Burnet,
Duckworth
& Palmer LLP
Law Firm

Via Electronic Correspondence to Addressees Indicated in Schedule A

March 30, 2007

The British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission

Dear Sirs:

Re: Comments on Proposed National Instrument 41-101 *General Prospectus Requirements* ("NI 41-101" or the "Rule")

The Securities Group at Burnet, Duckworth & Palmer LLP are responding to your notice and request for comment dated December 21, 2006 (the "Notice") on NI 41-101, the forms prescribed by NI 41-101 and the companion policy to NI 41-101. Prior to providing our comments, we would like to commend the initiative taken by the Canadian Securities Administrators (the "CSA") to create a national instrument to encompass all the various prospectus requirements from the local jurisdictions. We understand that this was a substantial undertaking and we appreciate the effort that staff at the various commissions have taken in drafting the Rule.

We have the following comments with respect to the Rule:

1. Section 5.5 – Trust Issuer

We have a concern with respect to the prospectus certification requirements for trusts provided for in section 5.5 of NI 41-101.

Most public energy trusts have been organized with a corporate trustee such as Computershare Trust Company of Canada, CIBC Mellon Trust Company or Valiant Trust Company. The requirement that the CEO and CFO of such trust companies and two directors of their directors executing any prospectus certificate is impracticable for these energy trusts.

Most of the declarations of trust of these energy trusts provides that the trustee will be a licensed corporate trustee appointed by unitholders. These declarations of trust delegate, among other things, the authority to make all decisions relating to public offerings, including the responsibility for executing prospectus certificates, to the board of directors of the primary operating entity of the trust. Generally the board of directors of the primary operating entity oversees all operations of the trust's controlled entities and all public reporting by the trust. The corporate trustee's primarily responsibilities are to hold the assets of the trust (shares, subsidiary trust units, debt and net profit interests issued by trust's various controlled entities) and managing the cash distributions to unitholders. In performing its responsibilities under the declaration of trust the corporate trustee and its officer and directors would not be in a position to execute a prospectus certificate. We submit that requiring certification of Computershare Trust Company of Canada, CIBC Mellon Trust Company or Valiant Trust Company would not add meaningful protection for investors.

We note that subection 5.5(3) of NI 41-101 provides an exemption from the requirements of subsections 5.5(1) and (2) of NI 41-101 to issuers that are investment funds in similar circumstances. We would submit that a similar exemption should be provided to trusts that meet the same criteria.

If no exemption is provided, we would submit that a reasonable transition period should be provided so that each trust effected by this provision can call a meeting of unitholders to approve the substantial reorganize the trust in order that we may have continued access to the public markets.

2. Section 5.13 - Certificate of Substantial Beneficiaries of the Offering

This comment is in response to the specific requests for comment in the Notice on the new requirement contained in section 5.13 of the Rule that substantial beneficiaries of the offering are required to sign a certificate in the prospectus. We believe this requirement will have drastic consequences on many of our clients as well as Canadian public entities generally.

We are concerned that this requirement may effectively end, or significantly limit, substantial acquisitions by Canadian public entities where the public entity is financing the acquisition (or repaying acquisition debt) through a public offering. Not only will the requirement impair the ability of Canadian public entities to complete acquisitions, but it may also have a negative effect on the prices realized by private and public sellers of assets and businesses as public entities may effectively be eliminated from the universe of potential buyers unless the seller is willing to assume inordinate risk. Section 5.13 will affect public issuers' ability to make acquisitions both domestically and outside Canada and will subject Canadian issuers to rules that do not apply to their U.S. and foreign competitors. This requirement will adversely affect all Canadian public issuers regardless of their business but may have an even greater impact on the oil and natural gas industry given the historically high levels of continuous asset rationalization among oil and natural gas industry participants.

Section 5.13 will require that a prospectus contain a certificate of any "substantial beneficiary of the offering", which is defined in the Rule as any person or company who is reasonably expected to receive, directly or indirectly, 20% or more of the proceeds of the offering if that person or company is or was, within one year of the date of the prospectus, or following the completion of transactions contemplated by the prospectus:

(a) a control person of the issuer or a significant business of the issuer; or

(b) the holder of voting securities carrying 20% or more of the voting rights attached to any class of voting securities of the issuer or of a significant business of the issuer.

The term "significant business" means any business of the issuer or any business in which the issuer proposes to acquire an interest that would be considered a significant acquisition pursuant to subsection 35.1(4) of Form 41-101F1 *Information Required in A Prospectus* ("Form 41-101F1") (which refers to the significant acquisition definitions in NI 51-102 *Continuous Disclosure Obligations* "NI 51-102")). The definition is broad enough to capture assets of an issuer or distinct subsidiary entities of an issuer.

We believe that this section will have unintended or undesirable consequences. The following are two possible scenarios when a prospectus will be required to contain a certificate of a substantial beneficiary:

> **Scenario 1 -** Company A is purchasing oil and gas properties from Company B. To finance the acquisition, Company A is raising money by a prospectus offering. More than 20% of the proceeds of the offering will be used to finance the acquisition. The purchased properties will be considered a significant business for Company A because they meet the tests for significant acquisition contained in NI 51-102. As Company B owned 100% of the properties they will be considered to control a significant business of Company A within the year preceding the acquisition. Company B will therefore be required to sign a certificate in the prospectus.
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> **Scenario 2 -** Company A makes a cash take-over bid for all the shares of Company B. Mr. C holds 25% of the shares of Company B. Company A finances the bid through an acquisition facility. Company A files a prospectus to pay down the acquisition facility immediately after the closing of the bid. Company B will be considered to be a significant business for Company A because it meets the test for significant acquisition contained in NI 51-102. As Mr. C owned 25% of the shares of Company B within one year of the financing he would be required to sign the certificate in the prospectus as he indirectly received more than 20% of the proceeds of the offering.

In both scenarios the substantial beneficiary will face potential liability for the entire amount of the offering if the prospectus contains a misrepresentation regardless of whether the misrepresentation relates to the significant business. The substantial beneficiary will be faced with having to perform full due diligence on the issuer even if the sale only represents a small portion of the substantial beneficiary's business. Attempts to obtain indemnification from the issuer with respect to the issuer's information may not be enforceable as violation of public policy and, from a practical point of view even if enforceable, are often worthless as they are only called upon when the issuer has a total financial failure. Substantial beneficiaries that are public issuers will also face challenges in complying with their own disclosure control and internal control policies. We expect that most entities will not be willing to sell their business or assets to a public issuer who is planning to finance the acquisition by a prospectus offering as they will not want to accept the potential liability or the costs of performing due diligence. This will likely be the case even if the liability were limited to the business or assets being sold given the lack of limitations that would be found in a normal commercial sale. Those that are willing to sign the prospectus will no doubt demand a significant premium to assume these risks.

In addition, please note that section 5.13 will have a retroactive effect. For instance if sometime in the year before the Rule becomes effective an issuer has made an acquisition of a significant business financed through an acquisition facility and then the issuer files a prospectus after the Rule becomes effective and the proceeds of the offering are used to repay the acquisition facility the person or company who sold the significant business to the issuer will be considered a significant beneficiary and be therefore forced to sign a certificate in the Prospectus. This is not fair to either party to the transaction as this requirement may not have been contemplated at the time they entered into the transaction and would need to be the subject of a covenant in favour of the issuer. If the seller of the significant business is not willing to sign the prospectus the issuer will potentially default on its acquisition facility. If the CSA decides to maintain this requirement in section 5.13 of the Rule, at a minimum, transitional provisions should be included.

We believe that due to the severe impact that section 5.13 will have on public issuers this requirement should be removed from the Rule in its entirety. However, if the CSA decides to maintain this requirement it may be possible to amend the section to prevent unintended and undesirable consequences. One possible fix would be to amend the definition of significant beneficiaries so that it only includes persons or companies who are control persons of the issuer or of a significant business of the issuer after the completion of the transactions contemplated by the prospectus. This would help prevent the undesirable consequences in scenario 1 and scenario 2 above.

If the CSA decides to keep section 5.13 in the Rule we urge you to carefully consider this provision and amend it to ensure that it does not have unintended or undesirable consequences. It may be prudent to have formal or informal industry consultations with respect to this issue or at a minimum seek further guidance from the Security Advisory Committees in the various jurisdictions.

3. Section 10.2 – Licences, Registrations and Approvals

Section 10.2 of the Rule requires that when an issuer is raising funds through a prospectus to fund in whole or in part a new business of the issuer and the issuer has not obtained all material licences, registrations and approvals necessary for the operation of the business all the funds raised pursuant to the distribution must be held in trust by a registered dealer, Canadian financial institution or lawyer until such time as all material licences, registrations and approvals have been received. If all material licences, registrations and approvals necessary for the operation of the business have not been obtained within 90 days from the date of receipt of the final prospectus, the person holding the proceeds of the distribution must return the funds to the purchasers.

We believe this requirement may create a problem for many issuers starting a new business as the funds raised from the distribution may be necessary to obtain all material licences, registrations and approvals necessary for the operation of the business. Therefore, this new requirement should be removed or in the alternative a provision should be made to allow certain funds to be released from trust to pay for any material licences, registrations and approvals.

4. Part 11 – Over-Allocation Position and Underwriters

Our next comment relates to section 11.3 of NI 41-101. Although this section is intended to limit the number of securities issuable to underwriters as compensation or pursuant to an over-allotment option it may have the effect of prohibiting underwritten financings. The concept of an underwritten financing is that the underwriter acts as agent to the issuer to sell and distribute the issuer's securities to the public and if the underwriter is unable to sell and distribute the total amount of securities agreed to the underwriter agrees to purchase the remaining securities directly from the issuer. However, section 11.3 of NI 41-101, as currently worded, only allows securities qualified by a prospectus to be issued to an underwriter pursuant to an the over-allotment option and as compensation. This would prevent any securities that are distributed as part of the base offering to be distributed to the underwriter and therefore no prospectus offering could be done on an underwritten basis.

With respect to the limit in paragraph 11.3(b) on the securities to be distributed to the underwriter as compensation it may be worth considering having the percentage limit based on not only the base offering but the over-allocation position as well. General industry practice is that the compensation payable to underwriters (whether it be cash or securities) is based on the total securities issued pursuant to the offering.

5. Part 12 of NI 41-101 – Restricted Securities

The provisions in Part 12 of NI 41-102 will prohibit issuers from filing a prospectus for a distribution of restricted securities or subject securities (subject securities are defined as securities which upon the issuance will have the effect of making a currently issued and outstanding class of shares restricted securities) unless the minority shareholders have approved either the distribution or the prior creation of the restricted securities or subject securities (the creation must be approved at a time when the shareholder is a reporting issuer). Part 12 also requires issuers to use prescribed terms for the description of securities in the prospectus. In addition to the requirements of Part 12, proposed Form 41-101F1 contains certain prospectus disclosure requirements for an issuance of restricted securities. Although we believe that the additional disclosure requirements will provide useful information for investors we believe that some of the shareholder approval requirements with respect to restricted shares are too onerous. In particular we believe that shareholder approval should not be required if the issuer contemplates issuing restricted securities which have less rights than currently outstanding securities. The issuance of securities is a business decision which corporate law has always recognized as within the authority of the directors of the corporation. Therefore it is questionable why the issuance of securities that have less rights than the currently issued and outstanding shares should be approved by shareholders when the issuance of the same class of shares with the same rights as the issued and outstanding shares does not require shareholder approval.

Thank you for your consideration of the issues raised above.

Yours truly,

"*Burnet, Duckworth & Palmer LLP*"

SCHEDULE A

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