Pursuant to s. 101(1) of the BIA, where a bankrupt corporation has paid a dividend (other than a stock dividend) within the period beginning one year before the date of the initial bankruptcy event and ending on the date of bankruptcy, on application of the trustee, the court may inquire into the transaction to determine whether it occurred at a time that the corporation was insolvent or whether it rendered the corporation insolvent.

In general terms, the court will regard a corporation as insolvent if it cannot meet its obligations as they become due. Should the court inquire into whether the directors authorized a dividend while the corporation was insolvent, the onus is on the directors to prove that the corporation was not insolvent at the relevant time and that they had reasonable grounds for believing that was the case.

If the directors do not meet their onus, the court may give judgment to the trustee against the directors of the corporation, jointly and severally, in the amount of the dividend, plus interest.

Statutory limit

As under the CBCA, the BIA provides a mechanism to reduce or limit directors' liability in the event that dividends are authorized while the corporation is insolvent. For instance, section 101(5) of the BIA states that a director can escape liability altogether if, at the time the company paid the impugned dividend, he or she protested against the dividend in accordance with the law governing the corporation's operations.

Further, the BIA also specifies that nothing affects the rights of a director to recover from shareholders the value of any dividend paid to those shareholders at the time the corporation was insolvent, or if the corporation was rendered insolvent by the dividend.

While directors generally have broad discretion to authorize dividends, this discretion is severely restricted in instances where the corporation is in financial distress.

Significance

While directors generally have broad discretion to authorize dividends, this discretion is severely restricted in instances where the corporation is in financial distress. Failure to understand and comply with these restrictions can result not only in detriment to the corporation, but also in dramatic consequences to a director in the form of personal liability.

Directors are well advised to understand the circumstances in which their decision to authorize dividends may engage their own personal liability. It is important that directors abide by the requirements laid out in the various governing statutes and exercise diligence whenever authorizing the declaration or payment of dividends.

REFERENCES: *McLurg v. Canada*, 1990 CarswellNat 520, 1990 CarswellNat 743, [1990] 3 S.C.R. 1020 (S.C.C.) at para. 27; *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ss. 42, 118(2)(c), 118(4), (5) and (7); Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, ss. 38(3), 130(2)(d); *Kerr v. Danier Leather Inc.*, [2007] 3 S.C.R. 331 (S.C.C.) at para. 54; *Groupe Estrie Richelieu v. Choiniere*, [2000] J.Q. No. 257 (C.A.); *167806 Canada Inc. v. Ain & Zakuta (Canada) Inc.*, 1996 CarswellQue 2535, [1996] Q.J. No. 2689 (S.C.) at para. 72; *Ceapro Developments Inc. v. Canamino Inc.,* 1996 CarswellSask 437, [1996] S.J. No. 410 (Q.B.); *633746 Ontario Inc. (Trustee of) v. Salvatti*, [1990] O.J. No. 995 (Ont. H.C.J.); *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 2, 101(2), 101(4).

COMMERCIAL PROPERTY AND LEASES

"Best efforts" more onerous than "reasonable efforts" in lease

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Courts interpret a "best efforts" clause in a commercial lease as going beyond reasonable efforts in achieving an objective.

Parties negotiating a lease often negotiate the standard that must be met when fulfilling their contractual obligations. But what does it mean to use "commercially reasonable efforts," "reasonable efforts" or "best efforts" and the like?

Exactly what these competing standards entail is often a source of confusion for both the parties and their lawyers. Further complicating the matter is the question of when a party to a contract is entitled to reduce or stop making the required efforts.

"Best" versus "reasonable"

Although sometimes viewed as mere semantics, courts have drawn a real distinction between what qualifies as a "best" versus a "reasonable" effort.

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The recent Supreme Court of British Columbia decision in *Diamond Robinson Building Ltd. v. Conn* ("*Diamond*") reminds both commercial landlords and tenants alike that taking this distinction too lightly could result in unintended adverse consequences.

Facts

In *Diamond*, the plaintiff landlord brought an action against a commercial tenant for damages arising from the tenant's alleged breach of the lease between the two parties. The lease provided that the landlord agreed to make available to the tenant "up to" 22 reserved parking stalls in the landlord's parking garage to accommodate the tenant's customers.

To provide the parking stalls, the landlord needed the approval of the strata council to make alterations to the parking garage. In a rider to the lease, the landlord agreed to use its "best efforts" to obtain the necessary approvals from the strata council.

The landlord made a number of unsuccessful efforts over a period of several months to secure the council's approval, including meeting with security consultants and contemplating the installation of an intercom system.

On September 11, 2006 — roughly one and a half months before the commencement of the lease — the tenant informed the landlord that it no longer wanted to proceed with the lease because of the lack of adequate parking.

The landlord treated the lease "at an end as of this date" and immediately stopped pursuing the council's approval. However, it did not send formal notice of acceptance of the tenant's repudiation of the lease.

On December 15, 2006, the landlord sent a Notice of Termination to the tenant for default under the lease for failing to pay its rent, purporting to terminate the lease at that time.

"Best efforts" defined

Relying on Dorgan J.'s decision in *Atmospheric Diving Systems Inc. v. International Hard Suits Inc*, ("*Atmospheric*"), the court summarized the basic legal meaning of "best efforts" as:

1. Imposing a higher obligation than a "reasonable effort";
2. Not only exhausting all reasonable steps to satisfy a contractual obligation, but also carrying the process to its logical conclusion by "leaving no stone unturned";
3. Doing everything known to be usual, necessary, and proper to achieve the objective.

A party agreeing to use its "best efforts" is implicitly signalling to the other side that it will leave no stone unturned in attempting to fulfil its contractual obligations.

A party contracting to use its "best efforts" therefore faces an onerous burden because courts interpret this language as meaning that the party intended to go beyond reasonable efforts to achieve a particular objective.

According to the court, a party agreeing to use its "best efforts" is implicitly signalling to the other side that it will leave no stone unturned in attempting to fulfil its contractual obligations.

Although "best efforts" imposes an onerous burden, it is not an insurmountable one. In *Atmospheric*, the court noted that exactly what constitutes a party's best efforts is context-specific and 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.

In addition, it is not necessary for a party to have acted in bad faith for a court to find that it failed to use its best efforts to achieve a particular objective.

Landlord's continuing obligations

The court held that the landlord was undertaking its best efforts to secure the strata council's approval of the parking stalls until September 11, 2006 at which point it ceased making any efforts because the tenant had informed the landlord it was no longer proceeding with the lease.

However, the court also found that the landlord did not disaffirm the lease until December 15, 2006 when it delivered its Notice of Termination to the tenant. At common law, an innocent party must continue to perform its obligations under a contract until it communicates its acceptance of the other party's repudiation of the contract.

In this case, the landlord stopped making its best efforts to secure the council's approval on September 11 — not when it communicated its acceptance of the tenant's repudiation on December 15. Accordingly, since the landlord treated the lease as being alive until December 15, it was obligated to continue making its best efforts to secure the council's approval even after the tenant advised that it no longer wanted to continue with the lease on September 11.

Failing to do so meant that the landlord did not perform all that was required of it under the lease. Since the landlord could not demonstrate that it had fulfilled its obligations under the lease, it was not entitled to damages or to retain the tenant's deposit.

Significance

To avoid being held to a higher standard than they bargained for, parties negotiating a lease must always carefully consider the effects of being held to a standard of "best efforts."

If a party is unclear as to exactly what such a standard entails — or whether it is appropriate given the context of the lease — it may be prudent to aim for a lower standard (one of "reasonableness") when negotiating the lease.

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As the court in *Diamond* made clear, a party that fails to use its best efforts when it contracted to do so could face irreparable commercial harm. Further, whatever efforts are agreed upon as the applicable standard, a party should be careful not to cease required efforts too soon, to avoid being found to have itself defaulted on its own obligations.

This article was written with the assistance of Kelli Shoebridge, an articling student.

REFERENCES: Diamond Robinson Building Ltd. v. Conn, 2010 CarswellBC 115, 2010 BCSC 76 (CanLII) at para's 82 and 83; *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*, 1994 CarswellBC 158, [1994] 5 W.W.R. 719 (B.C. S.C.).

INTELLECTUAL PROPERTY

Sound trade-marks registrable in Canada

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Trade-mark applications for sound marks are now being accepted by CIPO.

The Canadian Intellectual Property Office ("CIPO") is now accepting trade-mark applications for sound marks as a result of the recent Federal Court order in *Metro-Goldwyn-Mayer Lion Corp. v. The Attorney General of Canada and the Registrar of Trade-Marks*.

This acceptance aligns Canada with other jurisdictions, such as the United States, which permit the registration of trade-marks comprised of sound.

Facts

Metro-Goldwyn-Mayer Lion Corp. ("MGM") filed a Canadian trade-mark application in 1992 for a "Roaring Lion" sound mark in association with motion pictures films and pre-recorded video tapes, motion picture services and entertainment services by distribution of motion pictures.

The sound mark is well-known to the public as it has been used in Canada since at least 1928 and is played in the credits of MGM studio films.

After several years, the Registrar of Trade-marks refused this mark in 2010 for failing to comply with the requirements of para. 30(h) of the *Trade-marks Act* (the *"Act"*) which states:

> An applicant for the registration of a trade-mark shall file with the Registrar an application containing (*h*) unless the application is for the registration only of a word or words not depicted in a special form, a drawing of the trade-mark and such number of accurate representations of the trade-mark as may be prescribed.

As sounds are being used in the marketplace as trade-marks, CIPO's new policy affords protection.

Federal Court order

MGM appealed the Registrar's decision to the Federal Court. The terms of the recent Federal Court order are a result of an agreement reached between MGM and CIPO.

The order sets aside the Registrar of Trade-marks' decision which refused the application on the basis that it did not meet the requirements of para.30(h) of the Act.

As well, the court ordered the Registrar to approve the application for advertisement and directed the applicant to provide CIPO with a digital file containing the actual sound mark. The mark is now approved and advertised as of March 28, 2012, almost 20 years after filing.

A digital representation of the sound is publicly available on CIPO's website. In contrast to the lengthy process MGM has experienced in Canada, the 'Roaring Lion' sound mark has been registered as a trade-mark in the United States since June 3, 1986.

Guidelines for filing

CIPO has since issued a practice notice containing guidelines for filing a sound mark in Canada. An application for the registration of a trade-mark consisting of a sound must be filed as a paper application and the application should:

a. state that the application is for the registration of a sound mark;
b. contain a drawing that graphically represents the sound;
c. contain a description of the sound; and
d. contain an electronic recording of the sound.

The notice further specifies the type of objections that may occur with a sound mark. For example, if the mark is considered to be functional and/or clearly descriptive or deceptively misdescriptive, the mark will be objected to under para. 12(1)(b) of the *Act*. As well, the notice specifies that registration of a sound mark is pursuant to the provisions of subs. 12(2) or s. 14 of the *Act*.

Electronic recording

The electronic recording of a sound mark must meet certain requirements set out by CIPO. In particular, the

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