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ONTARIO TABLES NEW LEGISLATION CONFIRMING LIMITED LIABILITY OF UNITHOLDERS OF PUBLICLY TRADED TRUSTS

On May 22, 2003, the Trust Beneficiaries' Liability Act, part of Bill 41 (The Right Choices Act (Budget Measures)), was introduced in the Ontario Legislature and given first reading. The proposed legislation is intended to clarify the liability of unitholders for publicly traded trusts, such as closed-ended investment funds (including many retail structured products), income trusts, real estate investment trusts (REITS), and other stock-exchange traded funds.

Institutional lenders and financial product architects should be particularly interested in this legislation as it addresses their potential liability in case of realization on publicly traded trust units that are pledged as security for a guarantee, primary debt or other obligations. The Act prescribes that unitholders, as beneficiaries of a trust, are not "liable for any act, default, obligation or liability of the trust or any of its trustees." Accordingly, secured parties may treat such trust units in virtually the same manner as shares pledged as security.

The proposed legislation covers trusts that are reporting issuers under the Securities Act and whose trust instruments are governed by the laws of Ontario. While it does not matter when the trust was created, the Act will not apply to "any act or default" that occurs, or "any obligation or liability" that arose, before the Bill comes into force. It is unclear whether the proposed legislation will provide the same certainty to unitholders of conventional mutual funds, although we believe it should. It appears that the proposed legislation excludes pooled fund trusts and other investment trusts which are not publicly traded; however, it is expected that the potential liability of unitholders of these trusts will not be adversely affected by the passage of this legislation.

This legislative initiative is significant to the development of income trusts, REITS, and other publicly traded trusts as an investment class in Canada. Financial institutions have expressed concerns over accepting trust units as pledged security due to their potential exposure if they have to realize on their security interest, although the liability of unitholders for the activities of a trust is considered remote by legal experts. Once in force, this legislation will clarify the position of all unitholders of publicly traded trusts. Additionally, the passage of the Act should improve demand and liquidity for this class of investments as increased participation of institutional investors is expected. It is also anticipated that publicly traded trusts may soon be eligible for inclusion in the S&P / TSX Composite Index, as the current uncertainty has been a factor in this investment class being deemed inappropriate for the index.

As the legislature is adjourned until September 22, 2003, there is a possibility that the Trust Beneficiaries' Liability Act may die on the order table should a Provincial election be called prior to the Bill coming into force. It should be noted that a time allocation

motion was passed on June 26 which will allow the Government to quickly order the Bill through second and third readings once the House resumes in September.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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