Indexed as:

Pacifica Papers Inc. (Re)

IN THE MATTER OF s. 192 of the Canada Business Corporations Act R.S.C. 1985, C.c-44, as amended
AND IN THE MATTER OF the proposed arrangement involving Pacifica Papers Inc. and certain of its security holders
Re: Pacifica Papers Inc., petitioner
Between
3017970 Nova Scotia Company, petitioner, and
J. Trevor Johnstone, Pacifica Papers Inc. and Norske Skog Canada Limited, respondents

[2001] B.C.J. No. 1484

2001 BCSC 1069

92 B.C.L.R. (3d) 158

15 B.L.R. (3d) 249

106 A.C.W.S. (3d) 837

2001 CarswellBC 1505

Vancouver Registry Nos. L011069, L011461

British Columbia Supreme Court
Vancouver, British Columbia

Lowry J.

Heard: June 18 - July 9, 2001.
Judgment: July 20, 2001.

(161 paras.)

Company law -- Fundamental changes and shareholders' rights -- Arrangement -- Judicial

approval -- Considerations -- Right of minority or dissenting shareholders -- Oppression, what constitutes.

Application by Pacifica Papers for court approval of a plan of arrangement. Pacifica and Norske, two large public corporations, entered into an arrangement agreement. Norske agreed to acquire Pacifica for $900 million. Each Pacifica shareholder would receive 2.1 Norske shares or one Norske share and $7.50 for each Pacifica share. The 7-member Pacifica board was divided during the negotiations of this transaction. It was negotiated by Johnstone, the chairman of the board. He consulted with four other directors when he negotiated the transaction. He was able to negotiate an enhanced share exchange. Another company had proposed a share merger which was not pursued because its offer was not all cash. The six board members who could vote on the transaction approved it five to one. Pacifica arranged support agreements between Norske and 10 of its larger shareholders whereby the shareholders committed to give proxies to vote in favour of the agreement. The transaction was approved by 73 per cent of Pacifica's shareholders. Pacifica obtained two opinions that it obtained a fair price for the shares. After the transaction was announced its shares increased in value by $4.00 per share. This application for approval was opposed by two shareholders of Pacifica who claimed that some of the directors of Pacifica were in a conflict of interest and should not have voted. They also alleged that the support agreements were solicited illegally and this invalidated the shareholders' vote. They further alleged that the five independent groups of shareholders should not have voted as one class, that the transaction was oppressive, and that Johnstone handled the negotiations poorly and failed to obtain a fair value for the shares.

HELD: Application allowed. The arrangement was approved. There was no evidence of conflict of interest by the directors. It was not necessary for the shareholders to vote by class. The shareholders all had a common interest in receiving maximum value for their shares. The Act was contravened when the support agreements were obtained. However, the contravention was unintentional and of little consequence. No shareholder who signed a support agreement was misled. The implications of the transaction were fully explained to the shareholders who signed the agreements. These shareholders were large financial institutions or nominee corporations closely linked with members of the board. Johnstone competently negotiated the agreement. The other offer was not comparable to this transaction. Johnstone had the support of the majority of the board when he conducted the negotiations. The fairness opinions and the increased value of Pacifica's shares proved that the price was fair. The arrangement was fair and reasonable, and not oppressive.

Statutes, Regulations and Rules Cited:

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 150, 150(1), 192, 192(1)(f), 192(3), 241.

Companies Act, 1973 (B.C.), c. 18, s. 177(1).

Counsel:

M.P. Carroll, Q.C., K.M. Stephens, J.W.E. Doris and A.L. Burke, for Pacifica Papers Inc.
J.A.C. Campion, R.B.S. Swan, D.A.H. Hausman and M.T.G. Ghikas, for 3017970 Nova Scotia Company.
P.H. Griffin and L.E. Thacker, for Wayne Nystrom.
D.B. Kirkham, Q.C., for Trevor Johnstone.
G.R.M. Haynen, for Joyce Johnson-Miller.
B.J. Wallace, Q.C., and C.A.B. Ferris, for Norske Skog Canada Limited.

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1 **LOWRY J.**:-- Pacifica Papers Inc. ("Pacifica") and Norske Skog Canada Limited ("Norske") are two large public corporations in the West Coast forest industry. On 25 March 2001 they entered into an arrangement agreement (the "Agreement") whereby Norske is to acquire Pacifica in a share exchange transaction. What is said to be a $900 million deal has the voted support of virtually all of Norske's shareholders and 73.6% of Pacifica's shareholders. Pacifica petitions for approval of a plan of arrangement (the "Arrangement") as permitted by the governing legislation in order to be able to complete the transaction. The application is opposed by two of its shareholders: the largest being a numbered company held by Cerberus Capital Management Limited Partnership ("Cerberus") with 18.8% of the shares, and the president and chief executive officer, Wayne Nystrom, who holds 0.7%. They are aligned in contending that Pacifica's shareholders are not going to receive what their shares are worth, and they raise a range of issues that bear on whether the approval sought can and should be granted.

2 Cerberus has filed a cross petition alleging oppression. In the main, it seeks the removal of the chairman of Pacifica's board of directors, Trevor Johnstone. He is said to have authored and carried out a flawed process of negotiation that failed to yield what Pacifica's shareholders were entitled to expect.

3 Pacifica is a federally incorporated company. The governing statute is the Canada Business Corporations Act, R.S.C. 1985, c. C-44. (the "CBCA"). Pacifica's application is made under s. 192. Cerberus applies under s. 241. In that much of the evidence is common to both proceedings, the two petitions have by agreement been heard at the same time.

4 It is important to record at the outset that the agreement between Norske and Pacifica provides for its termination if court approval has not been obtained by August 31st. This is a large piece of litigation that has of necessity been compressed into a short period of time.

5 Pacifica filed its petition on April 18th and applied as required for an interim order permitting it to distribute an information circular concerning the transaction to its shareholders and hold a

shareholders meeting for the purpose of voting on the Arrangement. Cerberus opposed the application. It was heard on April 24th, 30th, and May 1st before Neilson J. Mr. Nystrom was present at the hearing, but he did not appear and took no part. On May 8th Neilson J. rendered a comprehensive judgment: Pacifica Papers Inc., 2001 BCSC 701, [2001] B.C.J. No. 1049. The interim order sought was granted and, significantly, it provides that approval of the Arrangement requires a two-thirds majority vote as, I am told, is customary in proceedings under s. 192 of the Act. The circular was distributed with notice of a shareholders meeting on May 8th, and the meeting was held on June 11th. Having obtained the required shareholder vote, Pacifica now pursues its application, seeking a final order approving the Arrangement.

6 The hearing before me consisted of two weeks of argument. All of the testimony to be adduced was obtained in advance by affidavit and deposition. Given the volume of the evidence, both documentary and viva voce, counsel agreed that I should confine my deliberations to what I have been specifically referred to by them. This I have done, and I am indebted to counsel for the ordered way in which the case has been presented.

7 I begin by describing Pacifica and Norske and identifying those involved. I proceed to outline the Arrangement, the legal principles that govern the approval of arrangements, the case made on either side, and the issues to be resolved. I then review the course of the negotiations and discuss how each of the issues should, in my view, be resolved in coming to a conclusion with respect to the approval that is sought. Finally, I consider the allegation of oppression and the relief sought by Cerberus.

The Players

8 What is now Pacifica was acquired in 1998 with a view to eventually combining the enterprise with Norske or some other company in the forest industry. The industry has recently experienced significant consolidation and amalgamation. In the past three years Pacifica's board of directors has evaluated and considered several alternatives to maximize shareholder value, including organic growth, acquiring orphan mills, mergers, and the sale of Pacifica. However, because of the synergies, or the utility of combining the operations of the two (estimated to be at least $60 million a year), Norske has always been the most logical combination partner for Pacifica and the corporation in the industry that can be expected to pay the most for Pacifica's shares. That is presumably why there is no resistance to combining with Norske but only to combining at the share exchange ratio agreed.

9 Pacifica operates two mills and carries on the business of a major North American integrated manufacturer and marketer of newsprint and value-added papers. For the fiscal year ending 31 December 2000 it had net earnings of $20.9 million on sales of $857.7 million. Earnings before interest, taxes, depreciation and amortization ("EBITDA") were $164.7 million. Its total assets were approximately $1.32 billion. It had shareholders' equity of $308 million, and its long-term debt was $519 million. The Canadian Imperial Bank of Commerce ("CIBC") is the lead for Pacifica's

financing. Pacifica's shares are traded on the Toronto Stock Exchange. The majority are held by a small number of institutional investors and there has in the result been little trading activity resulting in a lack of liquidity. In the two years preceding the agreement with Norske being announced, the share price has stood at about $9.00.

10 Norske is a larger company. It operates two mills that are engaged in the production of groundwood printing papers and market pulp. For the fiscal year ending 31 December 2000, it had net earnings of $99.4 million on sales of $1.25 billion. Its total assets were $2.27 billion. It has shareholders' equity of $2.17 billion. After a proposed distribution to its shareholders of $12 a share, its debt will be approaching $500 million. Its shares have in recent months been trading at about $18.50. Russell Horner is the President and Chief Executive Officer. Norske appears and supports Pacifica's application for the approval of the Arrangement.

11 Currently 26.65 million Pacifica shares are outstanding. They are held as follows: Cerberus (18.8%), Tricor Pacific Paper Inc. (13.3%), Caisse de Depot et Placement du Quebec (8.6%), Altamira Management Limited (7.7%), CIBC Capital Partners, a division of CIBC (6.9%), TAL Global Assets Management (6.2%), RT Capital Management (4.7%), Septre Investment Counsel Limited (4.5%), Howson Tattersall Investment Management Counsel (2.9%), Mr. Nystrom (0.7%), Sheinico Enterprises Inc. (0.2%), Tripeak Capital Partners Inc. (0.2%), and others (25.5%). The companies are referred to as "Cerberus, Tricor, The Caisse, Altimara, CIBC Capital, TAL, RT Capital, Septre, Howson Tattersall, Sheinico" and "Tripeak" respectively.

12 Some of Pacifica's shareholders also hold shares in Norske. They are: The Caisse (0.9%), Tricor (1.2%), RT Capital (0.8%), and Septre (0.8%).

13 Pacifica's board of directors consists of seven: Mr. Johnstone, Mr. Nystrom, Keith Purchase, Kenneth Kilgour, Norman Wale, Joyce Johnson-Miller, and Sven-Erik Henriksson. As I understand it, there are no shareholders' agreements, but it is accepted that Ms. Johnson-Miller, who is a managing director of Cerberus, is its nominee. She appears on Pacifica's application in support of Cerberus. Mr. Wale is the nominee of The Caisse, although he has no officer or employment status with it. Mr. Kilgour is CIBC's nominee. He is a senior officer of the bank, and the managing director of CIBC Capital. Mr. Purchase, Mr. Henriksson, and Mr. Nystrom, are not shareholders' nominees, but Mr. Henriksson appears to be closely associated with Cerberus in his business dealings. Mr. Johnstone manages Tricor through Tricor Capital Inc. of which he is the managing director. He has no ownership interest but his wife owns 25% of the management company.

14 Mr. Nystrom is regarded as a very experienced and capable forest industry executive. Through his management, Pacifica's business has been well run in the last three years. His current salary is about $474,000 a year. During the time negotiations with Norske were ongoing, Mr. Nystrom renegotiated his employment contract with Pacifica and the board implemented a financial plan that would serve to retain its senior management for a brief period should the Arrangement be approved. Mr. Nystrom maintains that the net effect of the two is that, 30 days after the Norske transaction is

completed, he will be in a position to resign if he chooses and be paid almost $3.5 million. Mr. Nystrom has other business interests in the industry as well. Most significantly, he holds a 27% ownership interest in St. Mary's Paper Ltd., a smaller company than Pacifica based in Ontario that was a potential merger partner.

15 Cerberus is a New York based, limited partnership engaged in the business of providing relatively high risk financing for distressed companies. Responsibility for the Pacifica investment rests with Newton Glassman who is a managing director.

16 In June 2000, Pacifica retained CIBC World Markets, the managing director of which is Allan Wallace, to provide a broad range of assistance in relation to identifying, assessing, and facilitating the pursuit of viable combinations with other companies in the industry. In January 2001, it retained BMO Nesbitt Burns, the managing director of which is William Butt, to provide similar but more limited assistance with respect to combining with Norske. Both prepared extensive reports and provided the Pacifica board with comprehensive advice, attending most of its meetings throughout the negotiations with Norske. As one part of their function, both ultimately provided opinions on the fairness of the transaction that were included in Pacifica's information circular to its shareholders. CIBC World Markets and BMO Nesbitt Burns are well recognized for their expertise in providing services of this kind generally, and in respect of the forest industry in particular. Their fees are substantial. CIBC World Markets is entitled to a success fee of $5.6 million upon the completion of an agreement with Norske or a success fee based on share value achieved upon the completion of an agreement with some other entity. BMO Nesbitt Burns' fee is $475,000 and is payable in any event.

17 Pacifica also retained the services of Davies Ward Phillips & Vineberg ("Davies Ward"), a Toronto based firm of solicitors that is well known for its expertise in mergers and acquisitions. Davies Ward provided advice to the board on the transaction as required throughout the course of the negotiations.

The Arrangement

18 Under the Arrangement Norske will acquire all of the issued and outstanding common shares of Pacifica which will then become a wholly owned subsidiary of Norske. Norske and Pacifica will be amalgamated to form one federally incorporated company. Each Pacifica shareholder will receive 2.1 Norske shares, or one Norske share and $7.50, for each Pacifica share held. A shareholder which does not wish to take any Norske shares has the right to dissent and receive from Norske the court-assessed value of the shares held.

19 Options to purchase Pacifica shares will be deemed to have been exercised upon the completion of the transaction.

The Legal Principles

20 The principles applicable to the approval of an arrangement are well established, although

differently stated in the authorities. They are not materially in dispute here. I have been referred to several authorities which include: Gold Texas Resources Ltd., [1989] B.C.J. No. 167 (S.C.), Re Trizec Corp. (1999), 21 Alta. L.R. (3d) 435 (Q.B.), Olympia & York Developments Ltd. (Re) (1993), 102 D.L.R. (4th) 149 (Ont. Ct. (Gen. Div.)), Canadian Pacific Ltd. (Re) (1990), 73 O.R. (2d) 212 (H.C.J.), and St. Lawrence & Hudson Railway Co. (Re), [1998] O.J. No. 3934 (Gen. Div.). In the context of what is at issue in this case in particular, Pacifica is in the position of having to establish that:

1. the statutory provisions have been strictly complied with;
2. the majority vote is bona fide in the sense that the class (i.e., all of the shareholders) has been fairly represented; and
3. the plan is fair and reasonable and one that a person of business would approve.

21 With respect to the statutory provisions, Pacifica must establish that the arrangement meets the definition of such in s. 192 and that it is not practical for it to effect a fundamental change in the nature of an arrangement under any other provision of the CBCA: St. Lawrence & Hudson Railway at para. 13.

22 There being in this instance only one voting class, Pacifica must establish that it is a fair representation in the sense that those in the majority were not seeking to promote interests adverse to those of the shareholders as a whole: Gold Texas Resources Ltd. (Re) at 3.

23 To be fair and reasonable, the Arrangement must meet what is referred to as the "Business Judgment Test" - whether an intelligent and honest business person as a member of the voting class, and acting in his or her own interest, might reasonably approve the Arrangement: Trizec Corp (Re) paras. 31-32.

24 Cerberus makes the point that the standard of proof required of a company seeking approval of an arrangement must be high where, as here, the end result is to be achieved by an arrangement where, because of the size of the minority share holding, the same could not be achieved by a take-over bid that would afford other statutory protections. It relies on Re Hellenic & General Trust Ltd., [1975] 3 All ER 382 (Ch. Div.) at 388. It also contends that the degree of scrutiny of an arrangement will be higher where, as here, there is a lack of necessity caused by financial difficulties in undertaking what is proposed: Re Canadian Pacific Ltd. at 223. I accept both as sound propositions.

Pacifica's Case for Approval

25 Pacifica contends that all three requirements have been met. It maintains that the Arrangement is fair and ought to be approved because it is the product of an arm's length negotiation that has the bona fide voted support of 73.6% of the shareholders. Those who wish to do so may receive the court-assessed value of their shares, and only Cerberus has taken the steps necessary to preserve its

rights in this regard. Importance is attached to the history of efforts made to achieve a combination that would address the lack of trading liquidity in Pacifica's shares, the fact that Norske is the company that can be expected to pay the most, and the absence of any other acceptable offer being available when the Agreement was completed or when the shareholders voted on the Arrangement.

26 Reliance is of course placed on the two fairness opinions. As indicated Pacifica's shares were trading at $9.00 per share. CIBC World Markets values Pacifica between $11.90 and $15.47 per share. It values the consideration of the Norske offer to Pacifica's shareholders at between $14.75 and $17.64 (average $16.20) per share. BMO Nesbitt Burns values Pacifica between $14.75 and $18.00 a share. It values the consideration of the Norske offer to Pacifica's shareholders at between $16.50 and $19.00 (average $17.75) per share. Pacifica maintains that both opinions are well supported by the market's reaction. The trading prices of Pacifica's shares have risen to $13.00 while the price of Norske's shares has remained at what it was before the transaction was publicly announced.

27 Pacifica points out that, while those who now oppose the Arrangement may contend for exchange ratios exceeding 2.5, they are on record as having said that a ratio of 2.3 was acceptable. Based on values, the difference between an exchange ratio of 2.3 and a ratio of 2.1 is about $26 million or less than 7%.

28 Finally, Pacifica says that the Arrangement has achieved the desired liquidity in its shareholding, and that denying approval would serve in effect to oppress the majority who would face the prospect of seeing the trading value of their shares drop back to the prenegotiation price.

The Case Against the Arrangement

29 Between them, Mr. Nystrom and Cerberus raise four issues that may be described as procedural. First, it is said that the Arrangement is not an arrangement as defined by s. 192 of the CBCA and cannot be approved. Second, one or more of Pacifica's directors is said to have been in a position of conflict and ought not to have voted on Norske's offer. Third, it is said that separate voting classes were required because of the differing interests evident among the shareholders who voted as one class. Fourth, shareholder support agreements that were obtained are said to have been obtained in contravention of s. 150(1) or the CBCA because they were solicited before Pacifica's information circular was distributed to its shareholders. This is said to have rendered the shareholders' vote on June 11th invalid.

30 Mr. Nystrom and Cerberus then contend that the Arrangement ought not to be approved in any event. They say, as is accepted, that Pacifica's board of directors owed to the shareholders a fiduciary obligation to employ their best efforts to maximize shareholder value. Mr. Nystrom and Cerberus maintain that the process of the negotiations with Norske was so completely flawed, virtually from beginning to end, that Pacifica cannot establish that the exchange ratio is fair. They cite a litany of what are said to be shortcomings attributed largely to Mr. Johnstone's ineptitude as a negotiator that they say impaired any possibility of obtaining the best offer Norske might have been

expected to make. Cerberus alleges that it has in the result suffered oppression.

31 Particular importance is attached to the division in Pacifica's board, and the opposition of its largest shareholder and chief executive officer. Expert evidence of a business valuer, Stephen Cole, is adduced to challenge the fairness opinions given by CIBC World Markets and BMO Nesbitt Burns. Both opinions are said to be based on unreliable assessments of the en bloc value of Pacifica and hence the value of its shares. Finally, Mr. Nystrom and Cerberus say that the 73.6% vote was compromised by instances of cross ownership among the shareholdings in Pacifica and Norske, and a failure to give proper disclosure of the treatment of share option holders in Pacifica's information circular.

The Issues

32 At the conclusion of the argument I provided counsel with a statement of what appeared to me to be the issues to be resolved. All agreed that the issues to be addressed with respect to Pacifica's application for approval of the Arrangement are as follows:

A. The Procedural Issues

1. Is the share or share and money exchange contemplated by the Agreement an arrangement as defined by s. 192(1)(f) that constitutes a fundamental change for Pacifica that would not be practical to effect under any other provision of the CBCA as required by s. 192(3)?
2. Were one or more of the directors of Pacifica in a position of conflict such that they should not have voted on the Norske transaction at the March 23rd board meeting? If so, should approval of the Arrangement be denied?
3. Were separate voting classes of shareholders required to ensure that all shareholders, including the option holders, were treated fairly? If so, should approval be denied?
4. Were the support agreements solicited illegally (s. 150)? If so, was the June 11th shareholders' vote invalid?

B. The Fairness Issue

Has Pacifica established that the Arrangement is fair to its shareholders, as that concept is discussed in the authorities, having regard for the following:

a) Pacifica's efforts over a period of three years to negotiate some form of a combination with Norske and others and the lack of share liquidity;
b) the fact that Norske is accepted to be the most logical partner for Pacifica, and

that the synergy value is substantial (at least $60 million a year);

c) the process followed by the board of directors and, in particular, its chairman in discharging their fiduciary obligation to employ reasonable efforts to maximize the value of Pacifica's shares;

d) the board's divided view of the transaction and the opposition of the CEO and the largest shareholder;

e) the fairness opinions of CIBC World Markets and BMO Nesbitt Burns, the advice given by each on the transaction, and the analysis contained in the Cole Report;

f) the absence of any other acceptable offer on March 25th, the break fee (explained below), and the absence of any other offer on June 11th;

g) the 74% shareholder vote, the disclosure, and the extent of cross ownership;

h) the dissenting shareholders' rights; and

i) the market's reaction in terms of the trading prices of the shares of Norske (static at about $18.50) and Pacifica (increasing from $9.00 to about $13.00).

33 In alleging that it has suffered oppression as a consequence of the negotiations Mr. Johnstone conducted, Cerberus not only seeks to have him removed from Pacifica's board but contends that the oppression suffered is reason to set the transaction aside. However, Cerberus is driven to accept that an arrangement that is fair cannot be oppressive such that its claim in that regard is redundant. Thus, the issues to be addressed in respect of the alleged oppression can only be as follows:

1. Has Cerberus proven that its interests have been unfairly disregarded by any failure on Mr. Johnstone's part to employ the reasonable efforts to maximize share value that the shareholders of Pacifica were entitled to expect?
2. If so, should Mr. Johnstone be removed from the board?

34 An assessment of the issues requires an understanding of the course of the negotiations. It is convenient to outline what I find on the evidence to have occurred before turning to consider each of the issues in turn.

The Negotiations

35 Mr. Johnstone and Mr. Nystrom approached Mr. Horner with respect to combining Norske and Pacifica in October 2000. The initial discussions that culminated in the Agreement occurred in November. Mr. Nystrom appears to have been instrumental in convincing Mr. Horner that they had, in Mr. Horner's words at the time, "a unique and compelling opportunity to create shareholder value for both companies". The Agreement was negotiated between December 2000 and March 2001 by Mr. Johnstone and Mr. Horner. During that time, there were offers and counter offers. Pacifica's board of directors met at length on seven occasions. It ultimately voted to accept the terms of the Agreement. Five voted in favour; one (Ms. Johnson-Miller) voted against; and one (Mr. Nystrom) abstained.

36 Norske made the first offer. Following on discussions in December, a confidentiality agreement was put in place in early January to permit the mutual exercise of due diligence.

37 January 16th: Mr. Horner expressed an interest in Norske acquiring Pacifica by an exchange of shares. He proposed an exchange ratio of 1.7 Norske shares for each Pacifica share. The proposal was subject to Norske and Pacifica entering into an exclusivity agreement precluding either from having discussions with others for a period of 60 days and the further exercise of due diligence. Significantly, the proposal was based on Norske making a $12 per share dividend to its shareholders in advance of the completion of any transaction.

38 January 23rd: The first of the seven meetings of the Pacifica board was held. The minutes of the meeting, as of all the meetings, appear to have been reliably kept by Harjit Sangra, of Sangra Moller, Pacifica's corporate solicitors. The board was unanimous in voting that a counter to Norske's offer be made, but were unable to agree on what it should be. The minutes record that by a 4-3 majority vote (Ms. Johnson-Miller, Mr. Nystrom, and Mr. Henriksson opposing) it was decided that Mr. Johnstone was to convey an offer substantially in the terms discussed at the meeting. He then informed Mr. Horner that the board had instructed him to communicate that Pacifica's willingness to enter into an exclusivity agreement was premised upon a minimum exchange ratio of 2.3 rather than 1.7 and that there would have to be an option for Pacifica shareholders to take 1.726 Norske shares plus $3.05 cash. Mr. Johnstone proposed an exclusivity period of 21 days.

39 January 29th: Norske countered. Mr. Horner proposed a share exchange of 2.0 with an option of 1.5 shares and $3.05 with a $40 million cap. He also proposed that the exclusivity time be 28 days. Finally, he imposed a response date of February 2nd.

40 February 1st: The second board meeting convened. Both CIBC World Markets and BMO Nesbitt Burns advised that an exchange ratio of 2.0 was within the range of fairness which CIBC World Markets said it considered to be between 1.7 and 2.2. A concern was raised with respect to the future strategic intentions of Norske's parent company and major shareholder in the event that Norske and Pacifica would to be combined. It was unanimously resolved that Mr. Johnstone would attempt to make arrangements through Mr. Horner for he and Ms. Johnson-Miller to travel to Norway to meet with representatives of Norske ASA. There were meetings in Oslo on February 6th.

41 The meetings in Oslo were expanded from what the board had contemplated. Mr. Nystrom accompanied Mr. Johnstone. Ms. Johnson-Miller attended. Mr. Henriksson also attended and invited Mr. Glassman to join him. Mr. Johnstone took exception to Mr. Glassman's attending and refused to participate. Mr. Glassman took the opportunity to inject himself into the negotiations to the extent of informing those he met with from Norske ASA that Cerberus considered the share exchange ratio should be considerably more favourable to Pacifica than Norske had offered. The evidence is that he proposed a ratio of 2.8 to 3.0. The upshot was that Mr. Horner was greatly offended by what he perceived to be Mr. Glassman's attempt to negotiate the transaction with Norske ASA, and Mr. Johnstone was embarrassed and put in a position of having to apologize to

Mr. Horner. It was made clear to Norske that Cerberus, Pacifica's largest shareholder, was not then prepared to support the transaction on the terms proposed. Continued negotiations were put in some jeopardy.

42 Then, if not before, Norske took the position that it would require a demonstrated level of support of 60% of Pacifica's shareholders before it would enter into a share exchange agreement requiring court approval. This led to Mr. Johnstone approaching Pacifica's major shareholders in an attempt to "lock up" their votes by obtaining support agreements in favour of Norske. By March 25th (well before Pacifica's information circular was distributed), he obtained shareholder support for more than 50%. Between March 19th and 23rd, ten support agreements in favour of Norske were signed under which the shareholders covenanted that, five days before the shareholders meeting to vote on the Arrangement, they would give their proxy to permit the shares they held to be voted in favour of the Arrangement. Some were at an exchange ratio of 2.0 and some at 2.1. Some were on terms that required the transaction to be publicly announced by March 26th.

43 February 12th: The third board meeting convened. Mr. Johnstone proposed that five changes to Norske's January 29th offer be sought: the exchange ratio be increased, the cash component be increased, the cash pool be increased, the response time be February 13th and the exclusivity period be reduced to 10 days plus 14 days to complete definitive agreements. The minutes record that it was resolved that Mr. Johnstone and Mr. Nystrom would present a counter proposal in those terms to Norske. They met with Mr. Horner and had discussions on February 12th and 13th in an attempt to obtain more from Norske in respect of each point.

44 February 14th: The fourth board meeting was held. The discussions with Mr. Horner were reviewed. Mr. Johnstone advised that Norske was pressing for an answer to its outstanding offer of January 29th. The views of the board members were divided. The minutes record that it was resolved by a 4-3 majority (Ms. Johnson-Miller, Mr. Henriksson and Mr. Nystrom opposing) that Mr. Johnstone should proceed to execute an exclusivity agreement on the terms offered by Norske subject to amending the exclusivity period to 21 days and increasing the $40 million cash pool. Following the meeting, Mr. Johnstone approached Mr. Horner. Norske altered its offer to increase the cash pool to $80 million and agreed to a reduced exclusivity period.

45 February 15th: Norske and Pacifica entered into an exclusivity agreement. The agreement was in effect until March 12th facilitating the mutual exercise of what was a much more enhanced due diligence.

46 February 20th: A meeting was convened in Toronto with Pacifica's financial advisers and the members of the board who were able to attend largely to review the concerns raised by Ms. Johnson-Miller. She had written to the other members of the board at Mr. Johnstone's request following the February 12th board meeting detailing her views on various aspects of the proposed transaction with Norske. Mr. Glassman attended at Mr. Johnstone's invitation. The transaction was fully discussed.

47 March 13th: Cerberus (Mr. Glassman) wrote to the board and the major shareholders detailing its opposition to the proposed transaction. The matters of concern were said to include: the board's failure to publicly announce an auction process and pursue negotiations with parties other than Norske; the board's execution of the exclusivity agreement; what was said to be the board's lack of analysis of the value inherent in the Norske transaction; and an analysis of what was described as 12 months out under other scenarios. The purpose of the letter was said to be to urge the board to address these concerns and amend its process so as to ensure that maximum value would be received. Cerberus took strong exception to Mr. Johnstone having apparently by then told Mr. Horner that the transaction could be done without the largest shareholder's support. That was said to be indicative of an unwillingness to seek a better offer. Finally, Cerberus said it was its intention to oppose the transaction contemplated due to the board's failure to engage in an open and fair process with the intent of maximizing Pacifica's value.

48 March 16th: The Pacifica board met for the fifth time. Mr. Glassman was invited and attended part of the meeting. Mr. Johnstone expressed concern that there was insufficient shareholder support for the transaction. Mr. Johnstone proposed approaching Norske to amend its offer in three ways: to increase the share exchange from 2.0 to 2.1, to increase the cash option from $3.05 to $7.50, and to remove the cap on the cash pool. There was no vote, but, significantly, the minutes reflect general support and agreement among the directors that Mr. Johnstone approach Mr. Horner with a view to the directors meeting further the following week in the event that Norske was amenable to increasing its offer. It appeared that all of the members of the board would support acceptance of an offer from Norske in the terms discussed.

49 March 18th: Mr. Johnstone negotiated further with Mr. Horner. Norske amended its offer. The exchange ratio was altered to 2.1, and an increase in the share/cash option was increased to $7.50. In addition Norske accepted dissenting rights being exercised on as many as 6.795 million Pacifica's shares meaning that Norske would pay the court-appraised value of up to 24% of Pacific's shares held by those who wished to take no Norske shares. The market norm for dissents is in the range of 5%. In return Norske required a break fee of $20 million. A break fee is commonly imposed in transactions of this kind, which have to be subject to a shareholders vote, to offer some measure of protection to the buyer against the price being shopped and the transaction being abandoned in favour of a marginally better deal. To this point the negotiations had apparently been predicated on a break fee of $16 million.

50 March 21st: The sixth meeting of Pacifica's board was held but, because Ms. Johnson-Miller had not had sufficient time to consider all of the financial and other material that had been distributed, she was not ready to make a decision and declined to participate, maintaining she had been given only 46 of the 48 hours required for a meeting of the board. The meeting proceeded as an information meeting only. It was a lengthy assessment of the transaction predicated on Norske's amended offer of the 18th. There were comprehensive presentations by both CIBC World Markets and BMO Nesbitt Burns, a due diligence report by Mr. Nystrom for Pacifica's management, as well as other reports from Pacifica's legal and accounting advisors. It was agreed that a further meeting

would be held on the 23rd to vote on the offer.

51 Just before the board met again, Pacifica received a proposal for a share exchange merger from St. Mary's Paper Ltd. ("STM"). Pacifica was having discussions with STM during the later part of 2000 with a view to combining the two companies and CIBC World Markets was providing assistance with respect to that proposal. But Norske was considered the more desirable combination. For one thing the synergy value between STM and Pacifica (thought to be about $10 million) was not comparable. Thus in January, when Norske made its opening offer, Pacifica terminated discussions with STM and advised it of the reason without disclosing that it was talking with Norske. During the exclusivity period, STM sought to make another proposal to Pacifica and Mr. Johnstone sought details as soon as the exclusivity agreement expired. Nothing concrete was available then.

52 March 23rd: The seventh board meeting was held. It was a Friday. The meeting was lengthy and covered much of the same ground as on the 21st, largely for the benefit of Ms. Johnson-Miller. Given his holdings in STM, Mr. Nystrom left the meeting while STM's proposal was considered. It was seen as difficult to assess in comparison to the Norske offer, both because it was somewhat vaguely expressed and because it was structurally different. It was not the one-step solution that Norske was, but rather an incremental step that would not create shareholder liquidity, nor an immediate opportunity to cash out, as was expected with the Norske offer. There was a measure of skepticism associated with Pacifica having attempted on three previous occasions to come to terms with STM and concern about losing the opportunity the Norske offer afforded Pacifica's shareholders. According to the minutes, it was agreed that STM was to be contacted following the meeting and given a very short time that night to make an all cash offer at $15 a share for Pacifica's shares, barring which Mr. Johnstone was to accept Norske's offer after first resolving two relatively minor outstanding issues. At that point Mr. Nystrom rejoined the meeting and the board immediately proceeded to vote on the formal resolution with respect to the Agreement and the Arrangement required. The minutes record that each of Mr. Johnstone, Mr. Henriksson, Mr. Kilgour, Mr. Wale, and Mr. Purchase voted in favour. Ms. Johnson-Miller was opposed. Mr. Nystrom abstained.

53 STM was contacted. No all cash offer was made, but it did make an amended proposal on March 24th that provided an option with some cash in conjunction with a share exchange. Its offer remained inferior to that of Norske. Mr. Johnstone was able to resolve the two outstanding issues with Mr. Horner over the course of the weekend in a manner favourable to Pacifica. Norske abandoned its requirement of 60% shareholder support being secured in advance.

54 The Agreement was executed late on March 25th and a press release was issued the following day.

55 I turn now to the s. 192 issues that are to be addressed in determining whether the Arrangement should be approved. I consider the procedural issues first: compliance with s. 192,

conflicts of interest, voting classes, and the support agreements. I then turn to the broader fairness issue and address the two underlying complaints of Mr. Nystrom and Cerberus: the process that was undertaken in negotiating the Agreement with Norske and the price to be paid for Pacifica's shares.

Compliance with s. 192

56 Mr. Nystrom contends that the court is without jurisdiction to approve the Arrangement because it does not comply with the requirements of s. 192 in two ways. Under s. 192(1) an arrangement is defined inclusively as:

> (f) an exchange of securities of a corporation held by security holders for property, money or other securities of the corporation or property, money or securities of another body corporate that is not a takeover bid as defined in section 194 ... .

57 Section 192(3) provides:

> Where it is not practical for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.

58 The contention is first that the Arrangement is in substance a takeover bid, although not a takeover bid in form, such that it is not a fundamental change that can be approved and, second, that Pacifica has not shown that it is not practical to carry out the change under some other provision of the CBCA. The argument is that, by proceeding as it is, Pacifica is attempting to effect the share exchange and squeeze out its option holders with a two-thirds voting majority that under the takeover provisions of s. 206 of the CBCA would require a 90% vote. It is said that the Arrangement could easily have been structured as a share exchange takeover bid. It would not have succeeded because of the size of Cerberus's minority position, but that does not mean the protections that would have been available to Pacifica's shareholders are to be circumvented because it is convenient to do so.

59 In my view, the answer to the first point is simply that the Arrangement is not a takeover bid (an offer made directly to Pacifica's shareholders) and accordingly is a fundamental change that falls within s. 192(1)(f). As to the second point, what is not practical must mean not practical in a business sense so that reasonable and fair business objectives can be pursued by corporations without onerous time and financial constraints: Ultra Petroleum Corp. (Re), 2000 YTSC 507, [2000] Y.J. No. 86 at paras. 17-22. The Arrangement facilitates a one-step transaction that enables the deemed exercise of the options and Norske's acquisition of Pacifica's shares. This is in part what Norske is paying for, and, for all practical purposes, the success of the transaction, and the consideration to be received by Pacifica's shareholders, turns on Pacifica being able to deliver this certain result which it cannot do except through an arrangement.

60 What is said about the loss of protection that would be afforded if the fundamental change were undertaken pursuant to other provisions of the CBCA is met by the requirement of the court's approval which, as discussed above, is to be granted only when an arrangement is shown to be fair and reasonable to the shareholders. The court's supervisory role serves to overcome the necessity of any greater statutory protection for arrangements.

61 I consider Pacifica has established that the Arrangement complies with the requirements of s. 192.

Conflict of Interest

62 Mr. Nystrom and Cerberus contend that some of the directors of Pacifica's board had conflicts of interest when they voted to accept Norske's offer on March 23rd. Cerberus maintains that the votes should be discounted, the transaction set aside, and the approval of the Arrangement denied, although it cites no authority that would support that remedy. Where a director is shown to have acted within his authority but contrary to his fiduciary obligations in casting his vote as a member of a corporation's board, his act may give rise to a claim against him for damages, but it would not normally appear to invalidate his vote. It may be for this reason that Mr. Nystrom suggests that questions of conflict have now more to do with whether there should have been voting classes than with the effect of the votes cast to accept Norske's offer.

63 Both Mr. Nystrom and Cerberus say that, by virtue of his position with CIBC, Mr. Kilgour should not have voted. Both have also asserted that Mr. Johnstone and Mr. Wale were in positions of conflict, but Cerberus has resiled from its assertion in that regard with respect to Mr. Johnstone, and, in my view, the assertions were premised largely on a misapprehension of the significance of some shareholders owning shares in both Pacifica and Norske.

64 As indicated, Mr. Johnstone is the managing director of a company (Tricor Capital Inc.) that manages Tricor's investment in Pacifica. Most of that investment, 3.5 million shares (13.3%), is held on behalf of a provincial government fund (BCMIC). That fund also holds 1.5 million shares (1.2%) in Norske. It is said that, because of the value of the fund's holding in Norske, Mr. Johnstone had an interest in completing a transaction that would maximize value for the fund as a Norske shareholder. However, Tricor does not manage the fund's investment in Norske. And it appears clear that, because the fund holds a much greater proportion of Pacifica shares than it does of Norske shares, its interest would always lie in maximizing the consideration for Pacifica.

65 The position with respect to Mr. Wale is much the same. As indicated, he is the nominee of The Caisse. The Caisse holds shares in both Pacifica (8.6%) and Norske (1.1%). However, because it holds a much greater proportion of Pacifica shares than it does of Norske shares, maximizing consideration for Pacifica would best serve its interests.

66 The considerations with respect to Mr. Kilgour are different. As indicated, he is an officer of CIBC - the lead lender to Pacifica. The credit facilities will be paid out upon the completion of the

transaction, but there is no suggestion of any concern on the part of the bank about Pacifica's indebtedness being fully discharged. CIBC Capital, which holds 1.852 million shares or 6.9% of Pacifica's stock, is a division of CIBC. CIBC World Markets, which earns a contingent success fee at a fixed amount of $5.6 million upon completion of the transaction with Norske, is a wholly owned subsidiary of the bank. The BMO Nesbitt Burns analysis suggests that the value of the consideration in the transaction for CIBC Capital is between $14 million and $19 million.

67 It is alleged by Mr. Nystrom and Cerberus that CIBC was engaged in discussions with Norske to provide financing for the transaction, but I find the evidence does not support that allegation.

68 When the question of conflict was raised in the course of the negotiations, Pacifica obtained an opinion from Davies Ward. With respect to Mr. Kilgour it was said that he was not disqualified from voting under the applicable provision of the CBCA (s. 120) which prohibits a director voting on a contract in a conflicted position, and that whether he should abstain was best left to him.

69 Cerberus made essentially the same argument that it now makes with respect to Mr. Kilgour at the hearing of the interim application without success, although the point could be said not to have been fully resolved: Pacifica Papers Inc. (supra) paras. 28-31,

70 There is no sound evidentiary basis for concluding that Mr. Kilgour did not properly discharge his fiduciary obligation to Pacifica's shareholders. And I do not consider the fact that CIBC was the leading lender for Pacifica, nor that it was one of the larger shareholders, put him in a position of conflict in voting on the Norske offer. I view the CIBC World Markets contingency fee as a complicating factor that could be seen to have given rise to an interest in the transaction with Norske being completed at any price. That would of course have been inconsistent with the interests of the shareholders, but the bank was itself one of the larger shareholders and would certainly have been interested in maximizing the value of its shares.

71 Renaissance Energy Ltd. (Re), [2000] A.J. No. 1030 (Q.B.), would appear to be of some assistance. There (para. 12) it was held that, where the details had been disclosed in a company's information circular, a director who was in a similar position to that of Mr. Kilgour had not acted improperly in voting for an arrangement agreement. He was affiliated with another company that had provided a fairness opinion on a fee basis whereby it earned more for a positive opinion, and it had been involved in negotiating the transaction.

72 Here, the details of both the bank's and Mr. Kilgour's situation were disclosed and the shareholders approved the transaction. In my view, their approval is the ultimate answer to the contention that anything turns on Mr. Kilgour having voted to accept Norske's offer. His was, in any event, only one of the five votes cast on March 23rd.

73 I do not consider there to be any basis for discounting the votes of any of Pacifica's directors and denying the approval of the Arrangement on that basis.

Voting Classes

74 Mr. Nystrom contends that there are five separate and independent groups with separate and widely varying economic and financial interests - a disinterested part of the majority - which renders a single vote so improper that the Arrangement can not be approved: (i) CIBC Capital and Tricor, (ii) signatories to the support agreements, (iii) those holding shares in both Pacifica and Norske, (iv) the option holders, and (v) the remaining Pacifica shareholders.

75 What he says is that, rather than the requirement of a two-thirds vote of all shareholders voting as one class, the interim order should have required a two-thirds majority of each of the five classes that are now proposed.

76 Mr. Nystrom distinguishes between the five classes for which he contends on the basis of what can be said of factual differences between them. If the Arrangement is approved, CIBC will see Pacifica's indebtedness retired and its subsidiary will receive a $5.6 million fee. Tricor will apparently earn a performance-based success fee. Those who entered into support agreements in favour of Norske are said to have been deprived of independently scrutinizing the Arrangement and forming a reasoned investment decision. Those who hold both Pacifica and Norske shares are said to have been unable to vote in a disinterested fashion solely as a Pacifica shareholder would because of the accretion to the Norske shares they hold. And the relatively small minority of option holders are said to have been swamped in a single class of security holders with decidedly differing interests.

77 The option holders are said to be unfairly treated under the Arrangement. This is said to be because, under the Arrangement, their option rights are being foreclosed without compensation. But that does not appear to me to be so. It is also said that the disclosure that was given to the option holders in Pacifica's information circular was inadequate in that it was not made clear that no opinion on the fairness of the transaction specific to the option holders had been obtained. But that is a point that is raised by Mr. Nystrom alone, and he advised the board extensively on the contents of the information circular and raised no concern about disclosure in relation to the option holders. It was not raised before now and no other option holder makes any complaint in that regard.

78 The share options issued by Pacifica were issued essentially as employment incentives, although some were issued for other reasons. They were exercisable at the holder's option when they vested after a period of years upon payment of the stipulated price: $10 or $14. They were not transferable and became invalid on the termination of employment.

79 On March 25th there were 1.12 million outstanding options. Mr. Nystrom held 28% of them. All options immediately vested and option holders were given the right to exercise their options prior to the shareholders meeting such that they could obtain shares and sell them without risk that the Arrangement would not succeed. Some 628,000 options were exercised before the meeting and 2000 have been exercised since. Under the Arrangement, if an option holder does nothing, on the completion of the transaction there will be a deemed exercise of the options held and the holder will

receive an appropriate number of Norske shares. An option holder could have dissented and received the court-assessed value of the options, but none has done so. All of this has been made available to option holders without their having to pay any money. Currently, there are only six option holders remaining. Only two of those are not members of the Pacifica board. Mr. Nystrom holds 315,000 of the 488,000 options now outstanding. At the time of the shareholders meeting, he held 64%.

80 As can be seen, the classes for which Mr. Nystrom contends would have enabled him to veto the Arrangement to the prejudice of the majority of the shareholders.

81 It seems to me a remarkable suggestion that the holders of share options issued primarily as employment incentives should form a voting class of shareholders that could defeat an arrangement that the majority of shareholders would approve. The interests of employees who may face the possibility of the termination of their employment in a transaction of this kind could be quite at odds with those of the shareholders as a whole. Here the option holders were afforded votes that they otherwise would not have had because the share options carried no votes. It appears to me this was done so that the options would not have to be exercised to enable the holders to vote. But, in any event, it cannot be said that the holders of options that were not exercised before the shareholders meeting should have been able to control the vote on the Arrangement.

82 I recognize that CIBC, Tricor, the subscribers to the support agreements, and those holding shares in both Pacifica and Norske may be distinguishable from the remaining shareholders, but I do not accept that any can be described as constituting a disinterested part of the majority, as Mr. Nystrom suggests.

83 It appears on the authorities that there should be a classification of shareholders for the purpose of voting only when it can be said that the factual differences that could affect the minds and judgment of the shareholders will render their rights so dissimilar that it may be impossible for them to consult together with a view to their common interest: Sovereign Life Assurance Company v. Dodd, [1892] 2 Q.B. 573 at 580 per Lord Esher M.R. (also 583 per Bowen L.J.) as cited in Savage v. Amoco Acquisition Co. (1988), 40 B.L.R. 188 (Alta. C.A.) at 191-92. Savage is a good illustration of a consideration of the principle in the context of an interim application for the approval of an arrangement. A separate class for those who had entered into private commitments with the applicant, or who held a special position in relation to the applicant, was rejected. See also: British American Nickel v. O'Brien, [1927] A.C. 369, Carruth v. Imperial Chemical Industries Limited, [1937] A.C. 707, Re Hellenic & General Trust (supra), and Re United Provident Assurance Company Limited, [1910] 2 Ch. 477.

84 Here there is only one class of shareholding, the shareholders have a commonality of interest in receiving the maximum value for their shares, and they will receive the same consideration for the exchange of their shares under the Arrangement. There is no "class" of shareholder that, in my view, could have been so affected by factual differences as to render the rights of that class

dissimilar to the rights of others.

85 Mr. Nystrom and Cerberus contend that, even if the dissimilarities between shareholders did not warrant the creation of separate classes for the purpose of voting on the Arrangement, the 73.6% vote is to be regarded as significantly diluted because some shareholders had reasons to vote in favour of the transaction that were not common to all of the shareholders. This court in Gold Texas Resources Ltd. (supra) at p. 3, recognized that in reviewing an arrangement, it is necessary to be sensitive to whether there is within the majority some group of shareholders that does not represent a bona fide vote because of conflicting interests. However, it does not follow that the votes of those who may have had some collateral reasons to support the arrangement that were not shared by all are to be discounted. What is important is that there be no clear conflict evident which would render the majority vote other than bona fide. Here, in my view, there is none.

The Support Agreements

86 Mr. Nystrom and Cerberus contend that the support agreements made between Norske and ten of Pacifica's larger shareholders were obtained by Pacifica in contravention of the CBCA. As indicated, the support agreements are commitments to give proxies to vote in favour of the Arrangement that were made prior to the completion of the Agreement on March 25th. In seeking the support agreements, Pacifica was soliciting proxies. This is said to have contravened s. 150(1) of the CBCA which is said to have prohibited the solicitation of any proxies before the information or proxy circular, and a notice of the shareholders meeting, were distributed to the shareholders on May 8th. The contention is that the contravention of the CBCA rendered the shareholders' vote invalid and that is fatal to the approval of the Arrangement.

87 Pacifica maintains that there was no contravention of the CBCA in obtaining the support agreements or the proxies for Norske and that the Arrangement ought to be approved in any event.

88 It is important to understand that there is no basis on which it can be said that those who signed the support agreements were not sufficiently informed. What Mr. Nystrom and Cerberus contend is that the agreements obtained by Pacifica undermined the shareholders meeting and rendered the vote a forgone conclusion. But they would have to accept that the result would have been no different in that regard if there had been no support agreements but the same proxies had been given after the proxy circular had been distributed. Indeed, it seems to me, that if their position on the point is sound, it may result in nothing more than the convening of a second meeting of the shareholders following a second round of proxy solicitation with respect to which the current complaint could not be raised.

89 Section 150 of the CBCA provides:

> 1) A person shall not solicit proxies unless

> a) in the case of solicitation by or on behalf of the management of a corporation, a management proxy circular in prescribed form, either as an appendix to or as a separate document accompanying the notice of the meeting, or
> b) in the case of any other solicitation, a dissident's proxy circular in prescribed form stating the purposes of the solicitation
>
> is sent to the auditor of the corporation, to each shareholder whose proxy is solicited, to each director and, if paragraph (b) applies, to the corporation. ...
>
> 3) A person who fails to comply with subsections (1) and (2) is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both, whether or not the body corporate has been prosecuted or convicted.

A "proxy" and a "form of proxy" are defined in s. 147 as follows:

> "form of proxy" means a written or printed form that, on completion and execution by or on behalf of a shareholder, becomes a proxy;
>
> "proxy" means a completed and executed form of proxy by means of which a shareholder appoints a proxyholder to attend and act on his behalf at a meeting of shareholders ... .

90 Pacifica says that s. 150(1) cannot be interpreted as prohibiting Pacifica's solicitation of the support agreements for Norske prior to the mailing of a proxy circular. It says that would require the addition of the words "prior to or concurrently with the solicitation" at the end of the subsection which Parliament did not see fit to add. Pacifica maintains that proxy solicitation is permitted before a proxy circular is sent to a shareholder whose proxy is solicited providing a circular is at some time sent with a notice of a meeting.

91 This court considered a section of the Companies Act, 1973 (B.C.) c. 18 that was worded materially the same in Re Ardiem Holdings Ltd. (1975), 61 D.L.R. (3d) 725, reversed on other grounds (1976), 67 D.L.R. (3d) 253. The issue was not whether solicitation prior to the delivery of a proxy circular was prohibited but rather whether, where a circular had been distributed, it was necessary to distribute a copy whenever proxies were subsequently solicited. It was held that it was not necessary, but in considering s. 177(1) of the Act the learned chambers judge said at pp. 730-31:

> The argument turns on the use of the word "is" in conjunction with the word "sent" ... In my view, the plain meaning of s. 177(1), although it is a little clumsily phrased, is this: that as a condition precedent to management being

> lawfully able to solicit proxies an information circular must be sent, either as an appendix to or as a separate document accompanying the notice of the meeting, by prepaid mail to every member of the company, etc. I think the meaning to be plain enough and management in the present case sent out an information circular as required.

92 The issue may have been somewhat different, but this is a considered view of essentially the same wording by a judge of this court who concluded that the distribution of an information circular was a condition precedent to soliciting proxies. I take a condition precedent to mean something that must be done before, or at least at the same time as, the solicitation occurs to render it permissible, and I would be hard pressed not to follow this court's interpretation.

93 In view of what was said in Ardiem Holdings, I could not give s. 150(1) the interpretation for which Pacifica contends, although the section could be better worded. The meaning may have been clearer if the words "has been" were employed instead of the word "is", but it seems to me that the interpretation for which Pacifica contends is at odds with what must be the obvious purpose of the section - shareholder protection. Shareholders must be given the statutory prescribed information about a transaction upon which they are to vote, and the notice of a meeting to be convened for that purpose, before their proxies, are solicited.

94 Pacifica has adduced some evidence for the purpose of establishing that it is common practice to solicit shareholder support and to enter into agreements for such as happened here. The evidence is not particularly strong, but it leaves me with little doubt that shareholder support is regularly assessed through discussion and secured in one form or another during the course of negotiating transactions of this kind. No one has said it is not. It certainly is not suggested that by soliciting support Mr. Johnstone was doing anything that he, the solicitors, or anyone else involved, thought offended the CBCA. Indeed, Mr. Nystrom, who now leads the case made on the support agreements, was himself negotiating the terms of a support agreement which he ultimately did not sign because he decided not to support the transaction. His agreement was negotiated through solicitors and Mr. Nystrom made it clear that his signing was contingent upon similar agreements being obtained from four of Pacifica's larger shareholders.

95 Nonetheless, I find that there was a contravention of s. 150(1).

96 The question then is whether, as Mr. Nystrom and Cerberus maintain, the contravention of s. 150(1) is fatal to the approval of the Arrangement. Pacifica says that the remedy for the contravention is limited to a prosecution under s. 150(3), but I do not consider the provision for a summary conviction proceeding precludes a civil remedy. Pacifica then says that the contravention should not in the circumstances be permitted to defeat the Arrangement.

97 In my view, it is necessary to consider first whether the contravention of s. 150(1) rendered the shareholders' vote invalid and then whether it renders the Arrangement unfair in any event.

98 With respect to the first, it seems to me that it was clearly open to all of the shareholders to give or withhold their proxies regardless of whether they signed a support agreement. That is because the agreements were clearly unenforceable. Quite apart from whether there was any consideration given by Norske, which appears to be open to question, all of the agreements were illegal. They were the product of and unlawful solicitation prohibited by the CBCA. Norske had no recourse that I can see against any shareholder who, upon receiving Pacifica's information circular, chose not to give its proxy.

99 At least in a legal sense, the proxies can only then have been given by the shareholders in the exercise of their right to vote their shares. The votes cast were accordingly valid. It is said that some or all of the shareholders who signed a support agreement may have felt compelled to give their proxies, but there is no evidence to that effect, and they were in fact under no legal compulsion to do so. Given that the support agreements, as the subject of an unlawful solicitation, were of no force or effect, I consider that the inference, in the absence of any evidence to the contrary, must be that the proxies were given because the shareholders were content to vote for the Arrangement after the information circular was distributed and they had the opportunity to consider it. The solicitation did not render the shareholders' vote invalid.

100 It is then necessary to consider whether the approval of the Arrangement should, in any event, be denied because the solicitation that was carried out did not comply with the CBCA.

101 It is said that, to obtain the approval of an arrangement, the statute must be strictly complied with. While St. Lawrence & Hudson Railway (supra) at paras. 12-13 would appear to suggest that strict statutory compliance is limited to compliance with respect to s. 192, authority can be cited where arrangements have not been approved because of a failure to comply strictly with other provisions of the governing statute. Re Upper Canada Resources Ltd. and Minister of Consumer and Commercial Relations (1978), 20 O.R. (2d) 100 (H.C.) is a case where an arrangement under the governing provincial statute was not approved only because the shareholders meeting where it was voted on was not held where the articles provided meetings could be held. The view taken was that the particular wording of the statute required strict compliance with respect to the place of the meeting. Re Dairy Corporation of Canada Limited, [1934] O.R. 436 (H.C.) was relied on for the proposition that all statutory requirements that are condition precedents must be complied with. That was, however, a case where there was a serious irregularity that affected the legitimacy of the vote at the shareholders meeting and the arrangement was as well held not to be fair.

102 There have, however, been instances were arrangements have been approved even though they did not comply with some provision of the statute under which approval was sought: Re P.L. Robertson Manufacturing Co. Ltd. (1974), 54 D.L.R. (3d) 354, Teddy Bear Valley Mines Ltd. (Re), [1993] O.J. No. 1588 (Ont. Ct. (Gen. Div.)), and in particular Olympia & York Developments Ltd. (Re) (supra) at pp. 163-64.

103 I do not consider it can be said that any breach of the CBCA in the course of negotiating and

completing an arrangement is fatal to its being approved. It is necessary to consider the breach in the context of the transaction as a whole in determining whether the arrangement is fair and reasonable.

104 Here no contravention of the CBCA was ever intended. Indeed, Pacifica engaged a wealth of expertise to ensure that, among other things, all that was required to obtain approval of its proposed arrangement was fulfilled. What occurred appears to have been of little or no real consequence to the transaction. I say that because not one single shareholder who signed a support agreement has appeared to suggest having been in any way misled, and no one suggests that they were. The evidence is that Mr. Johnstone, Mr. Nystrom, and CIBC World Markets met with the major shareholders and would have explained what was contemplated in the transaction with Norske to them before they were asked to commit their support.

105 All involved are either large financial institutions or, in two instances, nominee corporations of persons closely linked to members of Pacifica's board. It is accepted that they are knowledgeable participants in the market who are regularly engaged in assessing publicly traded share values of large corporations. All appear to have had the benefit of Mr. Glassman's letter of March 13th containing the reasons for Cerberus's opposition to the transaction before they signed their support agreements in final form such that all were well aware of the controversy. All received Pacifica's information circular before the shareholders meeting as well as circulars issued by Cerberus and those on the board who opposed the transaction explaining why the Arrangement should not be approved. All would have known that they could have appeared on Pacifica's application and challenged the approval sought, if they were in any way misled. None have done so.

106 One shareholder that signed an agreement that expired did not vote in favour of the Arrangement, but there is no evidentiary basis to suggest that was because that shareholder had been in any way misled when its support agreement was signed.

107 It is of particular significance to me that Mr. Nystrom raised the illegality of the support agreements through his solicitors in mid April. He did not appear at the hearing of the interim application and Cerberus evidently did not see fit to raise the point at that time in its strong opposition to the order that the shareholders meeting be held. Mr. Nystrom took no procedural steps in respect of the support agreements until he filed an application in this court on the day before the meeting.

108 I do not consider the contravention of s. 150 to be fatal to the approval of the Arrangement. I find some support for my view in Re Tip Top Canners Ltd., [1973] 1 O.R. 626 (H.C.). The approval of an arrangement that was sought in that case was granted despite the fact that the applicant company's information circular was found to be materially deficient. If an arrangement can be approved despite a deficient circular, I see no reason why, in the absence of any evidence that anyone was misled, the Arrangement for which Pacifica seeks approval should be denied because support was solicited before its information circular was distributed.

The Process

109 Mr. Nystrom and Cerberus say that the process of negotiating the sale of Pacifica's equity was so flawed that it was impossible to obtain a fair value. They maintain that the board failed to capitalize on the current unprecedented degree of consolidation in the forest industry that affords Pacifica's shareholders a one-time opportunity to unlock shareholder value. What is said to be the gravamen of their complaint is the board's failure to take steps to foster an appropriate competitive bidding process in order to have created the kind of deal tension that would have ensured that the best value of Pacifica's shares was obtained. They say this was in large measure because Mr. Johnstone took over the negotiations with Norske at an early stage, excluded other members of the board and the company's management, and determined to conclude a transaction with Norske at all costs.

110 It is not said that Mr. Johnstone was wrongly motivated in the sense that he was not doing what he believed to be best for Pacifica's shareholders; rather it is that he was single-minded about concluding an agreement with Norske and negotiated the transaction badly thereby jeopardizing shareholder value. The contention is that he was not up to the task and misguided as to what his duties were. While the complaints made against him in this regard touch on virtually every aspect of the negotiations, in the main they focus on the position in which it is said Pacifica put itself, the disclosures that were made to Norske, and the events surrounding the completing of the Agreement.

111 Uppermost in the criticism of the process is the exclusivity with which Norske was able to negotiate with Pacifica. This was the burden of the concern raised by Mr. Glassman in writing to the board and Pacifica's major shareholders in mid March.

112 It is said that Norske was able to make the offers it did free of any concern about competing interests. It was simply bidding against itself. This is said to have been because Pacifica shut down discussions with STM in January when the first Norske offer was received, and then it agreed to an exclusivity period of some weeks to facilitate due diligence in mid February. This meant that it could not entertain and perhaps better develop the STM proposal received in that period. Further, neither the STM proposal that was received just before the Pacifica board met to vote on the last Norske offer, nor the improvement on that proposal made the following day, were used as it is said they should have been to improve Norske's offer. Indeed, it appears that, at one point, Mr. Johnstone effectively told Mr. Horner that STM was not competitive. Apart from Mr. Johnstone's attempting to get clarification of the STM proposal made during the exclusivity period as soon as he was free to do so, Pacifica is said to have made no concerted effort during the time the active negotiations with Norske were ongoing to interest anyone else in doing a deal. The only player was Norske.

113 The situation is said to have been made worse from the perspective of Pacifica's shareholders by the acceptance of the $20 million break fee. The fee is said to have been unduly large, so much so as to have dampened any interest there may have been in bettering the terms agreed with Norske

before the shareholders voted.

114 In answer it is said that there are two ways to approach the sale of a company like Pacifica. It can be publicly put up for sale in the hope of creating a competition amongst prospective buyers, or a sale can be privately negotiated with an appropriate break fee and announced with a view to then seeing whether the price agreed attracts a better offer. Pacifica's board apparently favoured the latter. In any event, the evidence is that it was well known in the industry that Pacifica was for sale. According to Mr. Horner, the perception was that some of Pacifica's major shareholders had an unrealistic view of its value.

115 Pacifica's acceptance of a period of exclusivity was a feature of the negotiations upon which Norske insisted and some exclusivity is accepted to be customary in transactions of this kind. The best that Pacifica could do if discussions were to proceed was to attempt to limit the period which is exactly what it did. Norske wanted 60 days; it got fewer than 30.

116 It may well have been better if Pacifica had been able to inject competitive bidding for its equity into the process, but the fact is that was a luxury it did not have, and it remains far from clear that anything could have been done about it. It seems to me that, once it is accepted that Norske could be expected to pay the most for Pacifica because of the substantial synergies between them, it is difficult to see how really competitive any other entity could be. The transaction was driven largely, as it had to be, on evaluations of the share exchange ratio - the price - that made a combination worthwhile for both Pacifica and Norske. Mr. Johnstone and Mr. Nystrom approached Mr. Horner at a time when discussions with STM were the only ongoing discussions of any consequence. Pacifica had tried to come to terms with STM at least twice before and, at least from its perspective, had gotten nowhere.

117 Further, I do not see how Mr. Johnstone can be faulted for not using the STM proposals that were advanced during the negotiations with Norske as leverage to extract more from Norske. It seems evident that there was nothing about the STM proposals that would have prompted that result. They were not as good as what Norske was offering in terms of value to Pacifica's shareholders. Indeed, their disclosure may have had a negative effect. Simply to tell Mr. Horner that STM was not competitive may actually have been the best way to address that aspect of the matter.

118 As for the break fee, the increase from $16 million to $20 million was sought by Norske to offset the 24% dissident rights which it was asked to accept. The fee may have been somewhat high, but the dissident rights that Norske accepted were high. It was a matter of negotiation. In any event, no real case has been made out by Mr. Nystrom or Cerberus. The evidence does not establish the break fee was so high that it would have precluded offers for the equity of Pacifica. Indeed, the advice given by Pacifica's financial advisors was that, at 4.5% of Pacifica's equity value, it was within the accepted range (3-5%).

119 A great deal is said of Mr. Johnstone's dealings with Mr. Horner. For example, he is very much criticized for responding to Norske's first offer by disclosing that he had been instructed to

say that an exchange ratio of 2.3 was the minimum at which Pacifica was prepared to proceed. It is said that a good negotiator does not start with his or her bottom line, and any prospect of Norske subsequently making an offer at that level or better was forever lost. Further, Mr. Johnstone's obtaining support agreements, particularly those obtained to Mr. Horner's knowledge for an exchange rate of 2.0 before the rate was agreed, are said to have undermined Pacifica's negotiating posture.

120 Mr. Johnstone is also faulted for having disclosed to Mr. Horner that the Pacifica board was divided on entering into an agreement with Norske, and for telling him that the transaction could be done despite the opposition of Cerberus. It is said that Mr. Johnstone had no business disclosing the positions being taken on Pacifica's board, and that he lost an opportunity to use Cerberus's lack of support to create deal tension.

121 Pacifica's response to Norske's first offer of an exchange ratio of 1.7 was the subject of much discussion by the members of the board. They were unanimous that a firm counter offer should be made but divided as to what it should be. The concern was to strike the highest exchange ratio that would keep Norske at the table. With the benefit of the advice of CIBC World Markets and BMO Nesbitt Burns, the board settled in a 4-3 vote on 2.3. Mr. Johnstone carried out the instructions the minutes record. All received a copy of the counter offer he made. No one complained. It is probably right to say that 2.3 was thereafter not likely to be achieved, but it does not follow that a higher number at that stage would have resulted in Norske offering more than 2.1 as it did in the end.

122 I regard the necessary disclosure of the shareholder lockup support at 2.0 and 2.1 before the exchange ratio was agreed simply an unavoidable consequence of having to demonstrate the level of support Norske required to stay at the table particularly when Cerberus had made it clear it was opposing the transaction.

123 I find the complaints about Mr. Johnstone's disclosing the division in the board and the transaction being possible without the support of Cerberus somewhat inconsistent. It seems the first had the potential to persuade Norske to put forward its best offer by creating deal tension which is said was lost in the suggestion that Cerberus support was not required. The point of discussing that was not to inform Norske of something that it clearly knew, but to persuade it to stay at the table despite the fact that Cerberus was opposed.

124 A great deal is said about the events of March 23rd, 24th and 25th. Mr. Nystrom and Cerberus contend that STM could not have been expected to make an all cash offer at $15 overnight and that Mr. Johnstone should not have concluded the Agreement as he did without consulting fully with all of the members of the board about proceeding to do so in light of the amended proposal that STM did make. Mr. Johnstone was in Las Vegas. He appears to have spent much of his time throughout that weekend speaking by telephone with Pacifica's solicitors, its financial advisors and Mr. Horner. He did speak with Mr. Kilgour, Mr. Purchase and Mr. Wale, and he was encouraged to proceed. He also spoke with Mr. Nystrom for almost 15 minutes, although it is unclear on the

evidence what was said. Mr. Johnstone attempted to reach Mr. Henriksson and Ms. Johnson-Miller, but did not make contact with either. It is now said that his efforts were not good enough. It is said that the situation called for another meeting of the board so that all would have the benefit of hearing the views of the other members. However, no one asked for another meeting, and all were aware of the revised STM proposal. Indeed, it is difficult to see what it would have achieved.

125 I see nothing for which Mr. Johnstone is to be faulted given what faced him following the board's vote to accept Norske's offer. On March 23rd, the board had voted 5-1 to accept it. Mr. Henriksson tried to make his vote subject to a transaction with STM being thoroughly explored and he says now that his vote was qualified accordingly. But he was told at the time that he had to vote "yes" or "no". He voted "yes". Thus Ms. Johnson-Miller cast the only vote against accepting the offer.

126 By March 25th, the two outstanding issues on the Norske offer had been resolved and Mr. Johnstone had then a clear mandate to complete the Agreement. STM had amended its share exchange proposal to put in some cash, but that did not meet the value of the Norske offer to Pacifica's shareholders, and there was no suggestion STM would make any all-cash offer. Indeed, its proposal was not in a form that was capable of being accepted in any event.

127 Mr. Johnstone took advice and consulted with four of the other directors. Particularly in the absence of any one of them suggesting a further meeting was required he had, in my view, little choice but to complete the transaction. He certainly could not, on his own, risk Norske withdrawing or downgrading its offer which it might well have done. Mr. Horner says now that he had gone further than he had intended to go. I consider Mr. Johnstone's duty was unquestionably to proceed as he did. He might well have faced personal liability if he had not.

128 Finally, Mr. Nystrom and Cerberus say there are two other aspects of the matter that reflect badly on Mr. Johnstone's disposition toward reaching an agreement with Norske.

129 The first is that in February, prior to entering into the exclusivity agreement with Norske, the board decided to accept management's retention proposal which included retention amounts for the directors. Mr. Johnstone was to receive by far the most at $500,000 to reflect his contribution, although it would apparently have been paid to Tricor Capital Inc. A short time later, when it was suggested at the February 20th meeting by Mr. Glassman that this created a conflict of interest, Mr. Johnstone waived the fee, and it was then decided that none of the board would received any retention benefits. It is said that, while the retention included the board members, it may have influenced the decision to enter into the exclusive agreement with Norske. In my view, the point is without merit.

130 The second concern that is raised is an allegation made by Mr. Nystrom that on two occasions Mr. Johnstone offered him a financial inducement to procure his support for the transaction. Mr. Nystrom characterizes what he says was offered as a bribe. Mr. Johnstone denies offering any inducement. He maintains that he was simply endeavoring to explain to Mr. Nystrom

why, as a shareholder, it was to his benefit to give his support. It is said that the exchange is indicative of Mr. Johnstone's determination to enter into the Agreement at any cost. I am not asked to resolve the dispute over what was said and indeed I could not do so without the issue being tried with evidence being adduced in the customary way. However, I find that a resolution is not required for present purposes. There is no suggestion that Mr. Nystrom acted on what was said, and the issue has, in my view, such limited relevance to the approval that is sought on Pacifica's application that nothing turns on it.

131 To be fair, I have not attempted to address every point that Mr. Nystrom and Cerberus make, but I have tried to address what I consider best illustrates the tenor of their complaint with the process. Their argument is very much predicated on the assumption that Norske or some other entity would have offered greater value for Pacifica's shares than Norske has. Whether or not that is the case will never be known and can be nothing more than mere speculation. The premise is without any evidentiary support. It is not said that the final STM proposal was a better offer. Indeed, as valued by CIBC World Markets, it was not, and that valuation is not disputed. No one says that it was to be preferred over the Norske offer.

132 Norske was not anxious to acquire Pacifica. It was Mr. Johnstone and Mr. Nystrom who first approached Mr. Horner. Initially it was Mr. Nystrom who was able to interest him in the prospects of combining the two companies. Mr. Johnstone was ultimately put in a delicate position. He had behind him a divided board with the largest shareholder as well as the chief executive officer opposed to entering into a transaction at the price that appeared to be available from the buyer that could be expected to pay the most. And he faced a negotiator who was, throughout the process, skeptical that enough of Pacifica's shareholders would be sufficiently realistic about the company's value to enable a transaction to be done. Put in this context, Mr. Johnstone's actions in attempting to obtain the best deal he could, persuade Mr. Horner that it would have sufficient support, and cope with the dissention on his home front, all for the benefit of Pacifica's shareholders, are perhaps best understood.

133 Mr. Johnstone had the support of the majority of the board in virtually all that he did. Every consequential move Pacifica made in the course of the negotiations was made with the considered sanction of the board. It seems evident to me that Mr. Johnstone did what he could have been expected to do to ensure that the minority view was expressed and considered. Most significantly, he invited Ms. Johnson-Miller to put her concerns in writing, he convened a meeting to consider them, and he afforded Mr. Glassman the opportunity to attend, meet with the financial advisers, become fully appraised of the details of the proposed transaction, and make his views known, which he subsequently did when he wrote to the board and the major shareholders. Mr. Johnstone also invited Mr. Glassman to attend and participate as he did in the board's meeting on March 16th which concluded in general agreement that Mr. Johnstone put the counter offer that eventually carried the day with Norske. This is certainly not indicative of Mr. Johnstone having taken over the negotiations to the exclusion of others on the board as Mr. Nystrom and Cerberus now contend. I do not consider there can be any merit in the contention that Mr. Johnstone acted other than in concert

with Pacifica's board of directors.

134 Further, there is no evidence of any significant complaints having been made by the other members of the board about the manner in which Mr. Johnstone conducted the negotiations until after the agreement was made. Not one of the members of the board ever suggested he was not up to it. Indeed, in my view, the evidence shows that he clearly was.

135 By the process followed, Mr. Johnstone was able to move Norske from an unacceptable offer based on a share exchange alone of 1.7 to a substantially enhanced offer at an exchange ratio of 2.1 with a substantial cash option and unusually high dissident rights that was accepted. I do not consider there is, on the evidence, any sound basis on which it can be contended that Mr. Johnstone and the board could have been expected to have extracted a better result to put to Pacifica's shareholders.

The Price

136 Mr. Nystrom and Cerberus say that from the perspective of value the transaction is advantageous to Norske and disadvantageous to Pacifica. Simply put, they say Norske is not paying a high enough price for Pacifica. It is said that Pacifica should have declined to enter into the Agreement at a share exchange ratio of 2.1 to be put to the shareholders and waited for a better offer from Norske at some future time. Norske is the buyer that will pay the most and those who oppose the transaction say it is not going anywhere.

137 The argument advanced in this regard focuses on the fairness opinions of CIBC Word Markets and BMO Nesbitt Burns. To be clear, the first assessed the value of Pacifica's shares (that were trading at $9.00) at $11.90 to $15.47, and it is of the opinion that the value of the consideration being offered to Pacifica's shareholders at a 2.1 exchange ratio is $14.75 to $17.64 per share. The second assessed the share value at $14.75 to $18.00 and the consideration being offered at $16.50 to $19.00.

138 The opinions are not business valuations. Rather they are assessments of the extent to which the value given up by Pacifica's shareholders and the value received by them is comparable - or fair - at the share exchange ratio agreed upon. Underlying that assessment is the determination of en bloc value. Mr. Nystrom and Cerberus adduce the expert evidence of Stephen Cole, a well recognized business valuer, who they rely on primarily for his criticism of some aspects of the approaches taken to arriving at the en bloc value of Pacifica.

139 It is important to appreciate that the fairness opinions reflect many weeks of work conducted over a period of months. While the information circular sent to the shareholders contains only relatively brief letter statements to the effect that, from a financial perspective, it was the opinion of CIBC World Markets and BMO Nesbitt Burns that the Arrangement is fair to Pacifica's shareholders, the opinions given are backed by extensive reports that were reviewed at length by the members of the board with the assistance of the financial advisers who, as indicated, were present at

most of the meetings. The approaches taken and the advice given by the two advisers was similar, and they appear to have worked and given their advice independently of each other.

140 The members of the board, who are knowledgeable business people, do not appear to have thought that the approaches taken to determine the en bloc value of Pacifica were so obviously suspect that they could not be relied upon. The minutes of the board meetings on March 21st and 23rd reflect intense scrutiny of the advisers' reports, particularly by Ms. Johnson-Miller on the 23rd, but there is no suggestion in the minutes, and none now, that any aspect of the en bloc value of Pacifica was seriously questioned.

141 Neither Mr. Nystrom nor Cerberus has sought to adduce evidence of fairness from a financial advisor. Mr. Cole is a business valuer. He does not offer a fairness opinion but confines himself to critiquing the advisers' work from a valuer's perspective. He was engaged just prior to the hearing before me and completed his critique in less than a week.

142 Mr. Cole says that CIBC World Markets and BMO Nesbitt Burns have underestimated the value of Pacifica, and that he cannot be confident that the conclusions in the fairness opinions are correct. He bases what he says on considerations that, as a business valuer, he maintains ought to have been addressed or addressed differently than they appear to have been in making a determination of the value of Pacifica. He does not attempt to offer any valuation. He comments on the approach to that aspect of the fairness opinions of CIBC World Markets and BMO Nesbitt Burns. His principal criticisms relate to: the synergies that he says the advisers ignored completely; the value of Pacifica's tax losses; the questionable and inconsistent exchange rates assumed with respect to Pacifica's substantial American revenue and debt repayment; and a frailty in the comparable transactions approach to value (being one of three approaches) relating to Pacifica's rate of usage of its plants.

143 I do not consider it necessary to say more about Mr. Cole's opinion. I intend no disservice to him or to the helpful submissions made with respect to his evidence or what is said by Mr. Wallace or Mr. Butt in response to Mr. Cole's opinion. I accept that a business valuer may well hold a different opinion of the value of Pacifica than a financial adviser who is retained to offer a fairness opinion. Their methods, the principles applied, and the purpose of their work differ.

144 As far as it goes, Mr. Cole's critique does suggest that Pacifica's value may be greater than the two advisers have assumed in giving their fairness opinions. It may well be that a complete business valuation of Pacifica, based on the principles employed in forming opinions of that kind, might also show the value of Pacifica to be greater than the advisers assumed. I suppose it might also show it to be less. I am, in any event, unable to accept the suggestion that the independently formed opinions of two highly reputable financial advisers, who are regularly engaged in assisting large corporations with merger and acquisition initiatives, should be substantially discounted on the basis that the determinations of value made are at odds with some of the considerations that a business valuer would employ.

145 The opinions of CIBC World Markets and BMO Nesbitt Burns find support in the fact that as many as ten of the major shareholders of Pacifica were prepared to support the transaction at share exchange ratios of 2.0 and 2.1 before the Agreement was concluded. And the market response has seen Pacifica's share values rise from $9.00 to more than $13.00 while Norske's shares continue to trade at about $18.00. The perception must be that Pacifica's shareholders are getting fair value for their shares.

146 The fairness opinions and the determinations of value they contain are but one indicator of the fairness of the transaction in any event. In the end, what is fair is the value that can be obtained given a reasonable process of sale. Contrary to what is contended, it cannot be said that an agreement with Norske should not have been concluded now on an exchange ratio of 2.1 because Pacifica is worth more and that Norske, which can be expected to pay the most, will in due course offer more. It might very well offer less if it were to make another offer at all.

Approval

147 With respect to the threefold burden Pacifica has, as discussed at the outset, I conclude then that it has established that the Arrangement complies with the requirements of s. 192, and that the shareholders who voted to support it were a bona fide representation of the shareholders as a whole.

148 In applying the business judgment test, I begin with the shareholders' 73.6% vote in support. It is a convincing majority which is not compromised by cross ownership or complaint about inadequate disclosure. As was said in St. Lawrence & Hudson Railway (supra) at para. 27:

> What better litmus test ... for assessing whether in the circumstances of a given arrangement "an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan", than the votes of those whose interests are actually at stake? The votes of security holders at meetings to consider a proposed Plan are not conclusive, but a substantial vote in favour of the proposed plan of arrangement by, the security holders affected is an important factor in the court's considerations. The "business judgment" of the security holders in determining their own interests is to be given great weight ... .

149 This principle is well endorsed in the authorities: Re Gold Texas Resources Ltd. (supra) at p. 5, Re Western Canada Four Mills Ltd., [1945] 1 D.L.R. 589 (Ont. H.C.) at 591; and Central Guaranty Trustco (Re), [1993] O.J. No. 1479, 21 C.B.R. (3d) 139 (Gen. Div.) paras. 3-4.

150 The board was divided through much of the process, but when the chips were actually down, it voted 5-1 of the six who were able to vote in favour of accepting Norske's offer. The process that it followed in securing the Agreement is much criticized, but I consider the criticism to be largely ill-founded. The process was one of offer and counter offer in the course of arm's length negotiations over a period of four months with the corporation having the highest synergy value.

There appears to have been little prospect of any real competitive bidding, but the absence of such does not render the offer that was eventually made one that the board should not have accepted and afforded the shareholders the opportunity to consider.

151 The Arrangement has achieved a considerable measure of liquidity in Pacifica's shares, and it affords Pacifica's shareholders the opportunity to continue their investment in an expanded enterprise in the forest industry or to cash out at enhanced share value any time if they wish. I attach particular importance to the dissent rights and the fact that Cerberus is the only shareholder to have even preserved its position in that regard. It holds 5.0 million Pacifica shares. Based on trading prices, their value before the transaction was announced was $45 million. The comparable value now would be in excess of $67 million. If Cerberus truly believes its shares have a greater value, it is entirely open to it to have the court assess their value, and Cerberus will be entitled to recover all of it from Norske.

152 It becomes very difficult to see how the Arrangement can be said to be anything but fair to Pacifica's shareholders, especially when these considerations are viewed in light of the following: Pacifica's determined but unsuccessful efforts over the past three years to negotiate some form of combination or sale that would unlock shareholder value, the opportunity that Norske in particular represents, the support found in the opinions of CIBC World Markets and BMO Nesbitt Burns, the absence of any other acceptable offer on March 25th or on June 11th particularly when the break fee has been shown to be within the range to have been expected in a transaction of this kind.

153 I regard the division on the board and the opposition of Pacifica's CEO and largest shareholder regrettable, but they do not of themselves render the Arrangement unfair. Corporations and their boards work largely on democratic principles. Participation means a willingness to be bound by those principles, providing they are not abused and are fairly applied as I have concluded to have been the case here.

154 I regard the market's endorsement in terms of the substantially increased trading price for Pacifica's shares to be perhaps the final straw in demonstrating the Arrangement to be fair.

155 It follows that I find the Arrangement to be one that a Pacifica shareholder, acting in his or her own interest as an intelligent and honest business person, might reasonably approve. I find that it is in all respects fair and reasonable. And I approve it.

Cerberus's Claim of Oppression

156 It becomes unnecessary to say very much about the claim of oppression made by Cerberus because, as indicated, an Arrangement that is fair cannot be oppressive.

157 It appears that the purpose of the claim was to somehow unseat Mr. Johnstone for negotiating an Arrangement that a majority of the shareholders wish to have approved but Cerberus does not. Cerberus says that all of the shareholders have been oppressed, but that it is the only one that is

complaining. It is less than clear to me what it is that could constitute the oppression of which it complains.

158 What Mr. Johnstone negotiated was an arrangement agreement that affords Cerberus the opportunity to enjoy substantially enhanced share value in an expanded enterprise or to receive the full value of its shares. I do not see how that could be said to be oppressive.

159 I consider the oppression claim is to be dismissed.

Disposition

160 The application made by Pacifica is allowed. The Arrangement is approved.

161 The application made by Cerberus for relief from oppression is dismissed.

LOWRY J.

cp/i/qldrk/qlcmk/qlbrl

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