

CANADIAN SECURITIES REGULATION

FIFTH EDITION

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KATHLEEN DOYLE ROCKWELL
AND
CRISTIE FORD



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To Sharon, Michael and Alex (Sasha)
and to
The Eleven Grandchildren; and Nolan, Quinn, Courtney,
Moss and Nina Liv

In memory of Purdy Crawford,
a great leader in this area of law and governance

PREFACE TO THE FIFTH EDITION

The first edition of this book appeared in 1976, the second in 1998 when Kathleen joined as co-author, the third in 2003, the fourth in 2006 and this fifth in 2014. We warmly thank readers for your sustained interest for almost four decades.

The most important change in this edition is the addition of Cristie Ford, Associate Professor of Law at the University of British Columbia as a most welcome and strongly collaborative co-author. Cristie has brought a set of “new eyes” to make the book more readable and coherent. She has worked assiduously with Kathleen and me to maintain the balance between the student’s and the practitioner’s needs. We have tried to write a book which “tells the story” of the law of Securities Regulation so that students can see its general principles; its evolution and some of the more challenging problems. At the same time we have tried to go deeply enough (but not excessively) to provide guidance to practitioners on interpretive issues with leads for further research.

Pamela Helmes-Hayes has been the extraordinary coordinator of most of the revision, in my office, as she has for the previous two editions. Nicole Roussele has continued this work, splendidly, for the past year.

I became Governor General of Canada in October 2010. This position has constitutional responsibilities, including promulgation of laws of the Canadian Parliament. Accordingly I have refrained from expressing opinions in this revision on matters which are currently under public policy discussion. Any views or recommendations on policy changes which are now in this fifth edition are those of Kathleen Rockwell and Cristie Ford and should not be attributed to me.

This edition would not have been completed without the research assistance provided by Trevor Bant, Jonathan Lam, Tim Pritchard, Kendra Shupe and Evan Straight, all in the JD program at the University of British Columbia Faculty of Law. We thank them for their service.

We salute the special expertise of Navdeep Gill, Manager, Registration at the Alberta Securities Commission (ASC), who wrote the first draft of Chapter 13 “Registration”. Kelly Shuba, Senior Special Counsel to the Vice-Chairs, also at the ASC, provided valuable insights, consultation and analysis throughout the writing and revision process. The views expressed in this book cannot, however, be taken to represent the views of the ASC or anyone there other than Kathleen.

We also wish to thank the staff at LexisNexis Canada for their support of this project, including their generous support for research assistance.

Fran Cudlipp in particular was steadfast in her support. Jessica Foster and Dale Clarry admirably carried the project through to completion.

There are quite significant changes in this fifth edition. The entire edition has been updated to reflect current law and practice, as well as recent developments in areas such as the impact of the recent (and ongoing) global financial crisis, the continuing pursuit of a national or common securities regulator, increasing interprovincial harmonization through National Instruments and the like, and the continued impact of technology and financial innovation on securities regulation. A number of chapters are wholly new, including Chapter 13 “Registration”, Chapter 18 “Corporate Governance” (also including a discussion of corporate social responsibility) and Chapter 21 “Outstanding Issues”. All of the other chapters have been thoroughly revised and updated. Throughout the book, we note recent cases, articles and studies for further reference. Some of the more significant changes from the fourth edition to the fifth are:

- an even more pan-Canadian focus, with additional references throughout to cases and statutes from Alberta, British Columbia, Ontario and Québec;
- increased emphasis on the relationship between securities regulation and capital markets regulation more broadly, especially in Chapter 1, renamed “Context and Philosophy”, Chapter 20 “International Issues” and Chapter 21 “Outstanding Issues”;
- a new Chapter 6 “Materiality”, to concentrate into one place the discussion of this fundamental concept;
- more integration of exchanges and self-regulatory organizations into the history of securities regulation (in a substantially expanded Chapter 2 “History”), and a decision to collapse the separate fourth edition chapters on the exchanges and self-regulation into a new, comprehensive Chapter 15 “Recognized Entities”;
- more discussion of the continued development of securitization and derivatives (in Chapter 3 “Scope”, and Chapter 21 “Outstanding Issues”), also including their role in “empty voting” and “hidden ownership” in the take-over bid context (in Chapter 11 “Take-over Bids”);
- throughout the text, reference to insights gleaned from the recent financial crisis (referred to in the text as the global financial crisis, or GFC), including as it affects prospects for internationalization (Chapter 20 “International Issues”) and the disclosure-based nature of securities regulation (Chapter 21 “Outstanding Issues”);
- several reorganized chapters, including Chapter 9 “Distribution Exemptions” and Chapter 10 “Insider Trading” (with additional exploration of illegal insider trading, paralleling the Commissions’ increased focus in this area);

- a revised “Enforcement” chapter, with a discussion of matters such as new administrative sanctions and the development of “reciprocal” orders;
- a discussion of the Supreme Court of Canada’s decision in *Reference re Securities Act*, [2011] S.C.J. No. 66, 2011 SCC 66 (S.C.C.) in Chapter 17 “National and Coordinated Approaches to Securities Regulation”, including an analysis of prospects for federal and provincial cooperation in the wake of that *Reference*, current to April 30, 2014;
- a discussion of the practical impact and theoretical challenges associated with information technology (in Chapter 19 “Information Technology”) and innovations in the financial markets, including high frequency trading, dark pools, crowdfunding and increasing complexity (in Chapter 21 “Outstanding Issues”); and
- a new appendix, authored by Professor Emeritus John Chant, on the Asset-Backed Commercial Paper (ABCP) Crisis and its resolution.

The third edition added dedications to Kathleen’s two sons and my first granddaughter. To that family of people who inspire us, we added in the fourth edition Kathleen’s grown step-daughter Courtney, a strong source of support. In this edition we add 10 more grandchildren, simply grouped as “the grandchildren” who call me Grandpa Book from my habit of reading to them or sending them books. And, of course, we renew the dedication to my wife Sharon and Kathleen’s husband Michael, for their infinite patience and encouragement. With Cristie’s partnership we have added dedications to her family: to her husband Alex (Sasha) Burton, her son Moss and her daughter Nina Liv.

As this manuscript was being printed, Purdy Crawford, a lifelong mentor and cherished friend, died. Purdy launched me down the path of Securities Regulation when I carried his briefcase as a student at law, and he was the volunteer secretary to the Kimber Commission drafting Ontario’s 1967 *Securities Act*. He wrote the foreword to the fourth edition and alas was not well enough to do the same for the fifth. This edition is a memorial to him.

This manuscript is current as of December 31, 2013 (although some crucial developments after that date are noted). While we have made every attempt to ensure accuracy, we encourage readers who rely on this book as a starting point or a resource to update the information in light of their particular circumstances.

David Johnston
Rideau Hall
Ottawa, Canada
August 2014

ABOUT THE AUTHORS

His Excellency the Right Honourable David Johnston has a B.A. from Harvard, an LL.B. from Cambridge and an LL.B. from Queen's University here in Canada. He has been awarded honorary doctorates from over two dozen universities, and since 1997 has been a Companion of the Order of Canada. He became Dean of the University of Western Ontario Faculty of Law in 1974, Principal of McGill University in 1979, and President of the University of Waterloo in 1994. In 2010, he was installed as the 28th Governor General of Canada.

Kathleen Doyle Rockwell has a B.Comm. (Honours) and a JD from the University of British Columbia. After practising securities law with a major Canadian law firm, she obtained an LL.M. from McGill University. She then worked as Legal Counsel at the Court of Queen's Bench in Calgary for several years. She is now with the Alberta Securities Commission as Senior Special Counsel to the Vice-Chairs, where her work includes conducting research and providing advice on securities law, administrative law and procedural matters. She has also taught securities law at the University of Calgary.

Cristie Ford has a B.A. from the University of Alberta, a JD from the University of Victoria, and LL.M. and JSD degrees from Columbia Law School in New York. She practised securities and administrative law for several years in both Vancouver and New York, and taught in various capacities at Columbia Law School between 2000 and 2005. She joined the University of British Columbia Faculty of Law in 2005. She teaches and writes in the areas of securities and financial regulation, administrative law, and regulatory theory and governance.

LIST OF LEGISLATIVE AND RELATED ABBREVIATIONS

Abbreviation	Reference
ABCA	Alberta <i>Business Corporations Act</i> , R.S.A. 2000, c. B-9
ABCP	asset backed commercial paper
AcSB	Canadian Accounting Standards Board
AGM	annual general meeting
AIF	Annual Information Form
AMF	Autorité des marchés financiers, online: http://www.lautorite.qc.ca/en/index.html > (regulatory instruments, online: http://www.lautorite.qc.ca/en/regulation-vm-pro.html >)
ASA	Alberta <i>Securities Act</i> , R.S.A. 2000, c. S-4
ASC	Alberta Securities Commission, online: http://www.albertasecurities.com > (regulatory instruments, online: http://www.albertasecurities.com/industry/securities-law-and-policy/Pages/regulatory-instruments.aspx >)
ASIC	Australian Securities and Investments Commission
ATS	Alternative Trading System
BAR	Business Acquisition Report
BCBCA	British Columbia <i>Business Corporations Act</i> , S.B.C. 2002, c. 57
BCSA	British Columbia <i>Securities Act</i> , R.S.B.C. 1996, c. 418
BCSCn	British Columbia Securities Commission, online: http://bcsc.bc.ca > (regulatory instruments, online: https://bcsc.bc.ca/Securities_Law/Instruments_and_Policies/ >)
BIS	Bank for International Settlements
CA	clearing agency
CAP	capital accumulation plan
CBCA	<i>Canada Business Corporations Act</i> , R.S.C. 1985, c. C-44
CCC	<i>Criminal Code of Canada</i> , R.S.C. 1985, c. C-46

CCAA	Canada <i>Companies' Creditors Arrangement Act</i> , R.S.C. 1985, c. C-36
CCGG	Canadian Coalition for Good Governance
CCMR	Cooperative Capital Markets Regulator
CD	continuous disclosure
CDCC	Canadian Derivatives Clearing Corporation
CDNX	Canadian Venture Exchange Inc. (now TSX Venture Exchange or TSX-V)
CDO	collateralized debt obligation
CDO ²	CDO squared
CDS	credit default swap
CEO	Chief Executive Officer
CESR	Committee of European Securities Regulators
CFO	Chief Financial Officer
CFTC	Commodity Futures Trading Commission (U.S.)
CICA	Canadian Institute of Chartered Accountants
CIPF	Canadian Investor Protection Fund
CNQ	Canadian Trading and Quotations System (later CNSX; now CSE)
CNSX	Canadian National Stock Exchange (now CSE)
COSRA	Council of Securities Regulators of the Americas
CP	Companion Policy
CPA	Chartered Professional Accountants
CPAB	Canadian Public Accountability Board
CPC	capital pool company
CRM	client relationship model
CRM2	Client Relationship Model Phase 2
CRO	Credit Rating Organization
CSA	Canadian Securities Administrators
CSE	Canadian Securities Exchange

CSR	corporate social responsibility
CSTO	Canadian Securities Transition Office
CTO	Cease Trade Order
DBRS	Dominion Bond Rating Service Limited
DC&P	disclosure controls and procedures
DPO	Direct Public Offering
EMD	exempt market dealer
EMH	efficient markets hypothesis
ESMA	European Securities and Markets Authority
ETF	Exchange-traded fund
EU	European Union
FAIR Canada	Canadian Foundation for Advancement of Investor Rights
FASB	Financial Accounting Standards Board (U.S.)
FCAA	Financial and Consumer Affairs Authority (Saskatchewan)
FCSC (Man)	Financial and Consumer Services Commission (Manitoba)
FCSC (NB)	Financial and Consumer Services Commission (New Brunswick)
FCST (NB)	Financial and Consumer Services Tribunal (New Brunswick)
FD	fair disclosure
FINRA	Financial Industry Regulatory Authority (U.S.)
FMI	financial market infrastructure
FOFI	Future-Oriented Financial Information
FSA	Financial Services Authority (U.K.)
FSB	Financial Stability Board
G-20	Group of Twenty
GAAP	Generally Accepted Accounting Principles
GAAS	Generally Accepted Accounting Standards
GFC	global financial crisis
HFT	high frequency trading

IAS	International Accounting Standard
IASB	International Accounting Standards Board
IASC	International Accounting Standards Committee
IB	issuer bid
ICFR	internal control over financial reporting
IDA	Investment Dealers' Association of Canada
IER	issuer event report
IF	investment fund
IFIC	Investment Funds Institute of Canada
IFRS	International Financial Reporting Standards
IIROC	Investment Industry Regulatory Organization of Canada
IMET	Integrated Market Enforcement Teams
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
IPO	initial public offering
ISDA	International Swaps and Derivatives Association
IT	insider trading
ITR	Insider Trading Reports
JOBS Act	<i>Jumpstart Our Business Startups Act</i> , Pub. L. No. 112-106, H.R. 112-406 (U.S.)
Kansas Act	<i>An Act to provide for the regulation and supervision of investment companies and providing penalties for the violation thereof</i> , c. 133, 1911 Kan. Sess. Laws 210
KYC	know your client
KYP	know your product
MCR	Material Change Reports
MD&A	Management's Discussion and Analysis
ME	Montréal Exchange (now MX)
MER	management expense ratio
MFDA	Mutual Fund Dealers Association

MI	Multilateral Instrument
MJDS	Multi-Jurisdictional Disclosure System
MLAT	Mutual Legal Assistance Treaty
MMMF	Money Market Mutual Fund
MOU	Memorandum of Understanding
MRA	Mutual Recognition Agreement
MSA	Manitoba <i>Securities Act</i> , C.C.S.M., c. S50
MSC	Manitoba Securities Commission
MV	multiple voting
MX	Montréal Exchange
NASAA	North American Securities Administrators Association
NASD	National Association of Securities Dealers (U.S.)
NAV	net asset value
NAVPS	net asset value per security
NBSA	New Brunswick <i>Securities Act</i> , S.N.B. 2004, c. S-5.5
NEO	Named Executive Officers
Nfld SA	Newfoundland & Labrador <i>Securities Act</i> , R.S.N.L. 1990, c. S-13
NI	National Instrument
NOBO	non-objecting beneficial owner
NP	National Policy
NRB	net regulatory burden
NRD	National Registration Database
NRIF	non-redeemable investment fund
NRS	National Registration System
NSA	Nunavut <i>Securities Act</i> , R.S.N.W.T. 1988, c. S-5.5
NSSA	Nova Scotia <i>Securities Act</i> , R.S.N.S. 1989, c. 418
NYSE	New York Stock Exchange
NSSC	Nova Scotia Securities Commission

NWTSA	Northwest Territories <i>Securities Act</i> , S.N.W.T. 2008, c. 10
OBCA	Ontario <i>Business Corporations Act</i> , R.S.O. 1990, c. B.16
OBOs	objecting beneficial owners
OECD	Organisation for Economic Co-operation and Development
OM	offering memorandum
OSA	Ontario <i>Securities Act</i> , R.S.O. 1990, c. S.5
OSC	Ontario Securities Commission, online: < http://www.osc.gov.on.ca/en/home.htm > (regulatory instruments, online: < http://www.osc.gov.on.ca/en/SecuritiesLaw_irps_index.htm >)
OSC Pol.	Ontario Securities Commission Policy Statements
OSFI	Office of the Superintendent of Financial Institutions
OTC	over-the-counter
PEISA	Prince Edward Island <i>Securities Act</i> , R.S.P.E.I. 1988, c. S-3
POS Obligations	Point of Sale Obligations
PREP prospectus	post-receipt pricing prospectus
PREP Information	price or related information omitted from a PREP prospectus
QCA	Quebec <i>Companies Act</i> , CQLR, c. C-38
QIB	Qualified Institutional Buyer
QSA	Quebec <i>Securities Act</i> , CQLR c. V-1.1
QSC	Quebec Securities Commission (now AMF)
QTRS	Quotation and Trade Reporting System
RE	recognized entity
REIT	real estate investment trust
RS	Market Regulation Services
SCC	Supreme Court of Canada

SEC	Securities and Exchange Commission (U.S.)
SCL	statutory civil liability
SD	selective disclosure
SEDAR	System for Electronic Document Analysis and Retrieval
SEDI	System for Electronic Disclosure by Insiders
SOX	<i>Sarbanes-Oxley Act of 2002</i> , Pub. L. 107-204, 116 Stat. 745 (U.S.)
SPE	special purpose entity
SRI	socially responsible investment
SRO	self-regulatory organization
SRP	shareholder rights plan
SSA	Saskatchewan <i>Securities Act, 1988</i> , S.S. 1988-89, c. S-42.2
STP	straight-through processing
TOB	take-over bid
TSE	Toronto Stock Exchange (now TSX)
TSX	Toronto Stock Exchange
TSX-V	TSX Venture Exchange
UMIR	Universal Market Integrity Rules
VSE	Vancouver Stock Exchange (now merged into TSX Venture Exchange or TSX-V)
WPC	Wise Persons' Committee
XBRL	eXtensible Business Reporting Language
YSA	Yukon <i>Securities Act</i> , S.Y. 2007, c. 16

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