



## Summer 2016

### TOPICS:

**Recent Developments of Importance in Property Leasing**  
page 1

**Forfeited Corporate Property - The New Ontario Act and How It Affects Your Corporation**  
page 8

**Firm News & Professional Notes**  
page 11

# Recent Developments of Importance in Property Leasing

## **Distress:** *When Can a Landlord Lawfully Distrain?*

The common law remedy of distress has become an increasingly difficult remedy for landlords to exercise in response to a tenant default. Since *Delane Industry Co. v. PCI Properties Corp.*, landlords have continued to exercise the act of distraining against a tenant's goods and chattels without strictly observing various technical procedures. As a reminder, *Delane* affirmed that distress and termination are fundamentally inconsistent remedies because distress can only be exercised *during* a lease. The act of distraining by holding or seizing property

is an irreversible solution to affirm the lease. Any landlord who uses this option can only end the lease if there has been a *new* breach *after* the act of distraining is complete.

Following *Delane*, *Rays Outfitters Inc. v. Lixo Investments Ltd.* again illustrates some risks from invoking the distress remedy. In *Rays Outfitters*, the Landlord distrained against the Tenant's goods for Rental Arrears. The Tenant sought a ruling from the Court that the Landlord's distress was unreasonable, unlawful, and excessive because the Landlord granted





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the Tenant a verbal extension for payment of the Rental Arrears; the Landlord changed the locks and denied the Tenant access to the Leased Premises; the Landlord distrained after sunset; the Landlord forcibly entered the Leased Premises to distraint; and the value of the goods distrained against far exceeded the Rental Arrears (i.e., \$383,000 in the Tenant's goods versus \$25,053 in Rental Arrears).

The Ontario Superior Court found that there was no valid agreement between the Landlord and the Tenant to extend the payment deadline for Rental Arrears and, as such, the Tenant was in arrears at the time of the Landlord's distress. However, the Court also found that the Landlord's distress was unlawful because the Landlord had simultaneously terminated the Lease by locking the Tenant out of the Leased Premises, demanding the Tenant pay an inflated amount to regain access to the Leased Premises, and refusing to allow the Tenant to access the Tenant's records. The Court awarded the Tenant access to the Leased Premises, return of the seized goods, and a trial on the issue of damages.

In this case, the Court held that the act of changing the locks to a tenant's leased premises does *not necessarily* mean that a landlord has terminated the lease. The more important concern is whether the intended effect or the actual effect of changing the locks is to exclude a tenant from the leased premises. If the landlord's conduct amounts to termination, then any simultaneous or subsequent distress against the tenant's goods is unlawful.

**Landlords beware:** if you wish to preserve the lease when a tenant defaults you must make it clear that, if you change the locks, you are distraining and not terminating the lease and that the tenant may have access to the premises upon making arrangements with you.

**Indemnification:**  
*Is a Mutual Indemnity too Generous for Landlords to Grant?*

*Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.* highlights the importance of carefully drafting insurance and indemnity clauses to properly reflect the allocation of risk that each party bargained for during lease negotiations. In this case, the Tenant

leased part of a building from the Landlord. The Building was destroyed when the Landlord's contractor caused a fire while performing work for the Landlord. The Tenant recovered over \$10 million from its insurer and brought an action against the Landlord for the remaining \$4.1 million in losses.

This case hinged on the Court's interpretation of the Lease's insurance and indemnity provisions and, specifically, the relationship between the Tenant's obligation to get insurance coverage and the Landlord's arrangement to compensate the Tenant for "any damage to the Premises" as a result of "the act, default or negligence of the landlord or its contractors, guests or licensees." The Court stated that if the meaning of "Premises" meant the rentable area only (as the Landlord suggested), then the Landlord provided a meaningless indemnity for something the Tenant would not be interested in. The Court held that "Premises" included the Tenant's property and the Landlord was liable for the Tenant's uninsured losses. The Tenant's contractual obligation to obtain insurance coverage was limited by the Landlord's express covenant to indemnify the Tenant.

The Court, in a somewhat unexpected move, reviewed the leases for other units in the Building and noted that they each contained one-way indemnification clauses under which *only* the tenant was required to indemnify the Landlord (and not vice-versa). The Court felt this was a strong indication that the parties intended for the Plaintiff Tenant to have a benefit not granted to other tenants in the Building and, specifically, the parties intended for the Landlord to indemnify the Tenant with respect to certain damages to the Premises and thus the Landlord was liable for the losses claimed.

**Independence of Lease Covenants:** *Is Eviction an Option When the Landlord is Also in Default?*

Landlords in Ontario are fortunate to be able to evict defaulting commercial tenants without first obtaining a time-consuming and costly court order. Instead, the *Commercial Tenancies Act* outlines steps for landlords to follow in order to properly carry out the eviction process. These steps include: ensuring that the landlord hasn't accidentally waived its right to require strict performance of the tenant's obligations;

verifying that the tenant is in fact in default under the lease; optionally engaging the services of a bailiff; holding off on distraining against the tenant's goods and chattels; and, perhaps most importantly, reserving the landlord's right to claim damages for the early termination of the lease (as a result of the tenant's default).

*Sirdi Sai Sweets Inc. v. Indian Spice & Curry Ltd.* is welcome news for landlords who decide the best course of action for a tenant's non-payment of rent is eviction.

In this case, the Plaintiff Tenant leased retail space from the Defendant Landlord to operate a restaurant in the Shopping Centre. When the Tenant's restaurant failed, the Landlord terminated the Lease for non-payment of Rent. The Tenant sued the Landlord for loss of profits, arguing that the Landlord breached a covenant in the Lease that granted the Tenant the exclusive right to sell certain types of food in the Shopping Centre. The Landlord counterclaimed for Rental Arrears.

The Ontario Superior Court dismissed the Tenant's action and allowed the Landlord's counterclaim. The Court explained that each covenant in a lease is independent. As such, even if the Tenant had succeeded in its action against the Landlord for breach of the Tenant's exclusive use rights, Rent was still due and payable by the Tenant. The Tenant was liable for the Rental Arrears up to the date of termination of the Lease. The Ontario Court of Appeal agreed with the trial court's characterization of independent lease covenants and upheld the decision.

## **Injunctions:** *Can a Single Tenant Spoil a Landlord's Plans for Redevelopment?*

The unreported Ontario decision in *1465152 Ontario Ltd. v. Amexon Development Inc.* shows that injunctions remain a valuable judicial solution to keep a party from acting in a way that is clearly restricted by the lease. While courts often hesitate to grant rulings in cases that will need further judicial supervision, they are more willing to grant a permanent ruling if a party can show its rights were and will likely continue to be violated. This case is

also a reminder of the powerful proprietary rights a tenant has through its tenancy interest in real property.

The facts of this case are noteworthy: the Tenant leased office space from the Landlord for the purpose of operating a law firm. The parties agreed to extend the Term of the Lease on two occasions; the current extension Term was set to expire on March 31, 2016. The Landlord wanted to redevelop the building where the Tenant's Premises were located and required that the building be demolished. With the exception of the Plaintiff Tenant, the Landlord was able to successfully negotiate lease termination agreements with all of the other tenants in the building. In February 2014, the Landlord issued the Tenant a Notice to Vacate the Premises by August 31, 2014. The Notice stipulated that services to the building would be turned off on September 1, 2014, and the building would be demolished immediately thereafter. The Tenant sought relief from the Court with a declaration that the Notice to Vacate was void and with a permanent injunction preventing the Landlord from terminating the Lease.

The Ontario Superior Court found that the Landlord's Notice was void and granted the injunction. The Lease contained a "limitation of remedies" provision, which provided that the Tenant's sole remedy for breach of a term, covenant, or condition of the lease was damages. However, the Court found that this limitation clause did not apply because the Landlord's conduct constituted a complete repudiation of the Lease, rather than a mere breach of a covenant. Furthermore, the Landlord had trespassed on the Premises and this tortious misconduct also fell outside the scope of the limitation clause. The Court granted the injunction on the basis that the Tenant had property rights where the Landlord did not have the right to interfere.

The Ontario Court of Appeal upheld the decision and noted that injunctive relief is the preferred remedy where a landlord has wrongfully interfered with a tenant's proprietary rights. The Landlord's application to appeal to the Supreme Court of Canada was denied.

## **Insurance:** *Is the Allocation of Risk Ever Clearly Delineated?*

The following three cases are lessons in the intricate realm of insurance coverage. Too often, the insurance provisions in a commercial lease are overlooked, misunderstood, or drafted with inadequate protection for the parties. Such errors can prove costly for landlords and tenants who fall victim to misinterpreting the degree of risk they have assumed under a lease.

The case of *D.L.G. & Associates Ltd. v. Minto Properties Inc.* is a message to both landlords and tenants that a change in one party's insurance coverage partway through the lease term may signify more than a simple lease amendment. In *DLG*, the Tenant sued the Landlord for breach of contract, negligence, negligent misrepresentation, and fraudulent representation after the Landlord failed to implement a plumber's recommendations for the sewer system and the Tenant's restaurant was forced to close for a second time due to flood damage.

After the sewer system backed up the first time and damaged the restaurant, the Tenant's insurer revoked coverage for flood and sewer-backup damage. The Lease provided that the Tenant was responsible for obtaining insurance to cover all risks, including flooding, sewer-backup, and business interruption. The Landlord acknowledged the change to the Tenant's insurance policy and accepted the continuation of the Lease under the reduced insurance coverage.

When the Tenant's franchisor terminated the franchise due to the restaurant closure, the Tenant treated the lease as terminated and brought an action against the Landlord for damages. The Court found that the Landlord's decision to affirm the Lease after the Tenant's insurance coverage was reduced did not mean the Landlord waived its right to rely on the Tenant's covenant to insure under the Lease.

**Landlords beware:** While you can take some comfort in the *DLG* decision, assess and underwrite any such changes to a tenant's coverage with similar diligence as you would at the time of entering into the lease - use an abundance of caution to avoid unnecessary or unfavourable litigation.

*DLG*, *Giddings Holdings Ltd. v. High*, and *Orion Interiors Inc. v. State Farm Fire and Casualty Co.*, each exemplify the general principle that, where one party agrees to obtain insurance, the other party is relieved of liability for the damages caused when the insured event occurs.

Additionally, *Giddings Holdings* validates the following ratio set out by the Supreme Court of Canada in a series of insurance cases from the 1970's commonly known as the "trilogy": where a landlord stipulates to obtain insurance coverage from which a tenant is meant to benefit, the landlord cannot claim against the tenant for losses even if they were apparently caused by the tenant's negligence. *Giddings Holdings* also highlights the issue of implied release, wherein a landlord who receives a contribution towards insurance waives its right to sue the tenant.

In *Giddings Holdings*, the Landlord sued two Tenants for damages and argued that their combined negligence caused the fire that destroyed the Building. The Tenants argued that their triple-net Leases included a contribution to the Landlord's insurance coverage and the risk of fire was passed on to the Landlord. Neither party obtained and maintained insurance against fire.

The British Columbia Supreme Court dismissed the Landlord's action and found that reference to "building insurance" under the Leases constituted a covenant that the Landlord would insure the Property against risk of fire. As such, to deny the Tenants' the benefit of insurance coverage would lead to an inequitable result.

In *Orion Interiors*, the Tenant sued the Landlord to recover damages over and above the limits of its insurance policy after the Tenant's furniture showroom was flooded as a result of a dislodged drain plug that had been installed by the Landlord's contractor.

The Ontario Superior Court found that the insurance provisions of the Lease, which required the Tenant to obtain all-risk property insurance, precluded the Tenant from bringing its claim. The Court noted that, where one party to a lease covenants to obtain insurance against certain risks, that party assumes the risks associated with the insured losses and is barred from claiming damages

against the other party. The Lease provided that the Tenant was required to obtain insurance sufficient to cover the full replacement cost of its property. The Court held that the Tenant's failure to fully insure should not deprive the Landlord of the waiver of subrogation that it would have otherwise enjoyed.

Furthermore, the Lease contained an exclusion clause under which the Tenant explicitly agreed to look only to its insurers to cover any claim for loss or damage, no matter the cause. The Court saw the exclusion clause as a clear sign that the parties meant for the Tenant to be responsible for the risk of loss to its own property.

## **Interpretation of Contracts:** *When is Abatement Not Considered an "Inducement"?*

*Goreway Total Health Inc. v. Goldbrite Trading Co.* illustrates the importance of carefully defining the circumstances under which a Tenant is entitled to rent abatement. It is also a lesson to both landlords and tenants who are negotiating renewal agreements. Both should pay particular attention to a tenant's personal rights granted under the lease so that they can purposely decide whether such rights will continue during the renewal term. This case demonstrates that any such personal rights that are fundamental to the agreement should be expressly set out and not simply lumped into standard form language.

In *Goreway Total Health*, the Tenant's obligation to pay rent for operating a pharmacy in the Premises was contingent on the number of doctors operating medical practices in the Building. The Lease provided that the Tenant's minimum rent would abate by one-eighth for each doctor less than eight not operating in the Building.

The parties entered into a Renewal Agreement, which provided the standard landlord-friendly provision that the Tenant accept the Premises on an "as is" basis and any previous tenant allowances, rent-free periods, and other inducements would not apply during the renewal term. When the Building went from having 10 medical doctors to none, the Tenant relied on the abatement clause and the Landlord demanded full rent on the basis that tenant allowances, rent-free periods, and other inducements

no longer applied. The Tenant brought an application seeking a declaration that the renewal agreement did not terminate its right to abatement.

The Ontario Superior Court held that the Renewal Agreement did not quash the abatement right as the Tenant's right to cancel rent was a basic component of the bargain between the parties. The presence of the clause indicated that the parties noted that without a minimum number of doctors in the Building, the Tenant's pharmacy profits would suffer. Although the Renewal Agreement did not pointedly define the term "inducement", the Court held that the meaning of "inducement" did not refer to an element so central to the Lease as the Landlord's obligation to maintain the minimum doctor requirement and the associated abatement clause. The Tenant was entitled to an abatement until the Landlord was able to secure eight medical doctors.

The Ontario Court of Appeal agreed with the lower Court and noted that the application judge applied the correct principles and took into account the commercial context and the language used in both the Lease and the Renewal Agreement.

## **Option to Purchase: Is a Defaulting Tenant's Option to Purchase Worthy of Saving?**

*Marcel De Paris Ltd. v. 1484075 Alberta Ltd.* is a caution to landlords that any special rights granted to tenants require careful and far-sighted drafting to avoid any unintended financial consequences. In *Marcel De Paris Ltd.*, the issue was whether the Tenant had properly exercised its rights under a complex provision granting the Tenant an Option to Purchase the Lands and, if not, whether the Tenant was entitled to relief from forfeiture.

The Tenant rented a building from the Landlord and registered the Lease and an Option to Purchase the Land as caveats on title. The Tenant constantly defaulted on its Lease obligations and was eventually evicted. The Landlord brought an application to remove the caveats registered by the now-former Tenant. The Tenant argued that it was not in default at the time it exercised its Option to Purchase the Lands or, alternatively, it should be entitled to relief from forfeiture and permitted to close the purchase transaction.





The Court noted some confusion with the Option provision: while the Tenant could use the Option at any time during a five-year period, with closing to take place at the expiry thereof, the requirement did not address what would happen if the Tenant fell into default during the interim period from when it exercised the Option to when the transaction would close.

The Court held that the Tenant's Option was forfeited due to its defaults. The Court also noted that, while courts may exercise discretion for renewal options, there is a "long-standing refusal" to grant relief from forfeiture in the case of options to

purchase; they would not intervene for options that have the "effect of sterilizing the potential sale of the land to someone else." If the Tenant was permitted to keep the caveats registered on title, the Landlord would be unfairly prevented from altering, using, or selling the building.

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**Forfeited Corporate Property:**

# **The New Ontario Act & How It Affects Your Corporation**





On December 10, 2015, the Ontario government passed Bill 144, the *Budget Measures Act, 2015*, which will come into force on **December 10, 2016**.

This Bill will enact several new statutes, including the *Forfeited Corporate Property Act, 2015* (“FCPA”) and the *Escheats Act, 2015*.

This legislation addresses what happens to forfeited corporate property once a corporation is dissolved. The introduction of the FCPA amends other Ontario legislation that may have an impact on a corporation’s day-to-day reporting requirements and long-term consequences for corporations that are dissolved and not revived within a strict timeline.

## The Legislative Intent of the FCPA

The Ontario Ministry of Finance stated in a press release on November 18, 2015, that the intended effect of the introduction of the FCPA will be to:

1. Mitigate risks to Ontario taxpayers that may arise when corporate property forfeits to and becomes Crown property when a company is dissolved.
2. Reduce the number of corporate properties that are forfeited to the Crown.
3. Increase corporate accountability for costs associated with forfeited corporate property.
4. Increase transparency and certainty in the management and disposition of forfeited corporate property.
5. Return forfeited property to productive use as quickly and efficiently as possible.<sup>1</sup>

## Ongoing Reporting Requirement

On the surface the FCPA appears to have the best intentions. However, the practical application of the new requirements places a burden on corporations. The introduction of the FCPA has the effect of amending the *Ontario Business Corporations Act*, the *Corporations Act*, and the *Ontario Not-for-Profit Corporations Act* (the “Corporate Acts”) by introducing a requirement

to maintain an updated register of the corporation’s ownership interest in land at its registered office.

**This register must identify each such ownership interest and show the date of acquisition and disposal, if applicable. In addition, the corporation has to keep a copy with the property register of any deeds, transfers, or similar documents that contain the municipal address, the registry or land titles division, the property identifier number, the legal description, and the assessment roll number, if any.**

The practical implication of this amendment can be more onerous than it may appear. For example, corporations that have a registered address in Toronto but have properties across the province must ensure that the property register is maintained and held at the registered office of the corporation, together with copies of the ownership documents of each property.

Additionally, and most importantly, where a law firm maintains the corporation’s records, it is a corporation’s obligation to provide the law firm with the information to be inputted into this register together with the copies of deeds, transfers, and similar documents described above.

While these legislative amendments will come into force on December 10, 2016, there is a grace period of two years before the requirement comes into effect in order to prepare and maintain this register. It is advisable, however, especially for corporations that have ownership interests in many properties, that these registers be prepared and maintained sooner than the two-year deadline, as it may take extensive time to gather all of the required information.

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<sup>1</sup> Background: Amendments and Proposals in the Budget Measures Act, 2015. (2015, Nov 18). Retrieved from: <https://news.ontario.ca/mof/en/2015/11/amendments-and-proposals-in-the-budget-measures-act-2015.html>.

## Dissolution and How It May Affect Your Corporation

The new FCPA also introduces a new way for the Crown to manage forfeited corporate properties and sets out new timelines within which owners can revive corporations and recover their assets.

The Corporate Acts provide that in the event that a corporation is dissolved and the corporation is the owner of real property, such property is forfeited to the Crown. Until the introduction of the FCPA, the corporate owners had 20 years from the date of dissolution to revive the corporation and recover their assets.

**With the introduction of the FCPA, the timelines have changed. While the dissolved corporation can still be revived within 20 years from dissolution, it will not recover its assets if the revival takes place more than three years after the date of dissolution, subject to some exceptions.**

In addition to the forfeiture of real property, the FCPA also provides that any personal property left in, on, or under forfeited real property is also forfeited to the Crown, regardless of who owns the personal property.

After the three-year deadline, the Crown can use the forfeited property for Crown purposes, dispose of it, and delete or amend any encumbrances registered against the property from title (in the case of real property) and under the *Personal Property Security Act* (in the case of personal property).

## Conclusion

The enactment of the FCPA and the coming into force of the amendments to the Corporate Acts will place the onus on directors and officers of corporations to maintain updated property registers and will also make it more difficult to recover assets forfeited to the Crown in the event of dissolution. It is important and advisable that corporate owners come to terms with their new reporting requirements and take heed of the strict deadlines under the FCPA in the event the corporation is dissolved.

For further information or for any questions regarding the FCPA, corporate governance, or corporate law questions, contact Ira Stuchberry at [istuchberry@mindengross.com](mailto:istuchberry@mindengross.com).



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## Firm News



Minden Gross LLP welcomes **Andrew Elbaz** as Chair of the Securities Law Group. Andrew's Canadian and international practice focuses on securities and capital markets with industry experience in mining, technology, life sciences, and oil & gas. Andrew is recognized by *Best Lawyers in Canada* as one of Canada's leading lawyers in Mining Law. Read more about Andrew at [www.mindengross.com](http://www.mindengross.com).

The 2016 *Canadian Legal Lexpert Directory* acknowledged our lawyers as leaders in their fields. The firm received leading ranking in Property Leasing and Property Development and congratulates **Howard Black**, **Eric Hoffstein**, **Joan Jung** (Estate & Personal Tax Planning); **Reuben Rosenblatt**, QC, LSM (Property Development); and **Michael S. Horowitz**, **Stephen Messinger**, **Adam Perzow** and **Stephen Posen** (Property Leasing), who were recognized by their peers for the knowledge and expertise they bring to their work.

## Professional Notes

**Irvin Schein** published four blog posts on [irvinschein.com](http://irvinschein.com) including "Can a Will be Disregarded for Public Policy Reasons?" on April 21.

**William Lehun** was noted in *Lexpert Magazine's* June 2016 issue for his liquor licensing work on the Morguard Hotels acquisition of a Toronto hotel portfolio.

**Melissa Muskat** published "Understanding and Appealing your Residential Property Tax Assessment Notice for 2017-2020 Taxation Years" on June 15.

**Michael Goldberg** published three articles in *Tax Notes* including "NRT Tax Traps and the Non-Specialist Advisor" (Part 2 & 3) in May and June and "Sell Now! How the 2016 Budget Will Impact Business Owners Exit Strategies" in April. He presented at the York District Chartered Professional Accountants' Association CPD Seminar on June 22 and also to the MacNaughton Lynch Group of RBC Dominion Securities on June 14. He led the Meritas Tax Group Meeting on April 29 in Las Vegas and a Tax Talk session on May 18. Michael also spoke with **Samantha Prasad** on "A Sampling of Business Owner Planning Tax Traps" on March 31 at the RBC Wealth Management Services Team Conference.

**Samantha Prasad** was re-appointed to the Meritas Member Engagement Committee in April. She published three articles in *The Fund Library* including "How to object to a CRA Notice of Assessment" on June 9 and "Taxpayer Beware" in *The TaxLetter* in May 2016.

**Joan Jung** took part in a panel discussion on "Dissection of a Family Trust" on June 10 at the STEP Canada National Conference, where the firm was a sponsor. She published "Family Business Succession and an Advisor's Conflict of Interest" in the May 2016 issue of *STEP Inside* and "Gifts and Support Orders" in *Canadian Family Law Matters* in June 2016. Joan was elected to the 2016-17 Executive of the Toronto Branch of STEP Canada as the Newsletter Officer.

**Sasha Toten** spoke on the panel for Young Women in Law on "Life After Hire Back" on June 2.

*Precedent Magazine* featured **Brian Temins** as "The lawyer who eats 12 cheeseburgers a month" in the Secret Life section of its Summer 2016 edition.



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**Eric Hoffstein** presented "Incentives or Undue Influence: Rewarding Gift Planners Without Exposing Your Gifts or Your Charity to Challenge" at the CAGP National Conference on April 7.

**Stephen Posen** spoke on "Landlord's Rights and Remedies: Tenant Defaults – Monetary and Non-Monetary" at Springfest real estate forum, on April 7 and for the Association of Deputy Judges of Ontario on June 21.

**Matt Maurer** was named Chair of the Young Lawyers Committee of the TLA. He published five articles including "Judge Calls for Tenancy Law Reforms After Finding Tenant 'Gaming the System'" on *Slaw* and *REM Online* in April and May.

**Ira Stuchberry** was named as Assistant Editor of *The Directors Manual* in June.

**Rachel Moses** was a mentor at the Young Women in Law 5<sup>th</sup> Annual Speed Mentoring Event on June 9.

**Steven Pearlstein** organized and acted as Chair of the program "Become a 'Roads' Scholar" presented at the Ontario Bar Association on May 17.

On June 24, **Howard Black** presented to investment advisors with the RBC Wealth Management Group on "Is My Client Capable of Instructing Me? Danger Signals, Duties & Responsibilities".

**Stephen Messinger** participated as a member of the Georgetown Advanced Commercial Leasing Institute in Washington on April 4-6. He was a panelist at one of the sessions at the ICSC Law Conference on April 21-22 and a special lecture at the ICSC JTR School for Retail Real Estate Professionals in Phoenix April 24-28.

**Hartley R. Nathan, QC, Ira Stuchberry, and Sasha Toten** spoke on "Corporate Governance Issues" to Rogers Communication Inc. on May 11.

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