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December 23, 2003

**Via email**

Ontario Securities Commission
20 Queens Street West
Suite 1900, Box 55
Toronto, ON M5H 3S8

**Attention:** **Ilana Singer**
Legal Counsel, Corporate Finance
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Commission des valaurs mobilieres du Quebec
800, Square Victoria, 22nd Floor
Tour de la Bourse, P.O. Box 246
Montreal, Quebec H4Z 1G3

**Attention:** **Denise Brosseau**
Secretary
consultation-en-cours@cvmq.com

Dear Sirs/Madames:

**Re: Request for Comments — Proposed National Policy 41-201 Income Trusts and Other Indirect Offerings ( the "Policy")**

We refer to your Request for Comments issued on October 23, 2003 with respect to the Policy. Thank you for the opportunity of allowing us to provide you with our comments. The following sets forth some comments from certain individual members of our firm on the Policy and should not be taken to represent the position of Burnet, Duckworth & Palmer LLP on any matter nor represent the views or opinions of any of our clients.

**General Comments**

We are generally supportive of the Policy to the extent that it deals with certain unique issues relating to income trusts where the existing securities legislation does not provide the same level of investor protection as would provided with respect to corporate issuers.

We submit two overriding general comments:

1. Where an income trust consolidates its financial results with one or more of its subsidiaries, partnerships or other operating entities it should be treated on the same basis as a corporate issuer with one or more subsidiaries, partnerships or other operating entities with respect to financial and other disclosure. Disclosure on non-consolidated basis is not only very difficult to understand and is potentially confusing to investors but it also does not provide meaningful additional information if the entries are eliminated on consolidation; and

2. Where an income trust, whether in connection with an IPO or otherwise, makes an acquisition from a party which it deals at arm's length the vendor should be treated the same as the vendor would be treated if it entered the same transaction with a corporate issuers.

Income trusts, particularly in the oil and gas industry, must compete directly with corporate issuers and, to the extent possible, the regulatory framework should not favour nor disadvantage one issuer simply because of the use of a different legal form.

We have not provided comments on all aspects of you specific requests for comments and have provided some additional technical comments on some aspects of the draft policy.

***Comment #1***

**Specific Request for Comments**

- *Do you think that the discussion about indirect offerings is clear? Do you agree with the distinctions that we make between direct and indirect offerings?*

The discussion is relatively clear, but unfortunately tends to generalize with respect to the central issue being the non-arm's length of nature of some transactions, which impacts the liability of "selling securityholder", "promoters" and "vendors" as discussed part 4 of the Policy. In a direct offering, the issuer and the vendor are generally arm's length parties, but not always. It is also true that in an indirect offering the issuer and the vendor are often not dealing at arm's length, but certainly this not always the case. We submit that the focus should be on the non-arm's length transactions not on the structure of the issuer. If all indirect offerings are governed by this policy, income trusts, particularly in the oil and natural gas business, will not be able to compete in the open market for the purchase of assets or corporations if the vendors (including members of the public in a takeover bid) are considered to be making an indirect offer and must assume the liability relating to a public offering.

A vendor will prefer a corporate buyer over an income trust buyer if the vendor has to assume the public market liability risk, particularly given that the vendor will have no control over the income trust, unless the income trust buyer pays a significant premium to the corporate buyer. The breadth of this definition also appears to cover both initial public offerings as well as subsequent offerings, which are almost always negotiated between arm's length parties.

***Comment #2***

We find the requirement of Section 2.8 of the Policy to file all banking documents concerning in that corporate issuers, who may in particular circumstances have more risk associated with their lending position, are under no similar obligations. We would submit that the disclosure mandated by subpart C of Part 2 would provide adequate information to investors without putting income trust at a competitive disadvantage.

Section 2.9 mandates a separate risk factors about short term debt. Each income trust is unique, for some income trusts this will not be a material risk factor and for other income trusts this will be very material. We submit that this will lead only to "boiler plate" disclosure without a real assessment of the risk associated with the particular income trust.

***Comment #3***

**Part 3 – Continuous Disclosure**

**Continuous Disclosure about the Operating Entities**

We submit that the requirements of Section 3.1 should be clarified to make the first paragraph consistent with the undertaking set forth in (i). Separate financial statements, management discussion and analysis, business disclosure, press releases and material change reports should only be required in situations where generally accepted accounting principles prohibit the consolidation of financial statements of the income trust and operating entity. Where the operating entity is a subsidiary, partnership or other operating entity of the income trust, the income trust should be treated no differently than a holding corporation.

We also submit that the undertaking with respect to Rule 61-501 and Q-27 should also only be required to the extent that generally accepted accounting principles prohibit the consolidation of financial statements of the income trust and operating entity. An income trust and its subsidiary issuer is no different from a policy point of view than a holding company structure used by corporate issuers. Further it is submitted that applying Rule 61-501 and Q-27 to transactions between a parent and its subsidiary provides no real investor protection and adds to the cost of carrying on business with no real benefit.

***Comment #4***

**Part 4 – Prospectus liability**

Our comments primarily relate to the issue raised in Comment #1 and the use of the term "indirect offerings".

This section contains some troubling statements with respect to income trusts operating in a competitive market dealing with arm's length vendors.

In Section 4.3.1 the Policy states: "We believe that a vendor that receives, directly or indirectly, a significant portion of the offering proceeds, is a promoter and should sign the prospectus in that capacity". We respectively submit that this is not consistent with the definition of "promoter" found in the *Securities Act* (Alberta) and the discussion found elsewhere in the Policy including in Section 4.3.2 which we submit expresses the proper test.

In Section 4.4.3 the policy states: "CSA staff may consider recommending against the issuance of a receipt for a prospectus if vendors receive cash proceeds from an indirect offering by selling there operating entity interests and do not take appropriate responsibility (directly or indirectly) for the information provided as a basis for the offering through the acquisition agreement, or as a result of signing the prospectus, or otherwise". While this may be appropriate in the case of an indirect offering which has not been negotiated at arm's length, we submit this is not a proper test in an arm's length transaction. Firstly, the income trust will be limited by the market parameters of the market in which it operates. In the case of the oil and gas industry this often close to "as is, where is" after the purchaser has completed its due diligence. Secondly, the income trust will be usually negotiate the transaction prior to the filing of a prospectus and will have no ability in an arm's length transaction to renegotiate the transaction. Finally, an income trust will have no real ability to predict what "CSA staff" will consider appropriate in particular circumstances of the negotiations. In the context of a public takeover bid, any offeror will know that they will get no representations from a public shareholders other than ownership of the target shares and the power to sell and that after closing the Pre-Acquisition Agreement will be of no value as the representations, warranties and indemnities are only given from the offferor's new wholly-owned subsidiary.

It is respectfully submitted that Section 4.4 should only apply to indirect offerings that are not negotiated with a vendor dealing at arm's length with the income trust.

***Questions or Additional Information***

If you have any questions or require any additional information please do not hesitate to contact the writer.

Yours truly,

BURNET, DUCKWORTH & PALMER LLP

"*Grant A. Zawalsky*"

Grant A. Zawalsky
GAZ/lh

cc: Marsha Manolescu
Alberta Securities Commission
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