Case Name:

Calpine Canada Energy Ltd. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended AND IN THE MATTER OF Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company, Applicants

[2007] A.J. No. 136

2007 ABQB 49

28 C.B.R. (5th) 185

155 A.C.W.S. (3d) 77

2007 CarswellAlta 156

Docket No. 0501 17864

Alberta Court of Queen's Bench
Judicial District of Calgary

Romaine J.

Heard: January 22, 2007.
Judgment: February 8, 2007.

(55 paras.)

Insolvency law -- Proposals -- Court approval -- Court approved sale of assets of company under protection to entity which provided offer without conditions -- Lower consideration for offer was foregone in favour of greater certainty.

Insolvency law -- Receivers, managers and monitors -- Property -- Sale of -- Court approved sale of assets of company under protection to entity which provided offer without conditions -- Lower consideration for offer was foregone in favour of greater certainty -- Monitor reviewed competing offers and recommended offer accepted by court.

Application by Calpine, group of companies under protection, seeking authorization to sell assets -- Calpine group included trust fund with principal asset being interest in power plants -- Calpine sought to sell trust fund-related assets -- Advised court Harbinger intended to launch take-over bid for fund and Calpine considered this opportunity to negotiate sale of assets with bidders who might be interested in acquiring fund -- Fund cross-applied to terminate agreements under which Calpine managed fund -- Fund and Calpine entered settlement agreement, sought court approval -- Other stakeholders opposed settlement agreement due to its timing and confidentiality requirements -- Monitor subsequently received Harbinger's offer to acquire fund-related assets -- Monitor ordered to prepare report on settlement agreement and Harbinger offer -- Monitor recommended settlement agreement over auction process for sale of fund-related assets -- Harbinger made revised offer -- Court found settlement offer was negotiated without sufficient transparency and disclosure, such that it lacked requisite degree of integrity and fairness -- Monitor ordered to issue another report, considering settlement agreement and revised Harbinger offer -- Monitor received another offer from Catalyst -- Catalyst offer provided for greater consideration, but was conditional, while Harbinger final offer was not conditional -- Monitor recommended acceptance of Harbinger final offer -- HELD: Application allowed -- Harbinger final offer was approved, as it provided for reasonable balance of price and closing certainty, was endorsed by many stakeholders and recommended by Monitor -- Potential for increased consideration through continuation of process or acceptance of more conditional offers was outweighed by risks and potential delay --

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36,

Courts of Justice Act, R.S.O. 1990, c. C.43,

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John Finnigan and Robert Thornton of Thornton Grout Finnigan LLP
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Sean Dunphy and Elizabeth Pillon of Stikeman Elliott for the ULC2 Trustee

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Peter H. Griffin of Lenczner Slaght Royce Smith Griffin LLP for Calpine Corporation and other U.S. Debtors

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REASONS FOR JUDGMENT

ROMAINE J.:--

Introduction

1 These reasons describe the complicated and controversial course of an application to sell certain assets. The application was made by the above-noted applicants (collectively, the "Calpine Applicants"), who, pursuant to an initial order dated December 20, 2005, are under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

Facts

2 This saga began when the Calpine Applicants decided to attempt to sell certain assets that form part of the complex, intertwined relationship of Calpine Canada Power Ltd. ("CCPL") with the

Calpine Commercial Trust (the "Trust") and the Calpine Power Income Fund (the "Fund").

3 On December 21, 2006, the Calpine Applicants filed a Notice of Motion, returnable on December 28, 2006, seeking authorization to market and sell the following assets (the "Fund-related Assets"):

a) certain contracts, being a management agreement, an administration agreement and some operating agreements (collectively, the "MA&O Agreements") relating to the Fund, the Trust and Calpine Power L.P. ("CLP") and to the operation of two power plants owned by CLP; and
b) the Class B Units in CLP.

4 An affidavit sworn on December 21, 2006 by Toby Austin, President and CEO of CCPL, includes at para. 10 a simplified diagram of the structure of CCPL's relationship with the Fund, the Trust and CLP.

5 Briefly, CLP is a limited partnership with Calpine Power L.P. Ltd. ("CLPGP") as its general partner and the Trust and CCPL as limited partners. CLPGP has assigned its rights and obligations as a general partner to CCPL. The Trust is an open-ended trust, the sole beneficiary of which is the trustee of the Fund. The Fund is a publicly held income fund listed on the TSX. Since CCPL and the other Canadian Calpine entities sought the protection of the CCAA, the Trust and the Fund have been governed by the independent trustees of the Trust and the independent directors of CLPGP (who are also trustees).

6 The Trust's principal asset is its interest in CLP. CLP indirectly owns two power plants, the Island Cogen Facility in British Columbia and the Calgary Energy Centre. CLP granted a participating unsecured loan to Calpine Canada Whitby Holdings Company, an entity that owns 50% of a joint venture that is developing a cogeneration facility in Ontario.

7 The Trust owns A Units in the CLP limited partnership. CCPL owns B Units. The B Units, which represent 30% of the equity of CLP, are subordinate to the A Units. Further complicating this already intertwined relationship, the Trust purchased from CCPL in May 2004 a promissory note with a face value of approximately $53.5 million pursuant to a loan known as the Manager's Loan. As security for the Manager's Loan, CCPL granted to the Trust a pledge of the B Units.

8 CCPL administers the Fund and the related entities pursuant to the MA&O Agreements . The MA&O Agreements all provide that they may be assigned by CCPL only with the consent of either the Trust or CLP, which consent shall not be unreasonably withheld. In support of their motion for authorization to sell the Fund-related Assets, the Calpine Applicants advised that on December 19, 2006, Harbinger Capital Partners ("Harbinger") had announced its intention to launch a take-over bid for the publicly-traded trust units of the Fund and that the Calpine Applicants believed that this presented them with an opportunity to negotiate the sale of the Fund-related Assets with bidders who might be interested in acquiring the Fund.

9 In response to the Calpine Applicants' motion, the Fund advised that it intended to bring a cross-application to terminate the MA&O Agreements. The Christmas break intervened and the application and proposed cross-application were adjourned to a date in January 2007. The Fund was to circulate materials with respect to its cross-application by Friday, January 12, 2007.

10 During the days leading up to and including Saturday, January 13, 2007, the Fund and the Calpine Applicants negotiated and entered into a settlement agreement (the "Settlement Agreement"). A notice of motion and supporting affidavit with respect to this Settlement Agreement was circulated to the service list on January 13 and 14, 2007. The Calpine Applicants applied for an order:

a) authorizing CCPL to enter into the Settlement Agreement;
b) approving the Settlement Agreement and the various transaction agreements that accompanied it;
c) terminating the MA&O Agreements upon the closing of the Settlement Agreement and lifting the stay of proceedings under the CCAA proceedings for that limited purpose;
d) directing that a confidential supplemental report on the Settlement Agreement that was to be prepared by Ernst & Young Inc. (the "Monitor") be sealed until closing of the Settlement Agreement; and
e) miscellaneous other relief.

11 The Fund prepared a Notice of Motion bearing the same date in which the independent trustees of the Trust and the directors of CLPGP applied to lift the stay imposed under the CCAA for the purpose of terminating the MA&O Agreements if the Settlement Agreement was not approved by the Court. The motion to approve the Settlement Agreement was to be heard on Wednesday, January 17, 2007.

12 On Monday, January 15, 2007, I heard from various stakeholders in this CCAA proceeding who were aggrieved about both the timing of the application and the stringent requirements of confidentiality that had been imposed by the Fund on information relating to the Settlement Agreement. That day was a holiday in the United States where a number of stakeholders are resident and several counsel had been unable to receive instructions from their clients on these issues. I directed that the application to approve the Settlement Agreement be set over to Monday, January 22, 2007 and that the issue of the terms of confidentiality be adjourned to Wednesday, January 17, 2007 so that counsel could obtain adequate instructions from their clients.

13 Late on January 16, 2007, the Monitor received an offer (the "Harbinger Offer") for the Fund-related Assets from HCP Acquisition Inc. ("HCP"), the subsidiary of Harbinger that is the vehicle for Harbinger's take-over bid for the public Trust units. The Monitor provided the Court with a copy of the offer, together with an application for advice and directions, shortly before Court opened to hear submissions on the confidentiality issue. The Harbinger Offer for the Fund-related

Assets was publicly disclosed by press release, but most parties had only recently become aware of its terms. The Monitor, of course, was not in a position at that time to provide advice on the offer and how it compared to the terms of the Settlement Agreement. It became apparent during the course of the hearing that the stakeholders wanted the Monitor to prepare a comparison of the Settlement Agreement and the Harbinger Offer. Submissions from that point focussed on how much, if any, of the Monitor's report with respect to that comparison should be subject to confidentiality, and whether the confidentiality provisions imposed by the Fund on the Settlement Agreement and on the Monitor's Supplemental Report (as defined below) should be lifted. Some stakeholders argued vigorously for a different process more akin to an open auction or tender for the assets.

14 At this point, the Monitor had prepared two reports, a Sixteenth Report that discussed the Settlement Agreement in general terms, without disclosing its specific financial terms, which was disclosed without restriction to the service list, and a Supplemental Report to the Sixteenth Report (the "Supplemental Report") that disclosed those financial terms, together with the Monitor's comments on the value of the MA&O Agreements and the B Units. These latter comments included a review of CCPL's discounted cash flow financial model of the B Units. The Supplemental Report was made available only to stakeholders who entered into confidentiality agreements as required by the Settlement Agreement.

15 The Calpine Applicants and the Fund submitted that the Settlement Agreement and the Supplemental Report were confidential and commercially sensitive to both parties. The Calpine Applicants were concerned that pricing and valuation information contained in the Supplemental Report would have a negative impact on any subsequent marketing process if the Settlement Agreement was not approved. The Fund had concerns relating to its response to the Harbinger take-over bid of the publicly-traded trust units and submitted that disclosure of the pricing and financial terms could be used by Harbinger to the disadvantage of the Fund. The Fund also asserted strenuously that it did not want to be placed in the position of a stalking horse for the Fund-related Assets and that, if it was put in that position, it would withdraw its offer.

16 The parties who sought access to the terms of the Settlement Agreement and the Supplemental Report were offered certain choices of confidentiality agreements, but it is clear that the Fund sought to ensure that such parties would be precluded from using the information for any purpose other than evaluating the Settlement Agreement, and particularly from making any kind of competing bid for the Fund's public trust units. One version of confidentiality agreement proffered by the Fund allowed stakeholders to establish an internal confidential screen that would remain in effect for two years in order to evaluate the information without requiring confidentiality to be imposed on the stakeholder's entire organization. Another allowed legal advisors to review the material without allowing them to disclose confidential terms to their clients. Although an attempt to impose this degree of restriction on access to information is exceptional in litigation generally, it is not without precedent in cases involving CCAA proceedings and receivers where assets of a business are sought to be sold: See In the matter of a Plan of Compromise and Arrangement of Air

Canada, *et al.*, under the CCAA, R.S.C. 1985, c. C-36, as amended; see also In the matter of the CCAA, R.S.C. 1985, c. C-36, as amended, and In the Matter of the Courts of Justice Act, R.S.O. 1990 c. C-43, as amended and In the Matter of a Plan of Compromise or Arrangement of Royal Oak Mines, *et al.* (all unreported).

17 I concluded that, although the Settlement Agreement was negotiated under stringent terms of confidentiality and the Supplemental Report was prepared pursuant to an assumption of confidentiality and on the assumption that the likelihood of CCPL receiving any offers whose benefits to CCPL exceeded those of the Settlement Agreement was remote, the situation had changed with the introduction of the Harbinger Offer. I was concerned, however, that it could be prejudicial to the primary goal of maximizing value to stakeholders if I ordered unrestricted disclosure of the Settlement Agreement or of the Supplemental Report during the short period of time between January 17 and January 22, 2007, when the Monitor's new report comparing the offers became available, particularly if I determined after hearing full submissions on January 22, 2007 that a different process should be followed.

18 I therefore declined either to endorse the confidentiality provisions imposed by the Fund to that date or to order greater disclosure, on the basis that the fairness of the process that led to the Settlement Agreement and the confidentiality requirements that had been imposed by it were live issues for submissions on January 22, 2007 and would be factors in any decision on whether or not to approve the Settlement Agreement. I directed the Monitor to prepare its comparison report with the analysis of the Settlement Agreement remaining subject to restricted disclosure, but with the Monitor's conclusions and recommendations being available on an unrestricted basis to stakeholders. I asked the Monitor to address the issue of whether a broader auction or marketing process should be undertaken.

19 The Monitor's Seventeenth Report was prepared and circulated on Friday, January 19, 2007. The Monitor concluded that, taking into account the material variables affecting the comparison between the Harbinger Offer and the Settlement Agreement, the completion of the Settlement Agreement proposal was the prudent approach. The Monitor stipulated, however, that the Calpine stakeholders should have the benefit of the Seventeenth Report and that the Monitor and the Court "should consider the stakeholders' tolerance for increased risk and potentially incremental realizations for the Fund-related Assets when considering the motion to approve the [Settlement Agreement] on January 22, 2007."

20 The Monitor considered two broad options, the completion of the Settlement Agreement and an auction marketing process. The Monitor noted that the Fund had advised the Court that it would not participate in an auction process and had indicated that, if the Settlement Agreement was not approved on January 22, 2007, it would proceed on January 26, 2007 with its motion to terminate the MA&O Agreements. If the Fund removed itself from the auction process, there would be no competitive tension with the Harbinger Offer unless other parties came forward. The Monitor believed that a limited number of new parties would be available to participate in an auction process

because parties who might otherwise be interested might have become restricted in submitting an offer because of participation in the Fund's efforts to find a "white knight" with respect to the Harbinger take-over bid for the Fund public trust units. The Monitor pointed out that the B Units are an illiquid, subordinated minority position in a private entity, attractive primarily to parties who may be interested acquiring the Fund. He also noted that the Harbinger Offer could be terminated at any point prior to acceptance. Given all of these factors, the Monitor believed there was substantial risk in pursuing an auction process.

21 On the morning of January 22, 2007, shortly before the motion to approve the Settlement Agreement was heard, Harbinger submitted a revised offer for the Fund-related Assets (the "Harbinger Revised Offer") that increased the price offered from the greater of $100 million or the value of the Settlement Agreement transaction price plus $2 million, as set out in the Harbinger Offer, to the greater of $110 million and 110% of the value of the Settlement Agreement transaction price. The Harbinger Revised Offer also removed Harbinger's ability to withdraw the offer without the Monitor's permission before the earlier of:

a) February 16, 2007;
b) Court approval of an alternate proposal; and
c) Harbinger making a replacement offer that the Monitor concludes is superior to the Harbinger Revised Offer.

22 At the hearing, the Ad Hoc Committee of ULC II Bondholders, which includes Harbinger as a member, and the ULC II Indenture Trustee were in vehement opposition to the motion to approve the Settlement Agreement, suggesting that the process that led to the Settlement Agreement and the restrictions on access to financial information imposed by the Fund had resulted in a "fatally flawed secret marketing process" that placed the stakeholders and the Court in an untenable position. In answer to the Monitor's suggestion that the Court hear from the stakeholders regarding their tolerance for increased risk and potentially incremental realizations for the Fund-related Assets, the Ad Hoc Committee advised that its members, absent Harbinger, had conferred and that "they are prepared to forego the secret benefits of the Settlement Agreement and either take their chances with a properly supervised process, or if need be, revert to the status quo where the marketing of this asset had not yet been commenced." Counsel for the ULC II Bondholders and Trustee submitted that an expedited sales process should be conducted, and that there was still time, given the status of the Harbinger take-over bid, for there to be an auction between the two existing bidders.

23 The Ad Hoc Committee of the ULC II Bondholders and the ULC II Indenture Trustee were the only major creditor group who had not entered into a form of confidentiality agreement with CCPL and the Trust so as to obtain access to the financial terms of the Settlement Agreement and the restricted portions of the Monitor's reports. As noted by counsel, the ULC II Bondholders are in the business of trading in distressed bonds, and the possession of non-public information relating to the B Units would preclude them from trading in any Calpine securities until the information

became public. While the alternatives offered by CCPL and the Trust would allow counsel to the Bondholders to evaluate the Settlement Agreement with a view to the interests of their clients, it would not allow them direct access to information without the unpalatable result to their business of restricting their freedom to trade in Calpine securities. Thus, for this group of stakeholders, anything less than full public disclosure of information about the B Units would be problematic. This placed these creditors in direct conflict with the Trust and the Fund in their efforts to maintain confidentiality of commercially-sensitive information and to avoid becoming a "stalking-horse" for higher offers. While neither of these private commercial interests is of primary significance to this Court in the context of CCAA proceedings, which have as a primary goal the maximization of value of the debtors' assets for the benefit of stakeholders as a whole, they are factors to be weighed in a determination of the fairness and integrity of the sale process.

24 Counsel for the Ad Hoc ULC I Noteholders Committee, who had access to all information relating to the Settlement Agreement through a "counsel's eyes only" confidentiality agreement, noted that his clients were in favour of a short auction between the Fund and Harbinger, with the Fund publicly releasing the details of the Settlement Agreement.

25 Harbinger submitted that the Harbinger Revised Offer addressed a number of the Monitor's concerns, including the elimination of the right to withdraw the offer at any time prior to acceptance, and called for an open auction/marketing process for the assets.

26 The Fund pointed out that eighteen creditors or creditor groups had signed a form of confidentiality agreement, leaving only the ULC II Bondholders and the ULC II Indenture Trustee among the major creditors who had not had access to the financial terms of the Settlement Agreement and the restricted portions of the Monitor's Reports. It "strongly objected" to the marketing of the MA&O Agreements and set out the requirements it indicated it would insist that an assignee of those agreements and a purchaser of the B Units must fulfill if the Settlement Agreement was not approved.

27 When it became apparent that the Settlement Agreement likely would not be approved on the day of hearing, counsel for the Fund noted that the Settlement Agreement expired at midnight on January 23, 2007 and he could not indicate if the independent trustees and directors would extend the deadline or would let the Settlement Agreement lapse. He stated that the Fund would not participate if the process became an auction. Counsel for the Fund suggested that the terms of the Settlement Agreement be disclosed to all parties other than Harbinger for a very brief period of two hours that day, after which the Monitor would prepare a supplemental report on any additional offers that this disclosure would generate overnight, with the hearing continuing the next day. The Calpine Applicants pointed out that they were bound to support the Settlement Agreement and that they, too, were reluctant to prolong the process beyond the time the Settlement Agreement would expire, as they feared losing the benefits of that agreement.

28 This one-day proposal, which excluded Harbinger, was characterized by the ULC II

Bondholders group and the ULC I Noteholders group as being unworkable and wholly ineffective in maximizing value. Harbinger, through its counsel, suggested that the process required at least 10 days, the creation of a data room and a general invitation to bidders.

29 The duties a court must perform when deciding whether a receiver has acted appropriately in selling an asset are summarized succinctly in *Royal Bank v. Soundair Corp.*, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 at para. 16 as follows:

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
> 2. It should consider the interests of all parties.
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
> 4. It should consider whether there has been unfairness in the working out of the process.

While the *Soundair* case involved a receivership and this is a situation of a debtor-in-possession under the CCAA overseen by a Monitor, these duties remain relevant to the issues before me, with some adaptation for the differences in the form of proceedings. It is noteworthy that *Soundair* did not suggest that a formal auction process was necessary or advisable in every case, and the Court in fact referred to *Salima Investments Ltd v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473, where the Alberta Court of Appeal suggests that a court on an application to approve a sale is not necessarily bound to conduct a judicial auction.

30 I have no doubt that in negotiating the Settlement Agreement with the Fund, the Calpine Applicants made efforts to get the best price possible, and that they did not act improvidently. While there were submissions to the contrary, it is telling that the Monitor was prepared to recommend the Settlement Agreement despite the lack of negotiation with parties other than the Fund, due primarily to the unique and difficult character of the Fund-related Assets and the backdrop of the Harbinger take-over bid for the Fund's public trust units, which created a time-limited window of opportunity. I also am not persuaded that the Settlement Agreement was not responsive to the interests of all parties, particularly to the primary interest of the creditors in maximizing value, given the circumstances facing the Calpine Applicants at the time the Settlement Agreement was negotiated.

31 There was, however, a lack of sufficient transparency and open disclosure, which resulted in a process lacking the degree of integrity and fairness necessary when the court is involved in a public sale of assets under the CCAA. The CCAA insulates a debtor from its creditors for a period of time to allow it to attempt to resolve its financial problems through an acceptable plan of arrangement. It allows the debtor to carry on business during that period of time and to exercise a degree of normal business judgment under the supervision of the court and a Monitor. What may be commercially reasonable and even advantageous when undertaken by parties outside the litigation process,

however, may be restricted by the requirement that fairness be done, and be seen to be done, when the process is supervised by the court. While a more open process may not lead to greater value, and may, as in this case, give rise to the possibility that an existing bidder may exit the process, the nature of a court-supervised process demands a process that meets at least minimal requirements of fairness and openness. The process undertaken to the point of the hearing on January 22, 2007, particularly with its emphasis on control of information and confidentiality for the primary benefit of the Fund, did not pass the test.

32 In addition, the fact of the Harbinger Offer necessitated closer consideration of the Monitor's assumption, reasonable as it may have been at the time it was made, that the likelihood that the Calpine Applicants would receive any offers that would exceed the benefits to CCPL of the Settlement Agreement was remote.

33 I concluded that circumstances had conspired to produce a situation that was neither fish nor fowl, a kind of lop-sided auction where different bidders were privy to different information and bound by different constraints. What had already occurred could not be changed, but a different process was required from that point forward. While there were differences of opinion as to how much time was available to conduct a sales process with an acceptable degree of integrity, it was necessary that such process be conducted quickly, given the circumstances affecting the two interested bidders. It appeared clear that it would be to the benefit of all stakeholders if the process were accelerated. I decided that an abbreviated sales process was necessary in order to balance the competing requirements of fairness, speed imposed by external circumstances and protection of *bona fide* proprietary or commercially-sensitive information.

34 While not dismissing the application to approve the Settlement Agreement, I directed that:

a) the Monitor issue its Eighteenth Report which would disclose the financial terms of the Settlement Agreement to all stakeholders, including HCP, by noon on January 23, 2007;
b) offers for the Fund-related Assets were to be submitted to the Monitor by noon on Thursday, January 25, 2007;
c) the Monitor would issue its Nineteenth Report comparing offers received by 2:00 p.m. on Friday, January 26, 2007; and
d) the hearing would resume on Tuesday, January 30, 2007.

35 These time limits were later changed by agreement of affected parties so that final offers were to be received by noon on Friday, January 26, 2007 and the Monitor would issue its Nineteenth Report by noon on Saturday, January 27, 2007.

36 I directed that HCP would be able to meet and discuss issues relating to its offer with the Monitor and/or, if the Fund decided not to extend the Settlement Agreement, the Calpine Applicants.

37 I did not release the Supplemental Report generally, on the basis that it had been prepared in the scenario of a single offer and on the assumption of confidentiality. Nor did I release the confidential portion of the Monitor's Seventeenth Report, which had been superceded by events.

38 The Monitor issued its Nineteenth Report providing a summary and analysis of offers received for the Fund-related Assets by noon on January 26, 2007. However, immediately prior to releasing the report, the Monitor was contacted by HCP and the Fund, acting jointly, requesting a delay of two hours to allow time for the submission of a revised offer. The Monitor advised me of the receipt of such revised offer when it delivered the Nineteenth Report to me on January 26, 2007 and provided a copy of the newly-revised offer (the "Harbinger Final Offer"). The Monitor indicated that it would be canvassing major stakeholders to receive their input on the offers and would issue a supplemental report to the Nineteenth Report prior to the court hearing on January 30, 2007. On Monday, January 29, 2007, I asked the Monitor to include in such report an analysis of the Harbinger Final Offer and any other offers it might receive prior to the release of this supplemental report.

39 The Monitor issued its Twentieth Report late in the day on January 29, 2007. In addition to the Harbinger Final Offer, the Monitor had received a letter from Catalyst Capital Group Inc. ("Catalyst") varying certain of the terms of an offer it had submitted by Friday's deadline in view of the press release issued by HCP relating to the Harbinger Final Offer. These revised terms were incorporated into the Monitor's analysis of the Catalyst offer.

40 Four offers were presented to the Court on Tuesday, January 30, 2007. One was a revised offer from the Fund. One was a revised offer from HCP received by the Monitor on January 26, 2007 (the "Second Revised HCP Offer"). One was an offer from Catalyst as revised on January 29, 2007 (the "Revised Catalyst Offer"). One was the Harbinger Final Offer. The Monitor recommended the Harbinger Final Offer.

41 The Harbinger Final Offer provides certainty of price and certainty of closing. It eliminates risks associated with the splitting and realization of certain claims CLP has made against the Calpine Applicants, and it facilitates the capture of value for creditors with respect to the Whitby cogeneration project by allowing the prepayment of a loan related to the project and the sale by CCPL of its interest in the project. It has no material conditions, and eliminates the uncertainty of future litigation with the Fund as the Fund has undertaken to support the offer and to provide the necessary consents.

42 This certainty, of course, comes with a price, which is that between approximately $10 million and $34 million of additional potential consideration would be forgone compared to the Second Revised HCP Offer, the Revised Catalyst Offer or a new Catalyst offer briefly described by counsel during the hearing (the "New Catalyst Offer").

43 As the Monitor points out, there is substantial closing risk associated with the Second Revised HCP Offer and the Revised Catalyst Offer, risks that likely would erode the potential financial

upside of those offers. The Second Revised HCP Offer, which carries the least risk, could not guarantee the consent of the Fund to either the transfer of the MA&O Agreements and the B Units or the outcome of an application to hold in abeyance the Fund's application to terminate the MA&O Agreements for a reasonable time following closing. Nor could it guarantee the outcome of an application for a permanent stay of any claim by the Trust or the Fund to terminate the MA&O Agreements for default due to the CCAA proceedings. These are risks not only of outcome but of time, as litigation would be required not only in this Court, but also might be prolonged by appeal.

44 The Revised Catalyst Offer and the New Catalyst Offer carry the same risks and more. Although the Fund may be constrained in rationalizing a refusal of consent with respect to the Second Revised HCP Offer by reason of its support of the Harbinger Final Offer, it would not be so constrained in refusing consent with respect to Catalyst. The Revised Catalyst Offer (and presumably the New Catalyst Offer, although this was not made clear) were subject to due diligence, regulatory approval, and, with respect to its higher range of value, the ability of Catalyst to come to an agreement with CCPL and perhaps the Fund to achieve value from the Whitby project. Originally, the Revised Catalyst Offer could be terminated at any time before acceptance. While Catalyst, in its submissions during the hearing, stated that it was prepared to abandon this condition, it was not clear how long it was prepared to leave its offers open.

45 The Ad Hoc ULC I Noteholders Committee expressed the wish to continue the process to see if greater value could be achieved. While the temptation to continue the process is understandable, given the carrot of higher offers and the suggestion of late-breaking developments in the take-over bid for the Fund's public trust units, prolonging the process would not allow Catalyst or any other new bidder the opportunity to overcome the serious contract transfer and contract termination risks that shadow their offers, given that the Fund is now bound to support the Harbinger Final Offer. Only the Harbinger Final Offer can provide the assurance that prolonged litigation with the Fund will be avoided, at least in the time frame imposed on this process by the take-over bid.

46 In addition, given my decision on January 22, 2007 to allow an abbreviated process, and not the more leisurely time-frame requested by some of the bidders, it would be unfair to extend the process on the basis of Catalyst's last-minute, in-Court efforts to improve its bid.

47 I also considered the objection raised by the Ad Hoc ULC I Noteholders Committee to the transfer of value to the public unit holders arising from the Harbinger Final Offer. It is true that value that potentially existed under the Second Revised HCP Offer has been transferred from the Calpine creditors to the public unit holders of the Fund under the Harbinger Final Offer through the sweetening of the HCP take-over bid, but this did not occur without the significant advantage of greater certainty. It is noteworthy that the Monitor in his Seventeenth Report was prepared to recommend the Settlement Agreement with its lower consideration over the Harbinger Offer on the basis of that uncertainty.

48 The process was certainly not pretty. It started with a privately-negotiated Settlement

Agreement that could not be disclosed in a way that would create a level playing field for all interested parties. There were good-faith reasons for the negotiation of such an agreement, set out in the affidavits and cross-examinations of the Calpine Applicants and the Fund, reasons rooted in attempting to achieve a balance between the Calpine Applicants' goal of value maximization and the Fund's need for confidentiality arising from both commercial proprietary interest and the threat of the take-over bid. Nevertheless, as I indicated earlier, the restrictions on disclosure arising from these circumstances could not be sanctioned in the context of a public CCAA proceeding with many stakeholders.

49 The Fund-related Assets are, as many parties noted, unique and unusual assets. They are part of a web of intertwined relationships in a complex corporate structure. As the Calpine Applicants recognized, the value of these assets could be optimized because of the take-over bid and the strategic challenges facing Harbinger and the Fund relating to that take-over bid. While advantageous to the Calpine creditors in that respect, the situation foreclosed a more traditional court-supervised auction that may have been appropriate for a different kind of asset and created a brief window of time for maximizing value. Perfection of process was highly unrealistic in these circumstances.

50 Has value been maximized under the abbreviated sales process? As some of the case law on process notes, a good test of whether a process has produced improvident bids is whether a substantially higher bid surfaces at the approval stage. In this case, while the last-minute bid by Catalyst was higher, it was not substantially so, and the improvements offered at the last minute by Catalyst to eliminate conditions in its bid were not so attractive as to lead to the concern that unrealized value lurked in the market if only the process had been extended.

51 There was criticism of the Harbinger Final Offer on the basis that it came in after the deadline for final offers had expired. However, Catalyst was afforded the same opportunity to revise its previous offer. In fact, it did so, and its revised offer was considered by the Monitor. This was not a formal tender process with an elaborate set of terms and conditions. Given the short time line forced by external circumstances, a certain amount of flexibility was necessary and was afforded to both HCP and Catalyst, but the integrity of the process required that that flexibility end at the time of hearing on January 30, 2007. The ability afforded to both HCP and Catalyst to revise their bids prior to the completion of the Monitor's Twentieth Report was not unfair, nor did it materially compromise the process.

52 It must be emphasized that the Monitor recommended that the HCP Final Offer be accepted and set out thorough and thoughtful reasons for that recommendation in its Twentieth Report. That recommendation was unshaken by Catalyst's last-minute attempts to improve its bid. While this application involves a Monitor under the CCAA, rather than a court-appointed receiver, I endorse the view of the Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 at 90p, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 at 529p (H.C.) set out at page 112:

> If the court were to reject the recommendations of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

53 The Monitor in this case has been intimately involved in the proposed sale of the Fund-related Assets from the beginning and for more than a year has accumulated valuable knowledge and insight into the complications and intricacies of the very complex corporate structure of the Calpine Applicants. The opinion of the Monitor deserves respect and deference. If, as the Court in *Soundair* commented at para. 14, "(t)he best method of selling an airline at the best price is something far removed from the expertise of a court", so is navigating the difficult shoals of selling unique, illiquid assets forming part of a complex corporate network with bidders preoccupied with broader external challenges. The recommendation of the Monitor, who was faced with a number of difficult variables and a rapidly-changing set of circumstances, was sound and reasonable.

54 I therefore found that the Harbinger Final Offer should be approved, as it provided for a reasonable balance of price and closing certainty, was endorsed by many of the stakeholders and was recommended by the Monitor.

55 Given the unique nature of the assets being sold, the nature of the closing risks, and in particular the nature of the material conditions affecting the value of the Revised Catalyst Offer, I agree with the Monitor, the Calpine Applicants, the independent trustees, the ULC II Bondholder groups and the U.S. Calpine entities that the potential for increased consideration through a continuation of the process or acceptance of the more conditional offers is outweighed by the risks and potential delay that would follow.

ROMAINE J.

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