VIA FACSIMILE, COURIER AND EMAIL

December 19, 2003

Ontario Securities Commission
Alberta Securities Commission
British Columbia Securities Commission
Commission des valeurs mobilières du Québec
Saskatchewan Financial Services Commission
The Manitoba Securities Commisison

c/o

Ilana Singer
Legal Counsel, Corporate Finance
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8
Fax: 416-593-3683 and Email: isinger@osc.gov.on.ca

and

Denise Brosseau, Secretary
Commission des valeurs mobilières du Québec
800, Square Victoria, 22nd Floor
Tour de la Bourse
P.O. Box 246
Montréal, Québec H4Z 1G3
Fax: 514-864-6381 and Email: consultation-en-cours@cvmq.com

Dear Sirs/Mesdames:

Re: National Policy 41-201 – Income Trusts and Other Direct Offerings

INTRODUCTION AND INFORMATION CONCERNING OUR ASSOCIATION

We are writing in connection with the October 24, 2003 request for comments on proposed *National Policy 41-201 – Income Trusts and Other Indirect Offerings*.

CIPPREC is a national association comprised of the largest owners, developers and managers of commercial real estate in Canada, including real estate investment trusts (REITs), publicly-traded and large private companies, banks, brokerages, crown corporations, investment dealers, life insurance companies and pension funds. Our members currently own in excess of $70 billion in real estate assets located in the major centres across Canada, including retail, office, industrial, hotel, multi-residential

and seniors housing. Almost all of the 23 Canadian REITs are members of CIPPREC. A listing is attached as Schedule "A". For more information concerning our association, please refer to our website (www.cipprec.ca).

OVERVIEW OF OUR COMMENTS

Our comments on the proposed policy are intended to provide you primarily with the perspective of existing Canadian REITs (which constitutes the subset of our members that we expect will be most directly impacted by the proposed policy). However, to the extent relevant, we have also provided some insights on how the proposed policy may impact real estate businesses that may choose to adopt a REIT structure in the future (whether as an initial public offering or through the "conversion" of an existing public corporation).

In providing our comments on the proposed policy, we have been guided by the following principles:

- the regulation of REITs from a securities law perspective should be designed to ensure that REITs operate on a "level playing field" with public real estate and other types of public corporations; and

- securities regulation should be designed primarily to ensure that investors are provided with appropriate information to make an informed investment decision – it should not (and arguably cannot) protect investors who do not properly consider potential alternative investments (or seek professional advice, to the extent that they are unable to so consider alternatives on their own).

In preparing this letter, we had the benefit of reviewing the comments of the Canadian Association of Income Funds (CAIF) on the proposed policy, which were set out in its letter to you dated November 26, 2003. We believe that the comments of CAIF are very constructive and, in most respects, equally relevant from the perspective of a REIT. In order to avoid unnecessary duplication in the comment process, we have not repeated many of those comments although, in certain instances, we have specifically endorsed comments set out in the letter from the CAIF.

SPECIFIC COMMENTS ON THE PROPOSED POLICY

Our specific comments on the proposed policy are set out below. For convenience of reference, we have set out our comments under the specific section of the proposed policy upon which we are commenting.

Section 1.6

See our comments below under the heading "Part 4 – Prospectus Liability".

Section 2.2 – Consistency of Rate of Return

We agree with, and endorse, the comments made by CAIF in its letter to you with respect to the references to "non-taxable" returns of capital. We believe that the comments of CAIF are particularly relevant in the context of REITs because a large portion of the distributions of many REITs constitute "tax deferred" returns of capital (ie returns sheltered by the application of capital cost allowance to buildings and equipment).

Section 2.4 – Cover Page Disclosure relating to Distributable Cash

In its response to you, CAIF indicated that:

> Under the proposed instrument, issuers will be required to set out the following on the face of the prospectus; *"The estimated portion of your investment that will be taxed as a return on capital is ● and the estimated portion that will be taxed as a return of capital is ●"*. We do not believe it is appropriate to assume that this information will be available consistently for every issuer. We are concerned that in order to estimate and insert the amounts expected to be applicable to each category of taxable portions, issuers will effectively need to develop detailed forecasts of their expected financial information which would need to be supported by a formal forecast included in the prospectus. If so, this will add significantly to the cost of the prospectus filing and increase the length of time needed for the offering process. We ask that you delete the requirement of providing the actual expected dollar amounts under each category of tax. Issuers that are in a position to provide this information can still do so without it being a requirement.

We agree with, and endorse, this comment. However, if you do not agree with the deletion of the above-noted disclosure, at a minimum, we would recommend that the proposed language be revised to:

- limit the time period for which the issuer must provide such estimates; and
- emphasize the uncertain nature of any such estimates because of their dependence on future developments in the business and affairs of the issuer.

We would suggest that the recommended disclosure be substantially similar to the following:

> Management of the [Fund] has estimated that, for the [twelve-month] period commencing on the closing of the Offering, the portion of your investment that will be taxed as a return <u>on</u> capital is ●% and the portion that will be taxed as a return <u>of</u> capital is ●%; however, this estimate should not be regarded as a forecast or projection of these portions and the actual portions may vary from these estimates, and such variation may be material.

Sections 2.6 through 2.9 (inclusive) – Short-term Debt

Disclosure

We believe that proposed level of disclosure set out in Sections 2.7 and 2.9 of the proposed policy relating to short-term debt is generally appropriate and useful information from an investor's perspective. However, we believe that:

- the disclosure should be explicitly limited to "material" short-term debt so as to avoid the impression in the proposed policy that an issuer is required to provide detailed disclosure regarding *all* short-term debt, regardless of its significance;

- in appropriate cases (such as where an issuer has several short-term debt obligations), an issuer should be explicitly permitted to provide disclosure substantially similar to that contemplated in Section 2.7 on an aggregated basis;

- more relevant information for REITs would be whether debt is fixed or floating rate debt, and aggregate debt maturities, since these are factors that may harm a REIT if not well managed. The REITs generally disclose these today.

In our view, these changes to Section 2.7 of the proposed policy will ensure that the disclosure being provided to an investor is not unduly voluminous and limited to material information.

Filing Short Term Debt Instruments as Material Contracts

We do not believe that it is appropriate to designate the agreements relating to short-term debt of an issuer as "material contracts", thus requiring issuers to file the agreements on SEDAR. We are of this view for three reasons:

- financing agreements often contain sensitive commercial information concerning an issuer's business and the terms of its financing;

- the financing arrangements between an issuer and its lender(s) are generally dynamic and involve frequent interaction between the issuer and the lender(s), such that a person simply reviewing the agreement relating to such financing is unlikely to obtain a meaningful understanding of the arrangements and may, in fact, be unintentionally misled concerning the precise nature of those arrangements; and

- to the extent that the proposed policy implies that income funds (including REITS) are to be subject to a more onerous requirement with respect to filing financing agreements, this distinction is unwarranted and may put income funds at a competitive disadvantage in relation to public corporations.

We believe that all of the concerns identified by you in Sections 2.6 through 2.9 (inclusive) of the proposed policy are adequately addressed through the disclosure set out in Sections 2.7 and 2.9 and that the additional obligation to file the agreements relating to short-term debt of an issuer as "material contracts" is not justified in the circumstances.

Sections 2.10 through 2.13 (inclusive) – Stability Ratings

We have serious concerns about the requirements of the proposed policy relating to stability ratings.

- there is no pervasive use of stability ratings to date in the REIT industry, and some REITs may be skeptical of the objectivity and reliability of stability ratings applied to something as transparent as real estate;

- rating agencies are for-profit businesses, have no professional accreditation, and may make their subjective assessments without particular accountability;

- as noted in CAIF's letter to you, stability ratings merely perpetuate a myth that income funds are similar to bonds or other fixed-income securities and may confuse retail investors;

- other issuers, including issuers of debt securities, are not generally required to obtain stability or similar ratings or to disclose the reason for not obtaining such ratings. In this regard, we believe that the requirement that an income fund should obtain a stability rating or disclose its reason for not doing so to be a fundamental departure from the traditional offering process that encourages full, true and plain disclosure of an issuer's business and the risks associated with that business and, based upon that information, permits an investor to undertake an analysis of that information and make an informed investment decision.

- Many of our members are concerned that the proposed policies regarding stability ratings will give a false sense of security, particularly in the minds of retail investors, who may not understand that stability ratings represent a subjective measurement of a group of parameters which are less transparent and much more narrow in scope than those which are considered in bond ratings and very significantly more narrow than those which are considered in fundamental research analysis of equities such as REITs, Income Trusts and Royalty Trusts. Through their own description of stability ratings, one of the rating agencies acknowledges that "there is a primary distinction between credit (i.e. debt) and stability ratings in that the credit ratings opine on the likelihood that an issuer will fulfill fixed principal and interest payment obligations. Stability ratings, in contrast, are determined in relation to distributions that are not fixed, but are variable in nature".

For these reasons, we strongly urge you to delete the references in the proposed policy relating to stability ratings.

Section 2.14

The OSC's proposed policies suggest that valuations should be disclosed and made available on Sedar. REIT IPO prospectuses generally are disclosed and made available on Sedar. However, many REIT Declarations of Trust require an appraisal for every acquisition of real property throughout the life of the REIT. The disclosure and posting of such appraisals on an ongoing basis would represent a significant competitive disadvantage to the REIT as the appraisals will likely contain sensitive confidential information concerning tenant lease rates and expiries. Such disclosure, because of its volume, would also represent an unfair burden for the REITs compared to corporations in accessing the equity markets as short form issuers. As a result, we do not believe this should be a requirement.

PART 4 – PROSPECTUS LIABILITY

We do not intend to comment substantially on the prospectus liability sections of the proposed policy because we believe that others are in a better position to do so. However, we believe that there is one aspect of the prospectus liability sections that is particularly relevant to REITs and that requires clarification.

Because of the nature of the business of a REIT, it is not unusual for a REIT to undertake a public offering of its units in the context of acquiring a portfolio of real estate properties. Such an offering can occur in the context of the initial public offering of a new REIT or an acquisition by an existing REIT. In most cases, the vendor of the real estate properties is not the promoter, not involved in the establishment, or associated with the management, of the REIT but is simply selling its properties to the REIT. In the context of these types of transactions, we believe that the proposed policy might lead to unintended confusion and market-chilling liability.

Section 1.6 of the proposed policy suggests that where the issuer and the vendor(s) of a business or assets negotiate at arm's length and the vendor is not directly involved in the offering process, the concerns associated with indirect offerings do not generally arise and the principles set out in Part 4 of the proposed policy are not applicable. However, portions of Part 4 of the proposed policy raise some uncertainty in this regard. In particular,

- certain portions suggest that a vendor may be a "promoter" if it receives a "significant portion" of the offering proceeds, and
- it is not clear whether simply receiving a portion of the offering proceeds may suggest that a vendor is "involved" in the offering process.

We believe that it would be helpful if the proposed policy made it clear that where there is a *bona fide* arm's length negotiation between the issuer and a vendor and the vendor is not involved in the offering process and does not have the ability to materially affect control of the issuer (other than to the extent that it is receiving a portion of the offering proceeds as the balance due on closing of its sale), the principles set out in Part 4 of the proposed policy are not applicable. Otherwise, any uncertainty with

respect to this matter may place a REIT at a competitive disadvantage with other potential purchasers in the context of acquiring a new business or material assets because the vendor may be concerned that the securities regulators may impose additional liability on the vendor (or, if the vendor refuses to accept such liability, that the issuer will not be able to finance the acquisition).

*   *   *

We hope that you will find the foregoing comments of assistance in your review of the proposed policy. Please contact the undersigned should you require further information, or require clarification on any of the above, at 416.642.2700 ext 25.

Yours very truly,

S. Michael Brooks
Executive Director

SCHEDULE "A"

CIPPREC MEMBER REITS

Alexis Nihon REIT

Allied Properties REIT

Borealis Retail REIT

Calloway REIT

CAP REIT (Canadian Apartment Properties)

CHIP REIT (Canadian Hotel Income Properties)

CREIT (Canadian Real Estate Investment Trust)

Dundee REIT

H & R REIT

InnVest REIT

Legacy Hotels REIT

Morguard REIT

Northern Property REIT

O&Y REIT

Residential Equities REIT

Retirement Residences REIT

RioCan REIT

Summit REIT

TGS North American REIT