THE REQUIREMENT TO 'DULY AND REGULARLY' PAY RENT AS A CONDITION PRECEDENT TO A LEASE RENEWAL OPTION

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Frequently options to renew a lease at the expiry of the original term stipulate that the tenant's right to exercise the renewal is dependent upon satisfactory past performance of the covenants contained in the lease. Courts have interpreted these stipulations as conditions precedent which must be strictly satisfied; the party relying on the option bears this onus.

An important condition precedent is the requirement that the tenant has 'duly and regularly' paid the rent. The meaning of 'duly' has been interpreted to require that there is no unremedied default, either when the option is exercised or when the renewal term begins, and punctuality is not required. Two seemingly opposed interpretations of 'regularly' have surfaced. From a practical standpoint, the author suggests the same result may be reached by either interpretation, as the critical issue in either case is whether the failure to pay rent in accordance with the lease is trivial and inadvertent.

Two arguments are often advanced to suggest the landlord has waived, or is estopped from relying on strict compliance with the conditions precedent. First, the author suggests that continued acceptance of rent or overdue rent is not a waiver of the conditions precedent to the renewal option by the landlord. Second, the author suggests that the landlord does not owe a duty to warn the tenant that a breach of the lease has occurred. Mere failure to warn is not equivalent to expressly communicated waiver.

Practical suggestions for landlords, tenants and their legal counsel are provided based on the findings in the article.

Fréquemment, un locataire a le droit de renouveler son bail à la date d'expiration du contrat original à condition d'avoir satisfait au préalable à toutes les conditions exigées. Selon l'interprétation des tribunaux, ces conventions et stipulations sont définies comme étant celles qui doivent avoir été rigoureusement respectées par la partie qui invoque l'option de renouvellement.

Une condition préalable importante est l'obligation d'acquitter régulièrement le loyer. Le sens de «régulièrement» signifie que le ou la locataire n'est pas en défaut au moment d'exercer cette option ou à la date d'entrée en vigueur du bail renouvelé, et n'implique pas la ponctualité. Il existe deux interprétations diamétralement opposées du terme «régulièrement». Sur le plan pratique, l'auteur suggère qu'elles aboutissent probablement au même résultat, le point critique étant que le défaut de paiement conformément aux conditions du bail est insignifiant et fortuit.

Les deux arguments sont souvent invoqués pour suggérer que le propriétaire a dispensé le locataire de respecter strictement les conditions suspensives. En premier lieu, l'auteur suggère que le fait de continuer à accepter le loyer ou les arriérés de loyer ne constitue pas une exemption des conditions préalables à l'option de renouvellement. L'auteur suggère de plus que le propriétaire n'est pas tenu d'avertir le locataire qu'il [le locataire] a enfreint les conditions du bail. Le non-avertissement ne peut être interprété comme constituant un avis exprès de dispense.

L'article offre quelques suggestions aux propriétaires, aux locataires et à leurs avocats.

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I. INTRODUCTION

An option to renew the lease at the expiry of the original term is a common characteristic of modern commercial leases. To protect the landlord from a tenant who proves unreliable during the original term, the renewal option usually contains a stipulation that the tenant's right to exercise the renewal option is dependent upon satisfactory past performance of the tenant's covenants set out in the lease (*e.g.* payment of rent). These stipulations have been strictly construed by Canadian common law courts as conditions precedent.

When a tenant breaches a covenant in the lease, circumstances may be such that the landlord chooses not to terminate the lease (*e.g.* high vacancy rates; no suitable alternative tenants to whom to relet; no other profitable use for the premises.) Alternatively, even if the landlord terminates the lease, the tenant may obtain relief from forfeiture.[1] Consequently, the landlord may wait until the end of the original term to terminate the relationship by denying the tenant's renewal right. Such a denial would be based on the argument that, due to the past breaches, the tenant has not satisfied the conditions precedent and therefore is not entitled to exercise the renewal option. In this article, I review Canadian common law judicial treatment of conditions precedent in lease renewal options, with emphasis on conditions precedent that the tenant has 'duly and regularly' paid the rent. In Part II, I examine decisions that conditions precedent in options must be strictly satisfied, and that the onus is on the party seeking to exercise the option to establish that all conditions precedent have been performed.

In Part III, I examine the condition precedent that the tenant has 'duly and regularly' paid the rent. I focus on two, seemingly contradictory, interpretations of the word

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[1] In *Sparkhall* v. *Watson*, [1954] 2 D.L.R. 22 (O.H.C.) [hereinafter *Sparkhall*], discussed in greater detail on page 7 below, the tenant had been granted relief from forfeiture for late payment of rent; and in *Pam-Cor Investments Ltd.* v. *Friends and Neighbours Family Restaurant Ltd.* (1986), 70 B.C.L.R. 347 (B.C.S.C.) at 351 the trial judge granted relief from forfeiture to a tenant which had breached a non-rent covenant stating that courts are "loath to find in favour of a forfeiture of a lease." On appeal, the British Columbia Court of Appeal ([1987] 4 W.W.R. 532 at 539) found that the tenant had breached a term of the lease which the trial judge had severed. The Court of Appeal held that the severance was wrong and the breach too serious to grant relief from forfeiture. The Court did not approve or disapprove of the trial judge's statement quoted above. It felt that the Court should be guided by the principles of equity and the circumstances of each case. Nevertheless, landlords are acutely aware of the existence of the attitude expressed by the trial judge.

'regularly' and argue that, from a practical viewpoint, either interpretation will produce the same result in any case involving a condition precedent that the tenant has 'duly and regularly' paid the rent. I suggest that one interpretation is more practical and adaptable than the other and should be preferred in future cases.

In Parts IV and V, I review two arguments used to suggest that the landlord has waived, or is estopped from relying on, strict compliance by the tenant with the conditions precedent to an option. The first argument is based on the landlord's acceptance of late rent. The second argument is based on the landlord's failure to warn the tenant of a breach of lease. I suggest that, absent a provision in the lease, neither of these arguments should succeed.

Finally, in Part VI, I provide some practice suggestions for dealing with the issues reviewed in this article.

II. CONDITIONS PRECEDENT

As noted above, renewal options are usually predicated on satisfactory past performance of the tenant's covenants. Although few options expressly state that past performance is a condition precedent, the courts have interpreted them in that fashion. One of the earliest decisions on this point, subsequently referred to in Canadian courts, is *Finch* v. *Underwood*.[2] In that case, the tenant was to be granted, at the expiration of the original term, a new lease on certain terms and conditions, one of which was "the covenants and agreements on the said tenant's part shall have been duly observed and performed."[3] During the ter,m an assignment of the lease occurred without the consent of the landlord and, at the expiration of the lease, the premises were slightly out of repair contrary to a covenant in the lease. In the Court of Appeal, James L.J. considered the renewal agreement to be "a privilege to which the tenants were to be entitled on certain terms which had not been complied with. It was in fact a *condition precedent* which must be strictly performed."[4] Mellish L.J. and Baggallay J.A. were of the same opinion and the tenant's action was dismissed.[5]

In *Coventry* v. *McLean*,[6] the Ontario Court of Appeal dealt with an option to purchase rather than an option to renew. The relevant clause gave the tenant "the option and privilege of purchasing the aforesaid block H ... at any time during the continuance of the term hereby demised."[7] For nonpayment of rent, the landlord repossessed the premises under a right of re-entry and declared the term of the lease forfeit by reason of the tenant's failure to pay rent. The tenant subsequently offered the rent and then brought action for relief from forfeiture and for specific performance of the option to purchase. In a unanimous decision, the Ontario Court of Appeal held that the terms of

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2 (1876), 45 L.J. Ch. 522.
3 *Ibid.* at 523.
4 *Ibid.* at 524 [emphasis added].
5 *Ibid.*
6 (1894), 21 O.A.R. 176 (Ont. C.A.).
7 *Ibid.* at 177.

the exercise of the option must be "strictly construed, and that all *precedent conditions* must be fulfilled before any contract binding on the vendor can arise."[8] The term of the lease having ended, either by the landlord's repossession or by the expiry of the original term prior to the trial date, the option could no longer be exercised 'during the continuance of the term' as required. The Court stated: "[i]t is, in fact, a conditional offer by the lessor, and the condition must be performed before the offer becomes binding."[9] The tenant's action and appeal were dismissed.

The Supreme Court of Canada first recognized this principle in *Loveless* v. *Fitzgerald*.[10] In that case, the tenants had an option to renew their lease if, amongst other things, they "had kept and performed all their covenants."[11] Anglin J., with whom Davies, Idington and Duff JJ. concurred in the majority, set out the essential facts of the case:

> The lessees had covenanted not to assign without leave. The tenants, Barbour and Loveless, gave due notice of their desire for an extension. After the notice had been given and before the expiry of the original term they dissolved partnership and thereupon Barbour, without the leave of the landlords, assigned his interest in the lease to Loveless.[12]

Anglin J. first ruled that this assignment violated the covenant not to assign.[13]

The parties apparently accepted that the tenants' obligation to keep and perform all their covenants was a condition precedent to renewal.[14] However, the tenant argued that performance was only required as a condition precedent up to the time of giving notice of exercise of the option to renew and that performance was not required as a condition precedent "throughout the entire original term."[15] In advancing this argument the tenant relied on an *obiter dictum* of Mellish L.J. in *Finch* v. *Underwood*,[16] but Anglin J. unequivocally refused to follow it.[17] He noted an intolerable absurdity that would flow from such a proposition:

> It is obvious that if this contention should prevail, the lessees, by giving the requisite notice for extension immediately after taking their lease, would entirely eliminate observance of their covenants as a condition precedent to their right to have such extension.[18]

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8 *Ibid.* at 181 [emphasis added].

9 *Ibid.*

10 (1909), 42 S.C.R. 254.

11 *Ibid.* at 255.

12 *Ibid.* at 257-58.

13 *Ibid.* at 260-61.

14 *Ibid.* at 261.

15 *Ibid.*

16 *Supra* note 2 at 524. This *dictum* is discussed again below at 121 in relation to the meaning of the word 'duly'.

17 *Supra* note 10 at 262.

18 *Ibid.* at 261. As an aside, it is interesting to speculate that the *dictum* of Mellish L.J. referred to in the text motivated lease drafters to frame renewal options that could *not* be exercised prior to a certain date (*e.g.* "by notice in writing given to the landlord not more than 6 months prior to the expiry of the term.").

The tenant's appeal was dismissed.

If there was any remaining doubt that something not expressly stated to be a condition precedent could be a condition precedent, it was laid to rest by the Supreme Court of Canada in *Cushing* v. *Knight*[19] and *Pierce* v. *Empey*.[20]

Cushing v. *Knight* dealt with an agreement for sale of land which required the purchaser to make a $10,000 down payment "on the signing of this agreement."[21] The Court unanimously dismissed the purchaser's action for specific performance as the purchaser had withheld payment of this deposit. Duff J., with whom Brodeur J. concurred, stated:

> The parties do not, it is true, in formal terms provide that the payment of that sum is to be a condition; but the intention that it should be so is manifested by the frame of the agreement as a whole, the stipulations of which pre-suppose that this payment has already been made and shew unmistakeably that it is upon the basis of this assumed state of facts that the parties are contracting.[22]

In *Pierce* v. *Empey*, the plaintiff sought to enforce an option to purchase certain property he had quit claimed to the defendant mortgagee which option was expressed to be exercisable "for a period of three months from the date of the quit claim deed ... [by] payment of the full amount of the mortgage."[23] The plaintiff did not make such payment within the three-month period. The Court unanimously dismissed the plaintiff's action and appeal. The decision was delivered by the Chief Justice who stated:

> It is well settled that a plaintiff invoking the aid of the Court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed. The owner incurs no obligation to sell unless the *conditions precedent* are fulfilled....
>
> ...until these conditions were fulfilled no obligation to sell could arise and the relation of vendor and purchaser did not come into existence (*Cushing* v. *Knight*, 6 D.L.R. 820).[24]

It is now accepted that a requirement in an option to perform some act is a condition precedent to the right to exercise that option, and the onus is on the party relying on the option to show that the condition precedent has been satisfied.[25]

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19 (1912), 6 D.L.R. 820.

20 [1939] 4 D.L.R. 672.

21 *Supra* note 19 at 822.

22 *Ibid.* at 825.

23 *Supra* note 20 at 673.

24 *Ibid.* at 674, 675 [emphasis added].

25 *Nankin* v. *Starland Ltd.* (1910), 15 W.L.R. 520 (Alta. K.B.); *Sparkhall* v. *Watson*, *supra* note 1; *Fingold* v. *Hunter*, [1944] 3 D.L.R. 43 (Ont. C.A.); *Pacella* v. *Giuliana* (1977), 1 R.P.R. 301 (Ont. C.A.); *Horne & Pitfield Foods Ltd.* v. *Fithen* (1981), 30 A.R. 477 (Q.B.); *B & R Holdings Ltd.* v. *Western Grocers Ltd.* (1982), 25 R.P.R. 121 (Sask. Q.B.); *Crescent Leaseholds Ltd.* v. *Gerhard Horn Investments Ltd.*, [1983] 1 W.W.R. 305 (Sask. Q.B.); *Finn* v. *Finn*, [1983] 3 W.W.R. 236 (Alta. Q.B.).

III. THE REQUIREMENT TO 'DULY AND REGULARLY' PAY RENT

In the majority of commercial leases the covenant to pay rent is the tenant's most important obligation. Thus, it is not surprising that conditions precedent receive meticulous scrutiny by the courts whenever a landlord argues that a tenant cannot exercise an option to renew because of past failures to pay rent.

As described in Part II above, conditions precedent are strictly enforced. This poses little difficulty where the condition precedent relates to a one-time event, such as the payment of money required in *Cushing* v. *Knight*[26] and in *Pierce* v. *Empey*.[27] However, because payment of rent is a recurring obligation, late payment of rent poses a dilemma. For example, if over a five-year lease requiring payments of rent on a set day each month during the term, the tenant is late with a monthly instalment only three times, and each time the late instalment is fully paid within thirty-five days of the due date, and there are no other breaches of lease, should the tenant lose the right to renew?[28] What if there are six late payments, or it takes the tenant longer than thirty-five days? Where should the line be drawn? How strictly should the courts enforce a condition precedent relating to payment of rent? To deal with this dilemma the courts focus on the exact wording of the condition precedent that deals with payment of rent. This wording invariably requires that the rent has been 'duly and regularly' paid.

As will be seen, the meaning of the word 'duly' is settled, but two diametrically opposed interpretations of the word 'regularly' have emerged. Nevertheless, I am of the opinion that the two interpretations overlap and, therefore, can be used concurrently to arrive at the same result in each case involving a condition precedent that the rent has been 'duly and regularly' paid. Consequently, I argue that only one interpretation should be used from now on, and I suggest which interpretation should be preferred.

A. THE MEANING OF 'DULY'

In *Finch* v. *Underwood*,[29] the condition precedent in the renewal option required that "the covenants and agreements on the said tenant's part shall have been duly observed and performed."[30] Of the three justices who heard this appeal, only Mellish J. commented on what this condition precedent meant. He did not think the tenants had to strictly observe and perform all covenants throughout the term so long as at the time of seeking renewal they were not then in default.[31] However, a breach of covenant did exist at the time the tenant sought to renew.[32] Thus Mellish J.'s comment was unnecessary to the decision (which may explain why the other two justices did not also deal with this issue). This *obiter dictum* was discredited by Anglin J. in the Supreme

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26 *Supra* note 19.

27 *Supra* note 20.

28 These facts occurred in *McLaughlin* v. *Bodnarchuk* (1957), 22 W.W.R. 60 (B.C.C.A.) below at 9-11 [hereinafter *McLaughlin*].

29 *Supra* note 2.

30 *Ibid.* at 523.

31 *Ibid.* at 524.

32 *Ibid.*

Court of Canada in *Loveless* v. *Fitzgerald*.[33] As noted above,[34] Anglin J. was of the opinion that the tenant must continue to observe all covenants until expiration of the term and not merely until the time the tenant chooses to exercise the option.

In *Starkey* v. *Barton*,[35] the option required that the rent be "duly paid."[36] Parker J. held that "'duly' does not mean punctually."[37]

'Duly' is therefore interpreted as meaning that there be no unremedied default, either when the option is exercised or when the renewal term begins, and that punctuality is not required. This interpretation of 'duly' has been accepted by the majority of the Ontario Court of Appeal in *Fingold* v. *Hunter*,[38] by Judson J. (as he then was) of the Ontario High Court in *Sparkhall* v. *Watson*,[39] by all three justices of the British Columbia Court of Appeal in *McLaughlin* v. *Bodnarchuk*,[40] by two Saskatchewan Queen's Bench justices in *North Central Expressways Ltd.* v. *MacCrostie*[41] and in *B & R Holdings Ltd.* v. *Western Grocers Ltd.*,[42] and by Stratton J. (as he then was) of the Alberta Queen's Bench in *Finn* v. *Finn*.[43]

B. THE MEANING OF 'REGULARLY'

The meaning of 'regularly' is not settled. In the context of the phrase 'duly and regularly' as it applies to payment of rent, two judicial interpretations exist.

1. The *Sparkhall* Interpretation

The first detailed analysis of the meaning of "duly and regularly" occurred in *Sparkhall* v. *Watson*.[44] There, the tenant had an option to renew if the tenant "duly and regularly pays the rent."[45]

The main issue was the tenant's right to renew considering the manner in which the rent was paid during the first two and a half years of the lease. Judson J. (as he then was) listed all payments made for the first two years. The payments were not made on the dates, or in the amounts, contracted in the lease. When a payment of $5,000 due April 1, 1950 was not paid, the landlord served a notice of forfeiture of the lease. The tenant immediately applied for, and received, relief from forfeiture (the arrears were presumably paid). Thereafter, the rent was paid punctually.

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33 *Supra* note 10 at 261-62.
34 *Supra* notes 14 to 18 and related text.
35 [1909] 1 Ch. 284.
36 *Ibid.* at 285.
37 *Ibid.* at 290.
38 *Supra* note 25 at 46 and 50-51.
39 *Supra* note 1 at 25.
40 *Supra* note 28 at 62 and 65.
41 [1979] 2 W.W.R. 747 at 751-52.
42 (1982), 25 R.P.R. 121 at 127.
43 [1983] 3 W.W.R. 236 at 253-56.
44 *Supra* note 1.
45 *Ibid.* at 23.

Reviewing *Fingold* v. *Hunter*,[46] *Finch* v. *Underwood*[47] and other related cases, Judson J. first ruled that the burden was on the tenant to show that the conditions precedent upon which the renewal right depended had been performed; therefore the question to be answered was "whether the lessee has 'duly and regularly' paid the rent reserved by the lease."[48] Relying on *Starkey* v. *Barton*[49] and *Finch* v. *Underwood*,[50] the tenant argued that the payment of rent did not have to be punctual.[51]

However, neither of those cases dealt with the meaning of the word 'regularly'. Consequently, Judson J. stated:

> In a phrase such as this, the word "regularly" surely must have some meaning. I think that it compels the lessee to show that he paid at fixed intervals or periods according to the rule established by the parties themselves when they signed the lease. In other words, I am saying that it means *punctually, at the due date*.[52]

However, Judson J. was quick to point out:

> This is not a case of an *occasional* or *inadvertent* or *trivial* default. If I were to hold that in this case rent has been duly and regularly paid after the record of irregular payments extending over a period of 2 1/2 years which I have set out in detail above, then words have no meaning.[53]

The landlord's application for possession at the expiry of the original term was allowed. The tenant's counterclaim for a renewal lease was dismissed.

This first interpretation of 'regularly', I call the '*Sparkhall* interpretation'. It says that 'regularly' requires punctuality, but suggests that occasional, inadvertent or trivial defaults will be ignored.[54] Presumably this is because such defaults do not detract from the meaning of the word 'regularly'.

The *Sparkhall* interpretation was applied in *North Central Expressways Ltd.* v. *MacCrostie*,[55] where the Saskatchewan Queen's Bench dealt with a five-year lease with an option to purchase. The rent clause required monthly instalments in advance "on the first day of each and every month during the term" of the lease.[56] The option

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46 *Supra* note 25.
47 *Supra* note 2.
48 *Supra* note 1 at 24.
49 *Supra* note 35.
50 *Supra* note 2.
51 *Supra* note 1 at 24-25.
52 *Supra* note 1 at 25 [emphasis added].
53 *Ibid.* [emphasis added].
54 The use of the word "trivial" suggests application of the maxim *de minimis non curat lex*. One definition of this maxim, found in H.C. Black, *Black's Law Dictionary*, 4th ed. (St. Paul, Minn: West Publishing, 1968) at 482, is "the law will not, in general, notice the fraction of a day. Broom, Max. 142."; so application of the maxim to matters of time is not unreasonable.
55 *Supra* note 41.
56 *Ibid.* at 748.

to purchase required the tenant to have "duly and regularly" paid the rent.[57] In fact, the tenant rarely paid on the first of the month and two years into the term fell eight months in arrears. The landlord had to resort to distress proceedings before the arrears were paid up. Two months before the original term expired the tenant "sought to exercise the option to purchase ... but was turned down by the [landlord]."[58]

Sirois J. reviewed a number of decisions dealing with options, including *McLaughlin* v. *Bodnarchuk*[59] and *Sparkhall* v. *Watson*.[60] He expressly concurred with the *Sparkhall* interpretation[61] and held that the "very substantial arrears accumulated at one time over a period of eight months were not of an occasional, inadvertent, trivial or momentary nature."[62] Accordingly, he found in favour of the landlord.

2. The *McLaughlin* Interpretation

The second interpretation comes from the decision of the British Columbia Court of Appeal in *McLaughlin* v. *Bodnarchuk*.[63] In this case, the tenant leased business premises for a five-year term with monthly rental payable in advance on the third day of each month. There was an option to renew provided the tenant "duly and regularly [paid] said rent."[64] Rent for November 3, 1955 was paid on November 22, 1955. Rent for December 3, 1955 and January 3, 1956 was not paid until January 7, 1956. The tenant made no other default. The trial judge dismissed the landlord's action for possession on the expiry of the term and allowed the tenant's counterclaim for specific performance of the covenant to renew. This result was unanimously upheld on appeal.

All three justices of appeal accepted the meaning of duly, as enlarged by Anglin J. in *Loveless* v. *Fitzgerald*,[65] that there be no unremedied default either at the time the option is exercised or when the renewal term is stipulated to begin.[66]

Sheppard J.A. found that punctual performance was expressly required by the words of the covenant to pay rent because the covenant stipulated such rent to be "payable in advance on the third day of each month."[67] The covenant demanded stipulated times and not merely payment. According to Sheppard J.A., the words 'duly' and 'regularly' did "not detract from a requirement of punctuality."[68] 'Duly' did not require punctuality but, following *Sparkhall* v. *Watson*,[69] 'regularly' did:

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57 *Ibid.*
58 *Ibid.* at 749.
59 *Supra* note 28.
60 *Supra* note 1.
61 *Supra* note 41 at 752.
62 *Ibid.* at 754.
63 *Supra* note 28.
64 *Ibid.* at 61.
65 *Supra* note 10 at 261-62.
66 *Supra* note 28 at 62 for the majority and at 65 for the minority.
67 *Ibid.* at 64.
68 *Ibid.* at 65.
69 *Supra* note 1.

> The word 'regularly' should be construed as emphasizing the necessity of payment being made on the days stipulated and not on a subsequent date, that is, as requiring punctual payment.[70]

Although he accepted the *Sparkhall* interpretation, Sheppard J.A. made no mention of what would happen when the defaults were occasional, inadvertent or trivial, even though he cited the trial evidence that the defaults were due to "inadvertence of the bank employees" in transferring the rent payments from the tenant's account to the landlord's.[71] Instead, Sheppard J.A. found on the evidence that the landlord expressly waived the requirement of punctual performance[72] and, for that reason, he found in favour of the tenant.

In contrast, Davey J.A. (Coady J.A. concurring) concluded that a stipulation of punctuality as part of the meaning of 'regularly' would "not permit indulgence in the case of 'an occasional or inadvertent or trivial default' as the observation [in *Sparkhall*] might seem to indicate."[73] Therefore, the majority disagreed with the *Sparkhall* interpretation and concluded that 'regularly' does not imply punctuality; it "means only uniformly, orderly, and systematically observing the stipulated times for payment or performance as opposed to casually, spasmodically, or intermittently — a meaning which requires *substantial*, but not punctual or exact, *compliance* with the provisions of time."[74]

This second interpretation of 'regularly', I call the '*McLaughlin* interpretation.' It says that punctual payment is not required so long as there is substantial compliance with the covenant to pay rent. Davey J.A. further stated:

> Such an interpretation gives full effect to one of the primary meanings of "regularly," and fully meets the reasonable business requirements of the parties, without imposing an unreasonable condition capable of being completely fulfilled only by the exercise of the most meticulous and unremitting care unlikely to be found in the business world.
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> Viewed in that light the [tenant] fully complied with the conditions of renewal notwithstanding his inadvertent default in the punctual payment of the three months' rent, and so became entitled to the renewal of the term.[75]

3. Interpretative Overlap

I find no distinction between someone who uniformly and systematically observes stipulated times for payment (the *McLaughlin* interpretation) and someone who pays punctually (the *Sparkhall* interpretation). The common sense plain meaning is the same. Consequently, these interpretations may overlap when applied to a given fact situation.

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70 *Supra* note 28 at 65.
71 *Ibid.* at 64.
72 *Ibid.* at 66-67.
73 *Ibid.* at 62.
74 *Ibid.* at 62-63 [emphasis added].
75 *Ibid.* at 63.

A Saskatchewan Queen's Bench case illustrates an overlap in the application of the *Sparkhall* and *McLaughlin* interpretations, while at the same time showing how these interpretations are construed as being mutually incompatible. In *B & R Holdings Ltd.* v. *Western Grocers Ltd.*,[76] a fifteen-year lease made in 1965 provided that if the tenant duly and regularly paid the rent, the tenant would have a right of renewal. Rent was payable during the term in thirteen instalments per year (one every four weeks). In each year, twelve of the instalments were $1,071.69 and one instalment was $1,071.72. For 1975 to 1979 (five years) all instalments were paid in the sum of $1,071.69, thereby creating a shortfall of $.03 per year ($.15 over five years).

The landlord never challenged the annual shortfall of $.03 in the rent until the expiration of the lease when the tenant sought to renew. The landlord denied its entitlement to do so on the ground that the rent had not been duly and regularly paid during the term. The landlord applied for a writ of possession. The tenant applied for an order declaring that the renewal clause was binding and granting specific performance of the right to renew. The Court dismissed the landlord's application for a writ of possession and granted the tenant a declaration that the renewal clause was binding.[77]

Addressing the issue of whether the tenant had "duly and regularly" paid the rent, the Court stated that:

> If an option to renew contains a condition precedent requiring the tenant to 'duly and regularly' pay the rent, the court, in the absence of clearly worded terms, will not require strict and absolute compliance with a covenant to pay rent before finding that the condition precedent has been met.
>
> The phrase 'duly and regularly' does not mean punctual payment.[78]

McLaughlin v. *Bodnarchuk*[79] is the authority cited for this proposition.[80]

The Court then analyzed the facts of the case, and how confusion as to the exact date of payment and the amounts of the payment arose due to the payments having to be made every "four weeks", setting the responsibility for any confusion as to the precise payment date on the landlord.[81] The Court also noted that two payments delayed by postal strike did not constitute a breach of the terms of the lease to pay "duly and regularly".[82] The Court then stated:

> The deficiency of 3¢ on the 13th instalment of each of the years from 1975 to 1980 was *inadvertent* and *trivial*.

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76 *Supra* note 42.
77 *Ibid.* at 137.
78 *Ibid.* at 127.
79 *Supra* note 28.
80 *Supra* note 42 at 127-28.
81 *Ibid.* at 128.
82 *Ibid.*

> There was no refusal to pay the 3¢ on the 13th instalment each year, it was simply an *inadvertent* accounting error totalling 15¢.... The failure to pay the 3¢ per year was *inadvertent* and *trivial* and as such does not constitute a breach of a covenant to 'duly and regularly' pay the rent.[83]

Thus it appears that a tenant will have substantially complied (the *McLaughlin* interpretation) with a condition precedent to 'duly and regularly' pay rent despite 'trivial' or 'inadvertent' breaches of the covenant to pay rent. Yet it is the *Sparkhall* interpretation that uses the words 'trivial' and 'inadvertent' and suggests that such defaults can be ignored. Therefore, it appears the two interpretations overlap. Under the *McLaughlin* interpretation, if a breach of lease is trivial or inadvertent there is still substantial compliance with the condition precedent to pay rent 'regularly' because punctuality is not required. Under the *Sparkhall* interpretation, a trivial or inadvertent breach does not detract from what has otherwise been punctual performance. Thus, the critical issue is whether a failure to pay rent in accordance with the lease is trivial and inadvertent; once that is determined, the result is the same, regardless which interpretation is used, because both interpretations ignore trivial and inadvertent breaches when determining whether a tenant has satisfied a condition precedent to 'duly and regularly' pay rent. In my opinion, *Sparkhall* v. *Watson*,[84] *McLaughlin* v. *Bodnarchuk*,[85] *North Central Expressways* v. *MacCrostie*[86] and *B & R Holdings Ltd.* v. *Western Grocers Ltd.*[87] are all just in their end results, and the result in each case could have been achieved by using either the *Sparkhall* interpretation or the *McLaughlin* interpretation.

One final note, in *Finn* v. *Finn*,[88] Stratton J. (as he then was) stated in *obiter dicta* that he did not accept the proposition that one trivial and inadvertent default of one day in the payment of rent would defeat an option to renew. In making this comment, he relied on the reasoning of Davey J.A. in *McLaughlin* v. *Bodnarchuk*,[89] which he refers to as a "rather liberal but well-reasoned" guideline of what constitutes a breach of a condition precedent.[90] Stratton J.'s comment notwithstanding, I believe that the *Sparkhall* interpretation is more liberal than the *McLaughlin* interpretation. The *McLaughlin* interpretation can be frustrated by a lease drafter inserting a requirement that rent be 'punctually paid' because, under the *McLaughlin* interpretation, the requirement of "punctuality [would] ... *not* permit indulgence in the case of 'an occasional or inadvertent or trivial default'."[91] In contrast, under the *Sparkhall* interpretation, such indulgence would be permitted. Therefore, in my opinion, the *Sparkhall* interpretation is more adaptable in practice and thus more liberal than the *McLaughlin* interpretation.

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83 *Ibid.* [emphasis added].
84 *Supra* note 1.
85 *Supra* note 28.
86 *Supra* note 41.
87 *Supra* note 42.
88 *Supra* note 43.
89 *Supra* note 28.
90 *Supra* note 43 at 252.
91 *Supra* note 28 at 62 [emphasis added].

IV. CONTINUED ACCEPTANCE OF RENT

As noted above,[92] Sheppard J.A. in *McLaughlin* v. *Bodnarchuk* found that the landlord had expressly waived the condition precedent in the renewal option. Undoubtedly, express waiver can occur and whether it exists in any case will turn on the particular facts. In this section I examine the argument, often raised by tenants, that by continuing to accept late rent payments the landlord has waived the condition precedent that the tenant duly and regularly pay the rent.

The preponderance of authority clearly supports the contention that continued acceptance of late rent by the landlord is not a waiver of the condition precedent to duly and regularly pay the rent. Hence, in *Coventry* v. *Maclean*:

> I cannot agree that the acceptance by the defendant of rent accruing due under the lease after the time when the representation ought to have been performed, or begun to be performed, is any waiver of the defendant's right to resist specific performance on this ground. The lease as a completed instrument stood by itself, and it does not lie in the plaintiff's mouth to say that if the defendant intends to rely upon the non-performance of the representation she might have re-entered for non-payment of the rent in September, 1889.[93]

In *Finch* v. *Underwood*,[94] Mellish J.A. pointed out that although the landlord's acceptance of rent from an unauthorized assignee constituted a waiver of forfeiture of the lease for assignment without leave, this "could not affect the terms on which the renewed lease was to be granted."[95]

Robertson C.J.O. for the majority in *Fingold* v. *Hunter*[96] wrote:

> Counsel for the [tenant] argued his case as if it was a matter of indifference whether there was default in the payment of rent on May 28th, the rent then overdue having later been paid ... the fact that the default in payment of rent was later made good does not impair [the landlord's] position.
>
> The position is not in the least altered by the subsequent payment of rent then overdue, and its acceptance by the [landlord].

The Ontario Court of Appeal unanimously ruled in favour of the landlord thereby defeating the tenant's option to purchase. A separate judgment by Kellock J.A. did not deal with this waiver argument.[97]

The position so far expressed has been recognized in Alberta. In *G & C Realty Limited* v. *Canadian Don Limited*,[98] a distraining landlord obtained an order for

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92 See above at 125.
93 *Supra* note 6 at 182.
94 *Supra* note 2.
95 *Ibid.* at 524.
96 *Supra* note 25 at 47, 48.
97 *Ibid.* at 48-51.
98 (1986), 67 A.R. 18 (Q.B.).

removal and sale of the tenant's distrained goods before the Master of the Court of Queen's Bench. On appeal to a Queen's Bench Judge, the tenant argued, amongst other things, that the landlord's conduct in accepting late payments of rent was "such that it amounted to a promise or assurance that rent would not be demanded on time."[99]

Dixon J. was of the opinion that a waiver would have to be in the form of a "promise or assurance which was intended to affect the legal relations between the parties and to be acted upon. The mere acceptance of late rent payments by the [landlord] was not intended to alter its right to have the [tenant's] obligations under the contract strictly enforced."[100]

Two cases contain *obiter dicta* that contradict this position. In my opinion, both are wrong on this point.

Firstly, in *Finn* v. *Finn*,[101] Stratton J. suggested that if a tenant paid arrears of rent to a landlord (who accepted same) then the tenant's right to exercise the option could be "re-established".[102] With respect, none of the cases reviewed by Stratton J. support this contention. Those cases dealt with the meaning of the word 'duly', that there be no unremedied defaults at the time the landlord is required to grant the renewal lease.[103] If a tenant was required to 'duly' perform, and there were no unremedied tenant defaults at the time the landlord was required to grant the renewal lease, then the tenant has satisfied the condition precedent to 'duly' perform and may exercise the option. The option would not need to be "re-established".

In arriving at his conclusion, Stratton J. ignored the additional requirements posed by the word 'regularly'. He described the arrears in the case as "quite substantial".[104] This meant, using the *McLaughlin* interpretation which he accepted in earlier *obiter dicta*,[105] the tenant had not substantially performed the condition precedent to duly and regularly pay the rent and so could not exercise the renewal rights. Nothing in any of the cases supports the view that the landlord's acceptance of late payment of arrears could 're-establish' those rights. For example, in *Sparkhall* v. *Watson*,[106] *North Central Expressways* v. *MacCrostie*,[107] *McLaughlin* v. *Bodnarchuk*[108] and *B & R Holdings Ltd.* v. *Western Grocers Ltd.*[109] arrears were paid, and there was no suggestion of re-establishment of the option rights.

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99 *Ibid.* at 20.
100 *Ibid.*
101 *Supra* note 43.
102 *Ibid.* at 254 and 258.
103 See above at 121-22.
104 *Supra* note 43 at 258.
105 *Ibid.* at 252.
106 *Supra* note 1.
107 *Supra* note 41.
108 *Supra* note 28.
109 *Supra* note 42.

Stratton J.'s comments were *obiter dicta* for two reasons. First, the arrears in that case were *never* paid.[110] Second, the plaintiff was unable to exercise the renewal option because he was only one of two individuals to whom it had been granted.[111]

The second case suggesting that acceptance of overdue rent by a landlord is a waiver of strict compliance of the conditions precedent to renewal is *B & R Holdings Ltd.* v. *Western Grocers Ltd.*[112] This was the case with a 15¢ shortfall of rent over five years. The judge clearly held:

> I am satisfied that the tenant has duly and regularly paid the rent.... The tenant having met the condition precedent is entitled to exercise the option to renew.[113]

At that point the case was decided, but the Judge continued in *obiter dicta* to observe that:

> The Landlord continued to accept rent after becoming aware of the late payments, the shortage of 3¢ per year....
>
> I am of the opinion that in so doing the landlord waived strict compliance of the covenant as to payment of rent as a condition precedent to the exercise of the option to renew.[114]

To support this opinion, the Court quoted from the decisions of *R.* v. *Paulson*[115] and *Clough* v. *London and North Western Railway,*[116] and cited the decisions in *Orpheum Theatrical Co.* v. *Rostein*[117] and *Isman* v. *Widen.*[118] On the contrary, those cases do not support this opinion. Those cases dealt with the forfeiture of the existing term of the lease, a situation quite distinguishable from the inability to exercise a renewal option for failure to satisfy a condition precedent.[119] Rent does not continue

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110 *Supra* note 43 at 243-45 and 258.

111 *Ibid.* at 258-59.

112 *Supra* note 42. This case is discussed in detail above at 126.

113 *Ibid.* at 130.

114 *Ibid.*

115 [1920] 3 W.W.R. 372 (J.C.P.C.).

116 (1871), L.R. 7 Ex. 26.

117 [1923] 2 W.W.R. 582 (B.C.S.C.).

118 [1920] 3 W.W.R. 766 (Sask. C.A.).

119 Loss of a renewal option for failure to satisfy a condition precedent is not a forfeiture, nor is it analogous to one. In fact, they are so distinct that there can be no statutory or equitable relief from forfeiture for failure to satisfy a condition precedent to an option: *Fingold* v. *Hunter, supra* note 25 at 48; *Sparkhall* v. *Watson, supra* note 1 at 24: "The situation is not one where the lessor declares a forfeiture. None of the considerations applicable to forfeiture have any relevancy," and at 25 and 26 where the Court points out that a prior order in favour of the tenant relieving against forfeiture saved the original term "but the order does not operate so as to excuse performance of conditions precedent to the right of renewal. The Court has power to relieve against forfeiture, but no power to excuse performance of conditions precedent."; *Finch* v. *Underwood, supra* note 2 at 524 per Mellish J.A.; *Pacella* v. *Giuliana, supra* note 25 at 305; *North Central Expressways* v. *MacCrostie, supra* note 41 at 752-753; *Horne & Pitfield Foods Ltd.* v. *Fithen, supra* note 25 at 488: "there is no relief from failure to satisfy a condition precedent to the exercise of an option."; *Crescent Leaseholds Ltd.* v. *Gerhard Horn Investments Ltd., supra* note 25 at 326: "A tenant,

to accrue after forfeiture of the term. Therefore continued acceptance of rent by a landlord is contrary to a forfeiture of the lease. Accordingly, when a landlord continues to accept rent, it is correct to treat the lease as subsisting. However, this does not affect the tenant's obligation to satisfy the conditions precedent to renewal which are part of the subsisting lease.

Continued acceptance of rent or overdue rent should not be considered a waiver by the landlord of the conditions precedent to the renewal option. So long as the lease subsists, the landlord is entitled to receive rent.

V. FAILURE TO WARN

Another argument occasionally raised by tenants is that the landlord owes a duty to warn the tenant that a breach of lease has occurred, failing which the landlord cannot rely on that breach as a failure to honour the conditions precedent to a renewal option. In *Cushing* v. *Knight*[120] notice and time to comply were given, but the option holder still failed to comply. The Supreme Court of Canada denied specific performance and the option was lost. In *Sparkhall* v. *Watson*[121] the landlord notified the tenant that due to the breach of covenant the tenant had lost the right to renew. The landlord's action for possession was allowed.

In Alberta and British Columbia, absent an express provision to the contrary contained in the lease, the landlord is under no duty to warn the tenant that a breach has occurred or that the landlord intends to rely on the breach as a failure by the tenant to satisfy a condition precedent in a renewal option. In *Nankin* v. *Starland*,[122] the landlord complained to the tenant about breaches of the covenant to heat the premises, however, the Alberta King's Bench stated:

> I do not know that he was bound to complain. I think he had a right to let them go on, and, if they did not furnish heat, the responsibility lay upon them.... He clearly is not bound, I think, to keep notifying

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however, cannot obtain ... [relief against forfeiture] simply to exercise the right of renewal."; *Finn* v. *Finn*, *supra* note 43 at 251; *Contra*: *Pam-Cor Investments Ltd.* v. *Friends & Neighbours Family Restaurant* (B.C.C.A.), *supra* note 1 at 359-60 where the British Columbia Court of Appeal refused to relieve against forfeiture on the facts and not because such relief is unavailable. However, it does not appear that landlord's counsel argued that such relief is unavailable: *Saint John Shipbuilding & Dry Dock Co. Ltd.* v. *The National Harbours Board* (1983), 25 R.P.R. 287 (N.B.Q.B. Trial Div.) where relief was granted without reference to any of the foregoing cases. The only authority the landlord's counsel presented was 16 Hals. (4th ed.), para. 1447. The Court quoted at 288-89 *Shiloh Spinners Ltd.* v. *Harding*, [1973] A.C. 691, but the quote is unconvincing because it only refers to "contractual forfeiture and penalties" which, as the above cited cases show, are not the same as a condition precedent to an option. Note: equity will intervene if the landlord has caused the tenant to default. Thus, where the landlord fails to give the tenant notice of the landlord's new address, with the result that the landlord does not receive the tenant's renewal notice because the tenant posts it to the landlord's old address, the landlord will not be able to rely on this default in giving notice because the landlord caused it. To hold otherwise would be inequitable: *Ross* v. *T. Eaton Co.* (1993), 96 D.L.R. (4th) 631 (Ont. C.A.) at 643.

120 *Supra* note 19.

121 *Supra* note 1 at 26.

122 *Supra* note 25.

> them from time to time. They knew their obligation. They were bound to know whether they were fulfilling their covenant or not.[123]

In *Finn* v. *Finn*,[124] the tenant argued that the landlord could not change its course of conduct *vis-à-vis* the tenant without first giving notice. The Alberta Queen's Bench held that there was no onus on the landlord to advise the tenant that no further concessions would be given or that a tougher stance would be taken.

Again, in *Republic Resources Ltd. & Joffre Oils Ltd.* v. *Ballem*,[125] the Alberta Queen's Bench held that a landlord is under no duty or obligation to advise the tenant of its legal stand. In so ruling, the Court applied the unanimous decision of the British Columbia Court of Appeal in *Kelly, Douglas & Co. Ltd.* v. *Ladner Shopping Centre Ltd.*,[126] that it is the tenant's responsibility to honour its covenants and there is no obligation on the landlord to notify the tenant of a breach of covenant. In *Kelly, Douglas & Co.*, the lease of a portion of a shopping centre contained a right by the tenant to renew if it had complied with all the covenants of the lease, one of which was to pay certain common area maintenance (CAM) charges. The tenant subleased the premises and the sub-tenant failed to pay the CAM charges. The landlord did not inform the tenant of this breach. When the tenant sought to exercise its renewal right the landlord argued that the tenant had not complied with the condition precedent due to the failure to pay the CAM charges. The trial judge held that the landlord was estopped from alleging the breach of covenant. The landlord's appeal was allowed:

> [t]he tenant may not excuse the failure to make CAM payments by the fact that the landlord did not inform it of the subtenant's default. The silence of the landlord in the absence of any duty to notify the tenant of the fact that the CAM payments were not being made, does not give rise to an estoppel as found by the trial Judge.[127]

This case is highly persuasive as the tenant had no way of knowing if the sub-tenant was honouring the terms of the lease unless the landlord told it so. The landlord's position must be even stronger when there is no sublease and it is the original tenant who is breaching the lease.

In *B & R Holdings Ltd.* v. *Western Grocers Ltd.*,[128] the landlord was estopped from relying on the tenant's shortfall in rent as a failure to satisfy the conditions precedent to renewal. The basis for implying this estoppel was that the landlord's continued acceptance of rent would lead the tenant to suppose that the landlord would not strictly enforce its rights.[129] This finding is *obiter dicta* because the Court ruled that the breaches were inadvertent and trivial, did not affect the tenant's right to renew and that

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123 *Ibid.* at 524.
124 *Supra* note 43 at 252-53.
125 [1982] 1 W.W.R. 692 (Alta. Q.B.) at 701.
126 (1981), 16 R.P.R. 201 (B.C.C.A.) [hereinafter *Kelly, Douglas & Co.*].
127 *Ibid.* at 206.
128 *Supra* note 42.
129 *Ibid.* at 132-34.

the tenant had duly and regularly paid the rent.[130] More important, the authorities cited to support this finding are tenuous. First, the Court incorrectly relied on the minority decision of Sheppard J.A. regarding waiver[131] in *McLaughlin* v. *Bodnarchuk*.[132] This reliance is incorrect because Sheppard J.A. referred to an *express oral waiver* given by the landlord to the tenant.[133] An express oral waiver is clearly distinguishable from an *implied* estoppel based on continued acceptance of rent. Second, the Court relied on the *trial* decision[134] in *Kelly Douglas & Co. Ltd.* v. *Ladner Shopping Centre Ltd.*,[135] apparently unaware that it had been overturned by the British Columbia Court of Appeal,[136] even though the appeal case had been reported for some months.

I prefer the reasoning of the British Columbia Court of Appeal and the Alberta courts. The responsibility for performance of tenant covenants should lie with the tenant and not with the landlord. Mere failure to warn is not the same as expressly communicated waiver. It remains to be seen whether the courts of other Canadian jurisdictions will adopt this reasoning.

VI. PRACTICAL CONSIDERATIONS

A. INTRODUCTION

The comments in this section are based on the foregoing analysis of each topic. My intention is to provide practical suggestions for landlords, tenants and their legal counsel.

B. CONDITIONS PRECEDENT

A landlord should make any option to renew subject to those conditions precedent which are important to the landlord. These conditions will be strictly construed by the courts, so they should be drafted in clear and precise language. For example, there should be a clearly defined time period during which the option can be exercised and a clearly defined method for exercising the option.

Ideally, a tenant will want an unconditional option, but these are virtually non-existent in today's commercial world. Nevertheless, in a soft rental market, a tenant may have the negotiating power to affect the number and the wording of the conditions precedent. A tenant should endeavour to keep the conditions precedent to the minimum necessary to fairly protect the landlord. The tenant should also be satisfied that the conditions precedent are capable of being performed.

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130 *Ibid.* at 128 and 130.
131 *Ibid.* at 133-34.
132 *Supra* note 28 at 66-67.
133 *Ibid.* at 66.
134 *Supra* note 42 at 134.
135 (1979), 106 D.L.R. (3d) 265 (B.C.S.C.).
136 *Supra* note 126.

C. A CONDITION PRECEDENT REGARDING PAST PAYMENT OF RENT

A landlord should ensure that the covenant to pay rent is unambiguous and sets out easily identifiable due dates for the payment of rent. As well, there should be a requirement that rent will be paid without deduction, abatement or set-off.

Regarding the renewal option, a landlord's minimal position should be that the tenant must have 'duly and regularly' paid the rent throughout the entire term of the lease. This will address defaults both before and after the tenant's exercise of the renewal option. Ideally, a landlord will want to insert a further requirement that the tenant must have 'punctually' paid the rent. In British Columbia, this should successfully circumvent the *McLaughlin* interpretation by precluding any exceptions for occasional, inadvertent or trivial defaults. In the rest of Canada, the *Sparkhall* interpretation may still be adopted by the courts, in which case, the use of the word 'punctually' should not affect defaults which are occasional, inadvertent or trivial.

Because of the situation in British Columbia, and the uncertainty of whether the *Sparkhall* interpretation will prevail in the other provinces, the tenant should seek the deletion of a condition precedent requiring the rent to be paid 'punctually'. In response, the landlord should point out that modern electronic banking now allows precise, punctual and instant transfers of funds between accounts, and that a commercial tenant should be able to arrange overdraft privileges. Consequently, by making proper banking arrangements, the tenant should be able to pay rent punctually. If the landlord remains intransigent on this point, the tenant should seek a clause whereby the condition precedent that rent has been paid 'punctually' will be deemed to be satisfactorily performed notwithstanding any late transfers of rent due to occasional, inadvertent or trivial defaults by the tenant, or tardiness, strike, lockout, electronic system failure or other *force majeure* by or affecting the relevant financial institutions. With this contractual provision, a tenant will no longer have to worry that the *McLaughlin* interpretation has been thwarted. Accordingly, I recommend such a provision for tenants located in British Columbia, where the *McLaughlin* interpretation prevails.

In his excellent book *The Commercial Lease, a Practical Guide*,[137] Harvey M. Haber, Q.C. suggests that a tenant should seek to change a condition precedent requiring punctuality so that it only requires that the tenant not be in default at the time the tenant exercises the renewal or, that the tenant remedy any default then extant. In my opinion, a landlord should never accept such a clause. It fails to address situations of continuous or rampant defaults by the tenant throughout the term and fails to address defaults that occur after the option has been exercised, but before the term ends. Essentially, the landlord would not have the protection ordinarily associated with the meaning of the word 'regularly'. The tenant would not have to substantially perform the rent covenant during the entire term so long as any defaults were corrected prior to the end of the original term. Thus, the landlord would be unable to induce a defaulting tenant to pay rent by suggesting that the renewal option will not be exercisable because of the tenant's failure to satisfy the condition precedent.

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[137] (Aurora, Ont.: Canada Law Book, 1989) at 229-30.

Finally, throughout the term of the lease, tenants and their legal counsel should be aware of the conditions precedent to the renewal option. In particular, if a dispute arises between a landlord and a tenant, the tenant should be extremely cautious about withholding rent as a tactic for dealing with the dispute. The deliberate withholding of rent may disentitle the tenant from exercising the renewal option, a consequence which the tenant may not have anticipated. This will undoubtedly be so if the lease requires that rent be paid without deduction, abatement or set-off.

D. WAIVER AND ESTOPPEL

To avoid the arguments that can arise by continuing to accept rent after a tenant defaults, acceptance of late rent, failure to warn the tenant of a default and even by allegations of oral waivers, a landlord should insert a clause in the lease which expressly addresses these issues. At a minimum, this clause should provide that a waiver must be in writing signed by the landlord and will not be construed as a continuous waiver or as a waiver of future breaches; that acceptance of rent, or other monies payable under the lease, whether or not tenant defaults exist, shall not be construed as a waiver or give rise to an estoppel; that the landlord has no duty to warn the tenant of breaches of lease by the tenant or by any assignee or subtenant, or to warn the tenant of the legal position the landlord will be taking respecting any alleged breaches. As well, the landlord should insert a clause stating that the written lease comprises the entire agreement between the parties and that there are no other agreements, preconditions, representations or collateral contracts, oral or otherwise.

In contrast, a tenant should seek a covenant that the landlord will warn the tenant of breaches that the landlord feels will prevent the tenant from exercising the renewal option, and will give the tenant a reasonable time to remedy these breaches. Whenever the premises are sublet or assigned with the landlord's consent (*e.g.* in a franchise situation where the franchisee is in occupation under a sublease), the tenant should request such a covenant because, without such a warning, the tenant may never know that a default has occurred that will prevent the tenant from exercising the renewal option.

E. CONCLUSION

Landlords, tenants and their respective counsel must give careful consideration to the drafting of conditions precedent in a renewal options. Other clauses in the lease that can affect the right to renew also require attention. Regarding conditions precedent concerned with the tenant's past performance of the covenant to pay rent, parties in British Columbia should be aware of the *McLaughlin* interpretation, and parties elsewhere should be aware of the present uncertainty about which interpretation may ultimately apply in their province.

Once the lease is prepared and signed, a tenant must continue to be cognizant of the conditions precedent in the renewal option so that, at the relevant time, the tenant can establish that all conditions precedent have been satisfied.