of Transportation) v. O.P.S.E.U
2. 364511 Ontario Ltd. v. Darena Holdings Ltd.
3. Atmospheric Diving Systems Inc. v. International Hard Suits Inc.

**The Lessons:** When drafting agreements give careful consideration as to what the expectations are for the efforts to be expended in order to try and satisfy a condition, and be wary of the obligation to use “best efforts” as that will impose an onerous standard, which may prevent you from doing what is in your own commercial self-interest. If “best efforts” are required, then consider carve outs for financial expense over a certain amount and the subjective economic interests of the party with the duty. Finally, if you don’t choose any standard, you run the risk on the courts implying one and that can include the “best efforts” standard.

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