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Deluce Holdings Inc. v. Air Canada

1992 CarswellOnt 154, [1992] O.J. No. 2382, 12 O.R. (3d) 131, 13 C.P.C. (3d) 72, 36 A.C.W.S. (3d) 724, 8 B.L.R. (2d) 294, 98 D.L.R. (4th) 509

# DELUCE HOLDINGS INC. v. AIR CANADA, 152160 CANADA INC., AIR ONTARIO INC., AIR ALLIANCE INC. and WINGCO LEASING INC.

R.A. Blair J.

Judgment: November 10, 1992
Docket: Doc. B119/92

Counsel: *Barry A. Leon* and *Jim C. Tory*, for plaintiff Deluce Holdings Inc.
*Robert W. Cosman* and *Robert W. Staley*, for defendant Air Canada.
*William V. Sasso*, for defendant Air Ontario.

Subject: Corporate and Commercial; Civil Practice and Procedure

Motion in oppression remedy action for interim order staying arbitration; Application for final order staying arbitration; Motion for order staying action and application.

***R.A. Blair J.:***

1 There are competing "stay" motions before me. They raise interesting questions concerning the interplay between the broad "oppression" remedy made avail able to minority shareholders by statute and the very clear "arbitration" direction set by the Legislature in the *Arbitration Act, 1991*, S.O. 1991, c. 17. In what circumstances, if at all, may "oppressive" conduct operate to undermine what would otherwise be a contractually arbitrable issue, enforceable by that mechanism in accordance with the provisions of the *Arbitration Act, 1991*, and justify the postponement of the arbitration procedure pending determination of the threshold "oppression" issue?

**Background and Overview**

2 Air Canada and Deluce Holdings Inc. ("Deluceco") are indirectly the 75 per cent and 25 per cent shareholders, respectively, in Air Ontario Inc. Their interests are held through a numbered company, 152160 Canada Inc. ("the holding company"). Air Ontario Inc. ("Air Ontario") is a regional airline operating out of London, Ontario. It serves as a "connector" airline, feeding passengers into the overall Air Canada network.

3 Air Canada acquired its controlling interest in Air Ontario in 1986 when, in a complicated transaction, it bought the controlling interest of the members of the Deluce family in Air Ontario Limited and Austin Airways, and the minority interest of other shareholders in Air Ontario Limited. Air Ontario Limited and Austin Airways were subsequently merged to form Air Ontario Inc.

4 Air Canada has seven "nominees" on the Air Ontario board of directors; Deluceco has three.

5 At the outset of the relationship the plan and the arrangement seemed straightforward. The members of the Deluce family — William Deluce, in particular — would be responsible for the management and operations of Air Ontario, and Air Canada would maintain its distance from the day-to-day operations of the regional airline. Subsequently, however, Air Canada's views on the suitability of this type of relationship between it and its regional connector changed.

6 In April 1991, Air Canada decided to acquire 100 per cent ownership of its connectors. The issue of whether or not it acted legitimately in carrying out this quite legitimate corporate objective, lies at the heart of these proceedings.

7 A unanimous shareholders' agreement ("the agreement") governs the relationship between Air Canada and Deluceco as shareholders in the holding company which owns Air Ontario Inc. One of the provisions in the agreement gives Air Canada the option to acquire the Deluceco interest upon the termination of employment of the last of Stanley Deluce (the father) and William Deluce by Air Ontario or the holding company. Another calls for arbitration in the event of a dispute over the value of the shares. It is the triggering of this latter provision which is the subject matter of the "oppression" action that has been commenced on behalf of Deluceco.

8 In February, 1989, the two-year employment contract of Stanley Deluce as chairman of Air Ontario came to an end and was not renewed. He was replaced as chairman by Roger Linder, a retiring Air Canada executive. In October, 1991, the employment of William Deluce was terminated.

9 Deluceco alleges that Air Canada improperly exercised its majority control of the board of directors of the holding company to terminate Mr. Deluce's employment as vice chairman and C.E.O. of Air Ontario, and that it did so for the sole purpose of enabling it to buy out the Deluceco minority interest in the holding company, and thus in Air Ontario. This was done, so the argument goes, as part of Air Canada's corporate strategy to acquire 100 per cent control of the regional air carriers associated with it and, accordingly, to be able to deal with them without the constraints imposed by the bother of minority shareholders.

10 Deluceco says this conduct is "oppressive" — using that term in the broad manner by which the remedy granted under s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("the CBCA"), is commonly referred — and that the purported exercise of the arbitration clause is therefore of no force and effect. In other words, so the submission goes, the action calls into question the very underpinning of the arbitration proceeding, and the arbitration should not be allowed to go ahead.

11 Air Canada says, on the other hand, that under the provisions of the agreement, Air Canada is entitled, "upon the termination of" the employment of Bill Deluce, to exercise its call on the minority shares of Deluceco. If there is no agreement as to the price for the shares, the agreement requires the issue of the fair market of those shares to be arbitrated. The terms of the agreement are clear, Air Canada argues, and the dispute which the parties have thus agreed to submit to arbitration *must* go to arbitration by virtue of the provisions of the *Arbitration Act, 1991*.

12 Therefore, submits Air Canada, the arbitration must be allowed to proceed and Deluceco's action and application must be stayed, at least to the extent that they purport to deal with matters that the parties have agreed to submit to arbitration. For Deluceco, of course, the proposed solution is completely the reverse.

13 The issues are thus drawn.

**The Motions**

14 The main proceedings before me are the following:

1. A motion in the "oppression remedy" action by Deluceco for an interim order pursuant to s. 241 of the CBCA, staying the arbitration that Air Canada has commenced against it;

2. A companion application by Deluceco pursuant to s. 241 of the CBCA seeking comparable relief by way of a final order;

3. A motion by Air Canada pursuant to the *Arbitration Act, 1991*, s. 7(1), to stay the action and the application;

  

4. A motion by Air Canada to strike out portions of Deluceco's statement of claim as not being properly asserted by way of the oppression remedy.

15 As well, the court is being asked to approve the discontinuance of the action as against Air Ontario, pursuant to s. 242(2) of the CBCA on such terms as to the costs of Air Ontario as the court may think fit. I shall return to this latter issue at the conclusion of these reasons.

**A. The motions to stay**

***The Facts***

16 Central to a resolution of these competing claims is an analysis of the circumstances leading up to the termination of the employment of William Deluce by the Air Ontario board of directors in October 1991.

17 From the inception of the shareholder relationship between Air Canada and Deluceco, William Deluce held the position of and carried out the duties of president and chief executive officer of Air Ontario. This arrangement was reflected both in the agreement and in a separate employment contract between Air Ontario and Mr. Deluce. The term of the contract was for a period of 5 years, expiring at the end of February, 1992, and subject to renewal by agreement of the parties. Six months' notice of non-renewal was to be given in the event that Air Canada did not wish to renew the contract at the end of its term.

18 Mr. Deluce was responsible for running Air Ontario, which was to be managed at arm's length from Air Canada. Subject to the overall direction of the board of directors, he was given a large measure of authority in carrying out these management functions. Indeed, one of the attractions for Air Canada of the Air Ontario acquisition was the entrepreneurial management style which Bill Deluce brought to the business.

19 Before long, however, there developed the almost inevitable clash between the management style of the entrepreneur, as exhibited by Mr. Deluce, and the more bureaucratic stay-at-home style of the large corporation, as exhibited by a series of changing Air Canada executives. Air Canada thought that Mr. Deluce was not spending enough of his time in his office at Air Ontario headquarters in London. Air Canada thought that Mr. Deluce was delegating too much of the day-to-day operations to subordinates (although the Air Canada executives subsequently hired the self-same subordinate to replace Mr. Deluce as president and chief operating officer of Air Ontario). Air Canada thought that Air Ontario was not performing up to expectations financially, either in relation to its own projections or in relation to the performance of its other sister regional airlines. Air Canada felt that Mr. Deluce's expenses were somewhat on the high side.

20 Air Canada says that these concerns, together with a heightened apprehension about Air Ontario management performance arising out of reports from the public enquiry into the crash of an Air Ontario jet at Dryden, Ontario, lay behind the ultimate termination of Mr. Deluce's employment in October, 1991. The termination was amply justified, counsel argued, and in the best interests of Air Ontario. Mr. Aleong, Air Canada's designated shareholder's representative on the board, and Mr. Linder, Air Ontario's chairman, both deposed that they and the other Air Canada nominees on the board were acting in the best interests of Air Ontario when voting for the termination.

21 While I have no reason to doubt their belief in this regard, expressed now, I nonetheless have some difficulty in concluding, on the materials before me, that the factors outlined above were the motivating ones at the time of the termination. Only a trial, whenever that takes place, can thresh these matters out adequately, and I therefore confine my remarks in this regard to what is necessary to explain the reasons prompting me to come to this conclusion.

22 A review of some of the chronology is a helpful starting point.

23 Sometime in the spring of 1991, Air Canada changed its policy regarding the "arm's length" operating relationship with the five regional connectors in which it held an equity interest. It decided to acquire 100 per cent ownership of the connectors, including Air Ontario, and to operate those connectors as a division of Air Canada. On April, 1991, it

 

announced the formation of Air Canada Regional Airline Holdings to oversee management of the five regional airlines. James Tennant, a senior vice president of Air Canada, was named president of the new division.

24 At a meeting held on April 29, 1991, Mr. Aleong deposes, "*Air Canada's plans* for Air Ontario were explained to William Deluce" (emphasis added) (Aleong affidavit, para. 56). On May 13, Mr. Aleong, Mr. Tennant and two other executives of *Air Canada* "*concluded* that there was no long term role [in Air Ontario] for William Deluce at the end of his five year contract" (ibid., para. 57). They also agreed that Thomas Syme — the man whom Mr. Deluce left with so much responsibility for managing the day-to-day operations in London, apparently in dereliction of his duties — should be appointed president of the company. On May 15, Mr. Aleong, Mr. Tennant and Mr. Linder met with Mr. Syme and advised they would seek to have him appointed president (ibid., para. 59).

25 On the same day, *Mr. Tennant*, who had no connection whatever with Air Ontario, met with Mr. Deluce "to advise him that *Air Canada* had no long term plans [for him]" and to ask for his resignation (ibid., para. 60, emphasis added). Mr. Deluce refused to resign but did ultimately agree to a realignment of his responsibilities at Air Ontario. He became vice-chairman and chief executive officer. Mr. Syme was appointed president and chief operating officer. These changes were confirmed in a letter and at a board meeting on May 21, 1991.

26 What was said regarding Mr. Deluce, as reflected in the minutes of that board meeting, is instructive. I note the following:

> Roger Linder expressed the appreciation of the Board *for the excellent stewardship provided by William Deluce* as President and Chief Executive Officer of the Company. Mr. Linder confirmed that William Deluce *had done a superb job in directing the Company throughout his tenure* as President and expressed the thanks of the Board for his efforts.

27 Not to be outdone, Mr. Aleong,

> ... advised the Board that he was *very impressed with the professional and pragmatic approach* taken by William Deluce in managing the Company. (Emphasis added)

28 In October 1991, the steps were completed. On October 11, Mr. Tennant and Mr. Aleong met with Mr. Deluce and asked him, again, to resign. Mr. Deluce deposes that Mr. Tennant informed him that the termination "was being effected to permit Air Canada to trigger the Option and that Air Canada wanted 'to set the wheels in motion' under the Option" (Deluce affidavit, para. 35). This appears to be confirmed by Mr. Tennant's letter to Mr. Deluce of the same date which I think warrants quoting at some length. In that letter Mr. Tennant said:

> Dear Mr. Deluce:
>
> In early May of this year, I met and discussed with you Air Canada's plans to bring about significant change at its Regional Airlines.
>
> In that regard, I advised you that Air Canada's support for your continued employment at Air Ontario would extend only until such time as negotiations which were about to commence led to Air Canada's acquisition of the Deluce family interests in Air Ontario, Air Alliance and Wingco but, in any event, certainly not beyond the term of your employment contract of February 29, 1992. I believe it fair to say that each of us then believed a transaction would have been negotiated, if not completed, before now.
>
> In discussing the absence in our plans of a position for you at Air Ontario, *I emphasized that this was not a reflection on your performance.* Rather than seeking your immediate resignation, we agreed that you would accept the new position of Vice-Chairman and Chief Executive Officer, having a primary responsibility for the disposition of surplus Air Ontario aircraft but with no responsibility for day-to-day operations of Air Ontario.
>
> *Now, however, Air Canada intends to proceed with its intention to bring about the full management change at Air Ontario that we contemplated and discussed in May and, consequently, I am requesting that you resign from your*

  

*position as Vice-Chairman and Chief Executive Officer. We are giving notice of a meeting of the Board of Directors of Air Ontario to accept your resignation from Air Ontario should you so tender it or, if not, to seek authorization to terminate your employment contract* ... (emphasis added)

[Mr. Tennant then went on to discuss the terms of Mr. Deluce's payout and the fact that Air Canada was "now prepared to come forward with an offer for the Deluce family interest".]

29 Mr. Deluce declined Air Canada's request that he resign.

30 Two meetings of the Air Ontario Board followed in which the final coup de grace was administered and the groundwork laid for the triggering of Air Canada's option to purchase the Deluceco interest in Air Ontario. Again, the minutes of the meetings provide an instructive reflection of what went on. Mr. Aleong has deposed that "the reasons for termination are as set out in the Minutes" (Aleong affidavit, para. 95). Two "reasons" only were advanced. Neither of them relate to any of the concerns apparently harboured in a growing fashion over the years by Air Canada's representatives about Mr. Deluce's management style or the performance of Air Ontario and its management.

31 The first reason was that Mr. Deluce's employment was too costly and that, while his employment contract was to expire in February, 1992, Mr. Aleong preferred that any costs associated with the termination of Mr. Deluce be taken in 1991. When it was pointed out to him that the same result could be achieved by accruing the cost in 1991, however, he acknowledged that such was the case.

32 The second reason was that Mr. Deluce had a conflict of interest as an officer of both Air Ontario and Deluceco. This conflict, however, had existed with everyone's knowledge since the inception of Air Canada's acquisition of its 75 per cent interest and, indeed, was built into the shareholder relationship.

33 Given the realities of what was going on at the time between these parties and the realities of Air Canada's pending implementation of its changed corporate objective, one might be forgiven a certain scepticism about accepting the foregoing two reasons as those which lay behind the termination of Mr. Deluce's employment. One might also be forgiven a similar doubt about the notion that Air Canada's concerns regarding Mr. Deluce's management style, regarding his expenses, regarding Air Ontario's performance, and regarding the Dryden crash were what triggered this action by the Air Ontario board at the instance of Air Canada's nominees.

34 In this respect, Mr. Aleong is reported in the minutes of the October 21st meeting as having advised as follows:

Conrad Aleong advised the meeting that anything he had to say in support of a Resolution he proposed to make with respect to William S. Deluce had nothing to do with Mr. Deluce personally *and, in particular, nothing to do with the performance of William S. Deluce in his capacity as an officer and director of the Company*. Mr. Aleong stated that he had the highest regard for Mr. Deluce. (Emphasis added)

35 Mr. Aleong attempts to explain the language in the minutes of these two meetings and the May meeting as nothing more than "the normal good things [one says] about people when they're leaving a company or when they are being relieved of a position". He said that he and Mr. Linder were being careful not to criticize Mr. Deluce's performance because Air Canada and Deluceco were entering into negotiations and he did not want any negative comments to affect those negotiations.

36 I find this hard to accept, in view of the clear and unequivocal language which the minutes reflect. It is readily apparent why the Air Canada representatives would not want to offend Mr. Deluce, if at all possible, in the face of pending negotiations. Nonetheless, if Mr. Deluce's management performance and the financial and safety performance of Air Ontario under his stewardship were as uppermost in the minds of Mr. Aleong and the other Air Canada board representatives as counsel have submitted, I am sure that less categorically positive testimony to Mr. Deluce could have been crafted and still have met the requirements of corporate niceties.

 

37 One need look no further than Air Canada's own internal documentation regarding its connector restructuring plan for further confirmation of what appears to be the effective motivation for the termination of Mr. Deluce's employment. The proposal itself, prepared by Mr. Aleong and others and presented to the Air Canada executive in November 1990, speaks of "the shared view at Air Canada ... that today's 'separate companies' approach is financially inefficient", and of "a growing view that the connectors are not effectively serving AC's interest". The phraseology "as an instrument of the parent" is used frequently in relation to Air Canada's plans for the connectors, both in this document and in others.

38 With regard to Air Ontario, the plan for effecting this corporate objective is set out succinctly in one of the transparencies used by the Air Canada planners in explaining the proposal. Entitled "Connector Restructuring", and under the heading "Corporate Ownership", it said:

> — There are provisions in the shareholders and employment agreements to achieve minority interest buyouts.
>
> — *Strategy for 152160 Canada Inc. (the holding company) would be to terminate Mr. Bill Deluce's employment contract, giving Air Canada the right to call Deluceco's 25% interest.*
>
> — Contract cancellation cost approximately $400,000 (Emphasis added)

39 I have little difficulty in concluding, on the materials before me and for the purposes of these motions, therefore, that the operating motivation triggering the termination of Mr. Deluce's employment with Air Ontario was the foregoing strategy, designed to enable Air Canada to exercise its call on Deluceco's 25 per cent interest in furtherance of its goal of acquiring 100 per cent ownership of Air Ontario and the other regional connectors. Certainly it was the primary motivation. Any consideration of the negatives of Mr. Deluce's management style and performance, or of the safety and performance concerns at Air Ontario, or of the interests of Air Ontario generally, were at best in the remote background.

40 There is no suggestion that Air Canada's changed corporate objective of acquiring 100 per cent equity ownership of its regional airline and making the connectors "instruments of the parent" in order "to achieve an efficient, integrated, effective and profitable domestic feeder system ...; all with uncompromising safety", was anything but a perfectly legitimate corporate objective.

41 Two questions arise out of what transpired, however. The first question is whether Air Canada was entitled to utilize its majority position on the Air Ontario board, as it seems to have done, for the predominant purpose of carrying out that objective or whether such conduct was "oppressive" of the minority. If the latter is the case, the second question is whether such "oppression" undercuts the apparent right of Air Ontario, on the face of the provisions of the unanimous shareholders' agreement, to terminate Mr. Deluce for any reason, thus triggering Air Canada's call on the Deluceco shares.

**The Law**

***"Oppression"***

42 In my view the conduct of Air Canada and its nominee directors, as outlined above, could be found, after a trial, to constitute "oppression" of Deluceco's interests as a minority shareholder in Air Ontario. While the conduct may not constitute "oppression" in the classic sense of conduct which is "lacking in probity" or "burdensome, harsh and wrongful", it may nonetheless be conduct which is "unfairly prejudicial" to or which "unfairly disregards" the interests of Deluceco as a minority shareholder, contrary to s. 241 of the CBCA. The authorities make it clear that this distinction exists and that the latter sort of conduct constitutes grounds which are "less rigorous" than oppression: see *Mason v. Intercity Properties Ltd.* (1987), 59 O.R. (2d) 631 (C.A.), per Blair J.A. at p. 635; *Re Jermyn Street Turkish Baths Ltd.*, [1971] 3 All E.R. 184 (C.A.).

43 The "oppression remedy" section of the CBCA provides, in subs. (2) as follows:

 

241(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(*a*) any act or omission of the corporation *or any of its affiliates* effects a result,

(*b*) the business or affairs of the corporation *or any of its affiliates* are or have been carried on or conducted in a manner, or

(*c*) the powers of *the directors of the corporation* or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of. (Emphasis added)

44 Much was made in argument by counsel for Air Canada about the plain wording of the agreement which says, simply, that "upon the termination of the employment" of Mr. Deluce, Air Canada's call upon the Deluceco shares becomes operative. No cause is required for termination by its terms. There are no qualifiers to the circumstances surrounding the termination which may lead to the exercise of the option. Parole evidence is not admissible, counsel submit, to alter or vary or add to the clear and unambiguous language of the agreement.

45 Equally as much was made in argument by counsel for Deluceco about the nature of the relationship between Air Canada and Deluceco, as set out in the agreement. While that relationship is not a partnership in law, counsel submitted that it is more than simply a relationship of employment coupled with an option on the part of Air Canada to purchase the Deluceco shares by bringing about the termination of that employment. The relationship is akin to a partnership, they argue, premised on the sort of mutual trust and confidence which characterizes such a relationship, and on a mutual expectation, as stated in their factum, that,

(a) both Air Canada and Deluceco would at all times act in good faith and with a view to the best interests of Air Ontario and [the holding company]; and,

(b) Air Ontario would be managed by William Stanley Deluce ("Bill Deluce") and other members of the Deluce family.

46 Counsel for Deluceco rely upon a number of provisions in the unanimous shareholders' agreement to emphasize their characterization of the relationship, amongst which are the following sections:

**5.01 Management General Principles**

*Each of the Parties* shall, *and* shall cause its *nominees* on the Air Ontario Board and the Corporation Board and any committees of such Boards, *to act in good faith and in the best interests of Air Ontario and the Corporation and with a view to facilitating as expeditiously as possible the implementation of this Agreement*. (Emphasis added, except heading)

**5.09 Officers of Air Ontario and the Corporation**

Until changed in accordance with the provisions of this Agreement, the officers of Air Ontario and the Corporation shall be as set out in Schedule "F" attached hereto.

**5.22 Executive Employment Agreements**

The Parties acknowledge that William S. Deluce and Stanley M. Deluce have been employed by Air Ontario in accordance with the employment contracts attached to this Agreement as Schedule "H" and "I" respectively.

**9.02 Co-operation in Voting, Etc.**

 

> Each Party agrees to cause its Shares to be voted (whether at a meeting of Shareholders or by way of resolution in writing) to give effect to the provisions of this Agreement. *Each Party shall make its best efforts to ensure that its nominees on the Boards act in such manner as to give effect to the provisions of this Agreement.* (Emphasis added, except heading)

47 Counsel for Deluceco also sought to rely upon certain extraneous evidence to buttress the "partnership in spirit if not in law" argument. This evidence took the form of statements attributed to representatives of Air Canada referring to Deluceco and the relationship as "a partner" and "partnership" respectively. Reference was also made to various notes prepared by Deluceco's solicitor during the course of the negotiations leading up to the purchase of majority control by Air Canada. I have not taken either of these types of evidence into account in arriving at my decision because, in my view, they are not admissible by virtue of the parol evidence rule.

48 Section 2.03 of the agreement clearly states that the relationship is not that of agent or partner. It is equally clear from the other provisions of the agreement which I have outlined above, however, that the parties have bound themselves to act, and to cause their nominees to act, in good faith and in the best interests of Air Ontario, and with a view to facilitating the implementation of the agreement. In addition, of course, a director has a statutory duty, under s. 122 of the CBCA to act in good faith and with a view to the best interests of the corporation.

49 I have considered the provisions of the unanimous shareholders' agreement as a whole, including those referred to above. I have attempted, as I must, to ascertain the intentions of the parties from those provisions. I am satisfied, having done so, that it was not the intention of the parties to permit Air Canada to trigger its call on the Deluceco shares at will by causing its nominees on the Air Ontario board to terminate Mr. Deluce's employment for that predominant purpose.

50 In my opinion, only a termination effected for the purpose of promoting the best interests of Air Ontario — for whatever reason — can constitute a "termination" within the meaning of the agreement such as to trigger Air Canada's right to call the Deluceco shares. Having regard to the terms of the agreement, Deluceco had a reasonable expectation as shareholder, I believe, that, in the absence of the termination of Bill Deluce's employment for reasons having to do with interests of Air Ontario or even in the absence of the non-renewal of his employment contract for similar reasons, the management/shareholder relationship between Air Canada and the members of the Deluce family would remain as envisaged in the agreement.

51 Cases dealing with oppression remedy situations have emphasized the distinction between the strict "legal rights" of shareholders and their "interests". For instance, in *Westfair Foods Ltd. v. Watt*, 48 B.L.R. 43, 73 Alta. L.R. (2d) 326, [1990] 4 W.W.R. 685 (affirmed 79 D.L.R. (4th) 48, [1991] 4 W.W.R. 695), Moore C.J.Q.B. stated, at p. 698 ([1990] 4 W.W.R.):

> An examination of the leading cases dealing with the C.B.C.A. and in particular s. 241 is worthwhile. In enacting s. 241, Parliament obviously intended that strict attention should be paid to the *interests* of all shareholders not just the legal *rights* of shareholders. (Emphasis in original)

52 Mr. Justice Farley elaborated on this distinction in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113, by commenting on the connection between shareholder "interests" and shareholder "expectations". At pp. 185-186 he said:

> Shareholder interest would appear to be intertwined with shareholder expectations. It does not appear to me that the shareholder expectations which are to be considered are those that a shareholder has as his own individual "wish list". They must be expectations which could be said to have been (or ought to have been considered as) part of the compact of the shareholders. Expectations were discussed in B. Welling, *Corporate Law in Canada: The Governing Principles* (Toronto: Butterworths, 1984), pp. 533 and 535:

 

> Thwarted shareholder expectation is what the oppression remedy is all about. Each shareholder buys his shares with certain expectations. Some of these are outlandish. But some of them, particularly in a small corporation with few shareholders, are quite reasonable expectations in the circumstances ...
>
> Lord Wilberforce [in *Ebrahimi*, supra, (*Ebrahimi v. Westbourne Galleries Ltd.*, [1972] 2 All E.R. 492 (H.L.))] went on to enshrine shareholder expectations as the guiding principle of statute-based judicial intervention, saying:
>
> > Acts which, in law, are valid exercises of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company.

53 Speaking for the Court of Appeal for Ontario in *Ferguson v. Imax Systems Corp.* (1983), 43 O.R. (2d) 128, Brooke J.A. stated, at p. 137:

> But s. 234 [the predecessor to the present s. 241 of the CBCA] must not be regarded as being simply a codification of the common law. Today one looks to the section when considering the interests of the minority shareholders and the section should be interpreted broadly to carry out its purpose: see the *Interpretation Act*, R.S.C. 1970, c. I-23, s. 11. Accordingly, when dealing with a close corpora tion, the court may consider the relationship between the shareholders and not simply legal rights as such. In addition the court must consider the *bona fides* of the corporate transaction in question to determine whether the act of the corporation or directors effects a result which is oppressive or unfairly prejudicial to the minority shareholder. Counsel has referred us to a number of decisions. They establish primarily that each case turns on its own facts. What is oppressive or unfairly prejudicial in one case may not necessarily be so in the slightly different setting of another.

54 Under s. 122 of the CBCA directors have a duty, amongst other things, (a) to act honestly and in good faith with a view to the best interests of the corporation, and (b) to comply with any unanimous shareholder agreement. In considering whether or not the directors have complied with these obligations in a given situation more is required than a mere assertion of good faith on the part of the directors. There will almost always be a tension between the director's position as a director of the corporation in question and the director's position as a shareholder or the nominee of a shareholder. Where an issue arises, hindsight and after-the-fact rationalizations all too naturally make it easy for the directors to believe that they were, indeed, acting for the benefit of the corporation. As I have indicated, I have no doubt that Mr. Aleong and Mr. Linder now believe, genuinely, that they were doing so in these circumstances.

55 All of the facts must be considered, however. I agree with Farley J.'s conclusion in *Ballard*, supra, at p. 176, that when assessing the directors' conduct in relation to the s. 122 duty to act "in good faith with a view to the best interests of the corporation", "the question is, what was it the directors had uppermost in their minds *after a reasonable analysis of the situation*" (Emphasis in original). I also agree with the view expressed at p. 178 of the same decision, that even if, after a proper analysis of the situation, the directors may be said to have acted in good faith, as required by s. 122 of the CBCA, the result of such action may still be such that it "oppresses" the interests of the minority shareholder in a fashion which brings the "oppression remedy" section (s. 241) into play.

56 I find the decision of the House of Lords in *Scottish Co-operative Wholesale Society Ltd. v. Meyer*, [1959] A.C. 324, particularly helpful in assessing whether the conduct of nominee directors may be considered "oppressive". There, a co-operative wholesale society had formed a subsidiary textile company to enable it to participate in the manufacture and sale of rayon materials and to get licences to manufacture rayon cloth. The two respondents, who were appointed managing directors, were also shareholders. The society had three nominees on the board of directors. After several successful years of operations for the subsidiary the society attempted to pur chase the respondents' shares, but the overtures were rebuffed. The society then reacted by adopting a policy of transferring the company's business to itself. The nominee directors, as directors of the society, were aware of this policy but did not advise the subsidiary of it. Not

 

surprisingly, the business of the subsidiary fell off, and the value of the shares of the respondents was affected. The House of Lords held that the society, through the conduct of its nominee directors, had acted in a manner that was oppressive to the respondents. As Lord Denning noted, at p. 367:

> [The nominees] put their duty to the co-operative society above their duty to the textile company in this sense, at least, that they did nothing to defend the interests of the textile company against the conduct of the co-operative society. They probably thought that "as nominees" of the co-operative society their first duty was to the co-operative society. In this they were wrong. By subordinating the interests of the textile company to those of the co-operative society, they conducted the affairs of the textile company in a manner oppressive to the other shareholders.

57 In *Ballard*, Farley J. summed up the directors' obligations in respect of these competing shareholder interests as follows, supra, at pp. 171-172:

> It seems to me that while it would be appropriate for a director to consider the individual desires of one or more various shareholders (particularly his "appointing" shareholder) in order to come up with a plan for the operation of a corporation, it would be inappropriate for that director (or directors) to only consider the interests of certain shareholders and to either ignore the others or worse still act in a way detrimental to their interests. The safe way to avoid this problem is to have the directors act in the best interests of the corporation (and have the shareholders derive their benefit from a "better" corporation).
>
> It may well be that the corporate life of a nominee director who votes against the interest of his "appointing" shareholder will be neither happy nor long. However, the role that any director must play (whether or not a nominee director) is that he must act in the best interests of the corporation. If the interests of the corporation (and indirectly the interests of the shareholders as a whole) require that the director vote in a certain way, *it must be the way that he conscientiously believes after a reasonable review is the best for the corporation* ... (Emphasis added).

58 As I have indicated, the evidence here strongly supports a conclusion that, in causing the Air Ontario board to terminate the employment of Mr. Deluce, the Air Canada nominees were acting to carry out an Air Canada agenda and made little, if any, analysis of what was in the best interests of Air Ontario. Whether, had they done so, such an analysis might have yielded sufficient reasons from Air Ontario's perspective to carry out the act of termination, is not the point. Not only was there no "reasonable analysis of the situation" from that perspective, the question which was uppermost in the minds of the directors was to effect *Air Canada's* newly developed corporate objective, it would appear.

59 I am satisfied that such conduct could be found, at law, to be unfairly prejudicial to and to have unfairly disregarded the interests of Deluceco as a minority shareholder, as those interests are set out in the unanimous shareholders' agreement.

**The Stay**

60 Is the conclusion that such conduct is "oppressive" of the minority sufficient to justify imposing a stay of the arbitration proceedings instituted by Air Canada and to justify declining to stay the Deluceco proceedings?

61 The *Arbitration Act, 1991* imposes what is tantamount to a mandatory stay of court proceedings, with certain limited exceptions, in circumstances where the parties have agreed to submit their dispute to arbitration. This legislation represents a shift in policy towards the resolution of arbitrable disputes outside of court proceedings. Whereas prior to the enactment of this legislation the courts in Ontario had a broad discretion whether or not to stay a court action, the focus has now been reversed: the court *must stay* the court proceeding and allow the arbitration to go ahead *unless* the matter either falls within one of the limited exceptions or is not a matter which the parties have agreed to submit to arbitration.

62 The Act is based upon an international commercial arbitration model in widespread use around the world, including in Ontario and other Canadian provinces, respecting international arbitrations. Its clear direction is to compel parties who have agreed to arbitrate disputes to do exactly that, and to discourage them from running to the courts after the

 

agreement has been made if they think there is some particular tactical or strategical advantage in doing so. I have dealt with the purpose and scope of this new legislation in an earlier decision, *Ontario Hydro v. Denison Mines Ltd.* (unreported, June 3, 1992), and I will not repeat here what was said there.

63 The stay provisions are set out in s. 7 of the *Arbitrations Act, 1991*. Section 7(1) states:

> 7(1) If a party to an arbitration agreement commences a proceeding *in respect of a matter to be submitted to arbitration under the agreement, the court* in which the proceeding is commenced *shall*, on the motion of another party to the arbitration agreement, *stay* the proceeding. (Emphasis added)

64 Subsection (2) sets out five exceptions where the court may refuse to stay the court proceeding. Subsection (5) provides that the court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters, in certain circumstances.

65 Counsel for Air Canada submit that none of the subs. (2) exceptions apply and argue, accordingly, that the Deluceco action *must* be stayed. In the alternative, they submit, even if the oppression action is allowed to proceed because the issues raised therein are not covered by the arbitration agreement, the arbitration must be allowed to continue with respect to those matters which are dealt with therein, namely the share valuation issue which is the present subject matter of the arbitration.

66 The primary submission of counsel for Deluceco is that the question which Air Canada purports to have arbitrated is not "in respect of a matter to be submitted to arbitration under the agreement", and, accordingly, that s. 7 has no application whatever in these circumstances. They submit, as well, that the invalid arbitration agreement exception of subs. (2) applies, and they point to a stipulation in s. 6 of the Act entitling the court to intervene in matters governed by the Act "to prevent unequal or unfair treatment of parties to arbitration agreements."

67 I do not accept the argument that the invalid arbitration agreement exception in subs. (2) applies to this case. The issue is not the validity or invalidity of the agreement to arbitrate, itself, but the validity or invalidity of the exercise of its terms. I have concluded that Air Canada's conduct may well be found to have been "oppressive" of Deluceco's interests as a minority shareholder. The question is whether that oppression is such that it destroys the very underpinning of the arbitration structure, thus taking the subject of the dispute out of the "matters to be submitted to arbitration under the agreement."

68 In my view it is, and it does.

69 The court has a very broad discretionary power under the oppression remedy legislation to select a remedy appropriate to the situation at hand. Its mandate is to "make any interim or final order it thinks fit". This discretion must be exercised in accordance with judicial principles, of course, and within the overall parameters of corporate law. Nonetheless, the remedy has been described by one early commentator as "... beyond question, the broadest, most comprehensive and most open-ended shareholder remedy in the common law world ... unprecedented in its scope.": see Stanley M. Beck, "Minority Shareholder' Rights in the 1980's", *Special Lectures of the Law Society of Upper Canada, 1982 Corporate Law in the 80's*, at p. 312. Courts are prepared to be creative and flexible in fashioning remedies to fit the case when called upon to apply this broad remedy.

70 Having regard to those principles, therefore, I see no difficulty in concluding that if the "oppressive" acts of the majority are what are relied upon to trigger the arbitrable mechanism in the agreement, to the advantage of the majority and to the disadvantage of the minority, the majority ought not to be entitled to rely upon that mechanism to effect its wrongful objective. The real subject matter of the dispute, in such circumstances, is not a matter which the parties have agreed to submit to arbitration, but rather one which strikes at the very underpinning of the contractual mechanism itself. It therefore lies beyond the scope of s. 7 of the *Arbitration Act, 1991*, and brings into play the customary principles respecting the stay of arbitration proceedings.

 

71 In this case I am assisted in drawing the conclusion that the issues may be dealt with outside the confines of s. 7 by the terms of the unanimous shareholders' agreement itself — or, rather, by the terms which are lacking therein. The only provision for arbitration is the one contained in Art. 8.01 which states that any dispute under the agreement with respect to the fair market value of the parties' shares is to be referred to arbitration. There is no general "resort to arbitration" clause in the event of any dispute arising in connection with the agreement, as there is in many such agreements. Such a broad clause, for instance, was at the heart of the dispute in *Ontario Hydro v. Denison Mines*, supra, a case in which the court held that the parties were obliged to arbitrate their differences notwithstanding an argument that there was a preliminary question which needed to be determined first.

72 The powers given to an arbitrator under the *Arbitration Act, 1991* are quite sweeping and broad enough to enable the arbitrator to deal with preliminary questions that relate to the underpinning of the parties' agreement. For example, the arbitral tribunal may rule on its own jurisdiction (s. 17(1)); it may determine questions of law arising during the arbitration (s. 8(2)); and it may apply both legal and equitable remedies (s. 31). The issue in each case is whether the parties have agreed to submit such a matter to arbitration. Here, in my view, the agreement between Air Canada and Deluceco, unlike the agreement between the parties in *Ontario Hydro*, does not require the matter at issue to be submitted to arbitration.

73 For these reasons, the competing stay motions before me must be resolved through resort to the traditional principles which have been applied to stays in arbitration situations. Courts have long exercised an equitable jurisdiction to restrain the continuation of an arbitration proceeding in circumstances where the foundation of the arbitration agreement is under attack. There must be some prima facie evidence — I would say, a strong prima facie case — that resort to the arbitration mechanism by the party seeking to rely upon it may be im peached. The stay must not cause an injustice to that party. The applicant for the stay must persuade the court that the continuance of the arbitration would be oppressive or vexatious or an abuse of the process of the court. See: *Kitts v. Moore*, [1895] 1 Q.B. 253 (C.A.); *Re, "Oranie" (The) and "Tunisie" (The)*, [1966] 1 Lloyd's L. Rep. 477 (C.A.), per Sellers L.J., at pp. 486-488.

**The Threshold Test**

74 There was some argument before me as to the threshold which must be met by an applicant for a stay on an interim basis under the oppression remedy sections of the CBCA.

75 I do not accept the submission, which seems to have garnered support in some western Canadian decisions, that the court must be in a position to make an actual finding of "oppression" before it can make an interim order under s. 241: see, for example, *Low v. Ascot Jockey Club Ltd.* (1986), 1 B.C.L.R. (2d) 123, at pp. 128-129. Such a consequence, it seems to me, would render the power to make an interim order meaningless in most cases. The very raison d'etre of an interim order is that the court is not in a position to make such a finding because the parties have not been able to prepare the case fully at that stage, but an equitable balance of sorts is necessary to preserve the parties' rights in the interim while they do so.

76 A threshold test of some kind on the merits of the case of the party seeking to stay the arbitration is clearly necessary. Where, as here, the question is to be addressed outside of the parameters imposed by s. 7 of the *Arbitration Act, 1991*, there will commonly be an argument that the impugned conduct impeaches the arbitration agreement or destroys its foundation and, thus, that the issues should be determined by a court of law. It is important to guard against the resort to such a position simply as a tactic to avoid the agreed upon arbitration procedure, thereby eroding the clear policy of the Legislature that the parties are to arbitrate what they have agreed to arbitrate.

77 This very concern was expressed by Mr. Justice Campbell in *Boart Sweden AB v. NYA Stromnes AB* (1988), 41 B.L.R. 295 (Ont. H.C.). In that case Campbell J. had before him a motion to stay an Ontario action which encompassed matters that were both within and matters that were beyond the scope of a valid arbitration clause in an international commercial situation. The *International Commercial Arbitration Act, 1988*, S.O. 1988, c. 30 (now R.S.O. 1990, c. I.9)

  

contains provisions similar to the *Arbitration Act, 1991*. Indeed, as I have pointed out previously, the latter is modelled after the former. Campbell J. stayed the action to the extent of the overlap with the arbitration proceeding. In doing so, he talked about the importance of deferring to the arbitral process and the need not to "violate [that] strong public policy" of holding parties to their agreement to arbitrate. He then went on to say (at p. 303):

> To conclude otherwise would drive a hole through the article by encouraging litigants to bring on matters related to but not embraced by the arbitration and then saying that everything had to be consolidated in Court, thus defeating the policy of deference to the arbitrators.

78 I agree with this note of caution, and for that reason I conclude that the party seeking a stay of an arbitration proceeding in circumstances outside of those caught by s. 7 of the *Arbitration Act, 1991*, at least, must establish a strong prima facie case on the merits before crossing the threshold to do so.

79 In this matter, I am satisfied that Deluceco has shown a strong prima facie case that Air Canada's conduct was "oppressive" of Deluceco's rights as a minority shareholder under the unanimous shareholders' agreement in such a fashion as to destroy Air Canada's entitlement to resort to the agreement for the purpose it had in mind.

**Balancing the Injustices Between the Party Seeking to Arbitrate and the Party Seeking Not to Arbitrate**

80 For a stay to be imposed it must not cause an injustice to the claimant seeking the arbitration and the continuance of the arbitration must work an injustice of the party seeking the stay.

81 These principles, it seems to me, are another way of approaching the same kind of balancing exercise that finds its expression in interlocutory injunction jargon through the concepts of "irreparable harm" and "the balance of convenience". I do not think it is necessary to apply these latter concepts in themselves — particularly the concept of irreparable harm — to the process of determining whether a stay of an arbitration should be granted. The competing factors which must be weighed are similar in nature, however, and the process boils down in the end to a determination, in the court's discretion, of what is most fair — or, to put it another way, what is least unfair — to the parties, in the circumstances.

82 In this matter, I see no injustice to Air Canada in imposing a stay of the arbitration proceeding and allowing the Deluceco action to go ahead. The company's representatives gave evidence and were cross-examined carefully on the harm which they perceived Air Canada would suffer if the arbitration were not allowed to proceed. They could not be any more precise than to say that Air Canada had a pressing need to be able to react quickly in the current aviation environment and wanted to be able to do so without the restriction of having to obtain the co-operation of the minority shareholder in Air Ontario. There was no indication that Air Canada had asked Deluceco for co-operation in any particular matter and been rebuffed. Indeed, it is admitted that no such request was ever made. Mr. Aleong and Mr. Tennant spoke only of certain "plans" — all hypothetical at this point — which Air Canada was developing and regarding which a number of "scenarios" were being worked on. None had been decided upon, however. For understandable business reasons Air Canada declined to provide details of any of these "plans" and "scenarios". This leaves me, however, with very little evidence of any concrete harm that Air Canada would suffer in the event of a stay, other than the bother of having to have to deal with the Deluce family as minority shareholders of Air Canada in the interim.

83 On the other hand, I have already concluded that Air Canada's conduct in these circumstances may be found to have been "oppressive" to Deluceco. It follows, in my view, that to allow Air Canada to take advantage of that oppression, in the meantime, and forge ahead with its plan to dislodge Deluceco from Air Ontario in accordance with Air Canada's impugned agenda may also be oppressive. It would, in any event, be "unjust".

84 It may turn out that this dispute is simply about money, as counsel for Air Canada succinctly put it. It may be, ultimately, that the only contentious issue hinges on what terms and at what price Air Canada is going to buy out the Deluceco interest. These matters cannot be said to be foregone conclusions, however. Deluceco has said on the record that it does not *want* to sell its shares in Air Ontario (although it has been realistic enough to engage in negotiations with

  

respect to that very event). Given the broad nature of the remedies available, should Deluceco succeed in its oppression claim, it cannot be said with assurance that only money may be at stake. Even if that is so, there are intricate issues involving valuation and timing at stake.

85 If Deluceco is right in its contention regarding the "oppressive" nature of Air Canada's conduct, Deluceco is entitled to remain in its position as a shareholder while these matters are being resolved. It has rights in that capacity and ought not to be deprived of those rights at the whim of the alleged oppressor until the issue has been determined.

86 For all of these reasons I am satisfied that the proper disposition of the stay motions before me is to stay the arbitration proceeding that has been instituted by Air Canada and to allow the Deluceco action and application to proceed. I expect these proceedings to be processed expeditiously by counsel and ask counsel to submit an agreed case timetable in that regard to me by the end of November. The trial may be expedited.

87 I am also satisfied that an undertaking as to damages is not necessary in the circumstances. What is at issue here is a stay of a dispute resolution process. It is not the same as a case where an interlocutory injunction is sought and obtained to restrain one party from continuing some wrongful conduct against the other. For these reasons I think the concept of an undertaking as to damages is not a necessary element of the relief granted.

88 In the result, then, Deluceco's motion to stay the arbitration proceeding is allowed and Air Canada's motions to stay the Deluceco action and application are dismissed. Deluceco shall have its costs of these motions on a party-and-party basis. I will fix the costs if counsel so desire.

**B. The motion to strike portions of the statement of claim**

89 In a separate motion Air Canada seeks an order striking out paras. 46 through 55 of the Deluceco statement of claim. It does so on the grounds that the allegations therein contained "are without foundation, have been asserted to dress-up a weak oppression claim, and in any event are derivative claims that are not actionable by Deluceco on its own behalf".

90 I do not propose to review these allegations at any length. They relate, in the main, to the commercial operations and arrangements between Air Canada and Air Ontario. The pleading is that Air Canada in various ways sought to utilize its control position to its advantage in connection with these matters. Air Canada argues that whatever was done was done at arm's length by the operating personnel between the two airlines and not at the board level and, in any event, was done with the involvement, knowledge and approval of Mr. Deluce.

91 Whatever the situation in this regard, these allegations cannot be decided at this stage of the proceeding. They can only be resolved at a trial. There is some conflict in the evidence and even if Air Canada's evidence and the cross-examinations may have exposed some weaknesses in the Deluceco allegations, it cannot be said at this stage that "the case is beyond doubt" or that "it is plain, obvious and beyond doubt that the plaintiff cannot succeed": see *Canada v. Operation Dismantle Inc.* (1985), 18 D.L.R. (4th) 481 (S.C.C.); *Re Air India* (1987), 62 O.R. (2d) 130 (H.C.).

92 The other thrust of Air Canada's attack on the pleading was that the allegations raise claims which are the claims of Air Ontario and not those of Deluceco as shareholder. The action is therefore derivative in nature and Deluceco requires leave of the court to commence it in relation to these claims, counsel submit. There is authority, however, that merely because the plaintiffs in a minority shareholder oppression action rely on conduct which might in the first instance have caused harm to the company (and, therefore, give rise to a derivative claim), the plaintiffs are not deprived of their personal remedy under s. 241: see *Ontario (Securities Comm.) v. McLaughlin* (1987), 11 O.S.C.B. 442 (Henry J.). Accordingly, again, it cannot be said to be plain, obvious and beyond doubt that the plaintiff cannot succeed.

93 The motion must be dismissed. Costs of this motion will be to Deluceco in the cause. I will fix the amount if counsel so desire.

**C. Dismissal against air Ontario**

  

94 The parties have agreed that the action is to be dismissed against Air Ontario. There was an argument about the terms upon which such dismissal should take place, or, to reduce it to its simplest terms, there was an argument about costs.

95 Deluceco argues that Air Ontario should have no costs. Counsel submit that Air Ontario was simply added as a party to ensure that it would be bound by any order the court might make and not for the purpose of claiming any substantive remedy against the company. Moreover, they continue, Deluceco offered to let Air Ontario out of the action once this was made clear, but Air Ontario refused to go out without costs unless Deluceco withdrew all allegations relating to any suggested wrongdoing by the Air Canada nominees on the Air Ontario Board. Since such allegations form the basis upon which Deluceco's oppression claim is founded, it was naturally reluctant to do so.

96 Air Ontario argues that it was compelled to participate as it did because of those very allegations against its directors. Counsel asks not only for costs, but for costs on a solicitor-and-client basis.

97 I am satisfied that Air Ontario is entitled to its costs of the proceedings and action to date. It was made a party to the action and had to defend its position and that of its directors. I am not going to second guess what it did in that regard. In view of my disposition of the matters before me, however, I am not prepared to allow those costs on a solicitor-client scale.

98 I think the proper disposition is to allow Air Ontario its costs on a party-and-party scale, but to allow Deluceco to recover those costs from Air Canada as part of Deluceco's costs on the stay motions, and I so order. As with the costs ordered above, I will fix the amount, if counsel so desire.

***Conclusion***

99 In summary, then, orders will go as follows:

(1) granting Deluceco's motion to stay the arbitration procee ding commenced by Air Canada, with costs to Deluceco which I will fix if the parties so desire;

(2) granting an interim order in the application proceeding staying the said arbitration proceeding, with costs to Deluceco which I will fix if the parties so desire, such costs to be considered as one set of costs along with those awarded in (1) above;

(3) dismissing Air Canada's motions to stay the Deluceco action and application, with costs to Deluceco which I will fix if counsel so desire;

(4) dismissing Air Canada's motion to strike paras. 46 through 55 of the Deluceco statement of claim, with costs to Deluceco in the cause; and,

(5) dismissing the action against Air Ontario, with costs payable by Deluceco to Air Ontario on a party-and-party basis, which costs Deluceco shall be entitled to recover from Air Canada as part of its costs in the motions referred to in (1) and (2) above.

100 In conclusion, I wish to commend and to thank counsel for their full, candid, well-organized and able submissions. Their use of compendiums, and their focus on the issues relevant to their various submissions — all in accordance with the Commercial List Practice Direction — helped to make a lengthy and reasonably complicated "big document" case much easier to dispose of. I am grateful to them for this assistance.

*Plaintiff's motion granted; defendant's motion dismissed.*

 

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