Stikeman Elliott

**Stikeman Elliott LLP**
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, ON Canada M5L 1B9

Main: 416 869 5500
Fax: 416 947 0866
www.stikeman.com

September 27, 2017

**Without Prejudice**
**By E-mail**

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal, Québec H4Z 1G3
Fax: 514-864-6381
Email: consultation-en-cours@lautorite.qc.ca

The Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
Email: comments@osc.gov.on.ca

Dear Sirs/Mesdames:

**Re: CSA Notice and Request for Comment**
**Proposed Amendments to National Instrument 45-102 *Resale of Securities***
**Proposed Changes to Companion Policy 45-102CP to National Instrument 45-102 *Resale of Securities***
**Proposed Consequential Amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations***
**- and -**
**Proposed Consequential Changes to National Policy 11-206 *Process for Cease to be a Reporting Issuer Applications***

We submit the following comments in response to the CSA Notice and Request for Comment (the "**Request for Comment**") published by the Canadian Securities Administrators (the "**CSA**") on June 29, 2017 with respect to proposed amendments to National Instrument 45-102 *Resale of Securities* ("**NI 45-102**") and proposed changes to Companion Policy 45-102CP to National Instrument 45-102 *Resale of Securities* ("**45-102CP**")(collectively, the "**Proposed Amendments**").

We have organized our comments below with reference to the proposed rule, policy or form to which the comments relate. All references to parts and sections are to the relevant parts or sections of the applicable rule, policy or form. Where our comments are responsive to the specific questions posed in the Request for Comment, we have included the text of such questions below for ease of reference.

Thank you for the opportunity to comment on the Proposed Amendments. This letter represents the general comments of certain individual members of our securities practice group (and not those of the firm generally or of any client of the firm) and is submitted without prejudice to any position taken, or that may be taken, by our firm on its own behalf or on behalf of any client.

*1. We have proposed a definition of "foreign issuer" for the purposes of the proposed exemption.*

- *Are the proposed elements of the definition of foreign issuer appropriate for purposes of establishing that an issuer has a minimal connection to Canada? If not, please explain which elements of the proposed definition of foreign issuer are not appropriate and why.*

- *Are there other elements we should incorporate into the proposed definition of foreign issuer that would be a more appropriate indicator of whether an issuer has a minimal connection to Canada? If so, which ones and why.*

We submit that the proposed elements of the definition of "foreign issuer" are appropriate for purposes of establishing that an issuer has a minimal connection to Canada. However, we note that while substantively not different, the language used in the definition of "foreign issuer" in the Proposed Amendments differs from that used elsewhere in Canadian securities laws, including, for example, subsection (b) of the definitions of (i) "foreign reporting issuer" found in National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*, (ii) "foreign issuer" found in National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards* or (iii) subsection (b) "foreign issuer" found in National Instrument 71-101 *The Multijurisdictional Disclosure System*. For the purpose of consistency of interpretation throughout Canadian securities laws, and with reference to the general principles of statutory interpretation, we respectfully suggest that the CSA consider revising the definition of "foreign issuer" found in the Proposed Amendments to mirror the language used elsewhere in the National Instruments, unless there is intended to be a substantive difference between such definitions.

*3. Under the proposed exemption, the determination of the non-reporting issuer status is made at either the distribution date or the date of trade.*

- *Do you agree with this approach?*

- *Do you believe that determination should be made at only one of these dates? If so, which date? Please explain the reasons for your views.*

We respectfully submit that the determination as to whether the issuer is a reporting issuer should be made at the distribution date for the same reasons noted in the Request for Comments with respect to when the determination with regard to foreign issuer status is to be made (see question 2 above). Investors should be provided with certainty at the time of their investment decision as to whether the proposed exemption will be available for subsequent resale of the securities. Similarly, an investor should be able to ask an issuer to make representations as to its reporting issuer status at the time of distribution.

In addition, if subsequent to the date of distribution, the issuer becomes a reporting issuer in Canada through the filing of a prospectus, pursuant to section 2.7 of NI 45-102, the four month seasoning requirement in sections 2.5, 2.6 and 2.8 of NI 45-102 will not apply. As such, securities issued prior to the prospectus being filed may then be resold, provided that any applicable restricted period under section 2.5 or 2.8 of NI 45-102 has expired. Given this section of NI 45-102, we question whether it is relevant to make a determination as to reporting issuer status on the date of trade as investors will generally be permitted to otherwise trade their securities.

4. *We have stipulated as a condition to the proposed exemption that if the selling security holder is an insider of the issuer, then no unusual efforts can be made by the selling security holder to prepare the market or to create a demand in Canada for the security that is the subject of the trade.*

- *Do you think that such a condition is appropriate? Please explain why or why not?*
- *Would a different condition be more appropriate to address potential concerns about selling security holders that are insiders preparing the market or creating a demand in Canada for the foreign issuer's securities? Please explain and provide examples.*
- *Do you think we should be concerned that security holders that are insiders may prepare the market or create a demand in Canada for the foreign issuer's securities? Please explain the reasons for your views.*

We respectfully submit that, to the extent the CSA believes that this condition is necessary for the proposed exemption, further explanation be provided as to its underlying policy rationale. While the Request for Comment notes that this condition is "meant to address potential policy concerns where an investor is an insider of a foreign issuer and, as a result, may have a greater opportunity or incentive to prepare the market or create a demand in Canada for the securities of the foreign issuer", as the proposed exemption does not permit a trade to be made through an exchange or market in Canada or to a person or company in Canada (i.e., an insider could not resell its securities to a Canadian under the proposed exemption), we do not see the foregoing statement to raise a potential policy concern. A sale by an insider to a potential purchaser in Canada of securities of a foreign issuer that is not a reporting issuer in Canada (i.e., securities that are subject to restricted or seasoning periods) would be a distribution and trigger the prospectus requirement or require an exemption therefrom. Should the CSA determine that there is a valid policy concern resulting in this condition being included in the proposed exemption, we respectfully submit that additional guidance as to the meaning of "no unusual effort" be included in 45-102CP so as to provide clarity and certainty to investors, as investors are currently required to refer to case law to make the necessary determination.

6. *The proposed exemption would not be available for the resale outside of Canada of securities of an issuer incorporated or organized in Canada because such issuers do not fall within the definition of foreign issuer.*

- *In your view, should we consider a similar exemption for the resale outside of Canada of securities of a Canadian issuer distributed under a prospectus exemption if the securities of the Canadian issuer are only listed on an exchange, or market, outside of Canada? Please explain the reasons for your views.*

Based upon our experience, an exemption for the resale outside of Canada of securities of a Canadian issuer distributed under a prospectus exemption would be helpful where the Canadian issuer's only connection to Canada is its incorporation or formation. In particular, we note that there are certain issuers who are incorporated or formed in Canada solely for tax or other purposes, but otherwise have no real connection to Canada. Where an issuer is incorporated or formed in Canada, and the issuer has no other material connection to Canada, we do not believe that the resale of such securities should be restricted.

Yours truly,

Ramandeep K. Grewal and Laura Levine