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Crash Landing: Comment on Airline Industry Revitalization Co. v. Air Canada

Anita Indira Anand*

This case addresses the right of an applicant (Airline Industry Revitalization Co.) to requisition a shareholders’ meeting so that shareholders of a target company (Air Canada) can consider a take-over bid offer. The author argues that the judgment in the case is deficient in its interpretation of section 143 of the Canada Business Corporations Act and in its failure to consider the Air Canada board’s fiduciary duties.

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III. Responding to the Issues
IV. Shareholder Rights
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Introduction

This comment discusses shareholders’ rights to consider and approve an offer that has been made to them regarding the company in which they own shares. This issue arose recently in Airline Industry Revitalization Co. v. Air Canada,¹ a case in which Onex Corporation (“Onex”) sought to compel the board of directors of Air Canada to call a special meeting of Air Canada

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shareholders. The purpose was to consider Onex’s offer to merge Air Canada with Canadian Airlines International Ltd. (“Canadian Airlines”).

The case is significant because it develops the interpretation of section 143 and section 144 of the *Canada Business Corporations Act* and highlights the importance of ensuring that shareholders are able to consider a take-over bid offer or merger proposal. However, the interpretation of section 143 is ambiguous and there are conspicuous gaps in the legal reasoning in the case. In particular, there was no consideration of the board’s fiduciary duties. Thus, though Onex was successful in its application to require the Air Canada board (the “Board”) to requisition a special meeting, the case fails to stand for a precise principle of law.

I. The Case

On August 24, 1999, Onex, through its wholly-owned subsidiary Airline Industry Revitalization Co. Inc. (“AirCo”), issued a press release announcing its plan to merge Canadian Airlines and Air Canada. AirCo specified the terms of the offer in an offering circular dated September 7, 1999. In the Offer, AirCo offered to purchase all outstanding common shares and Class A non-voting common shares of Air Canada. Specifically, AirCo offered to purchase each share of Air Canada for either $8.25 in cash or one share of AirCo, which would ultimately become what Onex termed the “New Air Canada”.

The Offer was very complex, containing at least 17 conditions which needed to be satisfied (or waived by AirCo) prior to the expiry of the bid on November 9, 1999. These conditions

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3. Airline Industry Revitalization Co. Inc., Take-over Circular, “Offers to Purchase all outstanding Common Shares and Class A Non-Voting Shares of Air Canada” (7 September 1999) [hereinafter Offer].
4. Ibid. at 23-25.
included waiving the application of the Air Canada shareholder rights plan and obtaining all regulatory approvals. The latter item would not be easy to obtain since, as is explained below, various issues needed to be settled pursuant to the Canada Transportation Act.⁵

Another condition required Air Canada shareholders to approve, at a special meeting, amendments to the articles of Air Canada. This amendment created a new class of shares which could be converted at the option of the holder on a one-to-one basis. The new class of shares would be “Special Voting Shares” and would entitle holders to attend all general and special meetings of Air Canada shareholders and to vote on all matters except the election of directors.⁶ A further item of business to be considered was replacing the Board with a new board consisting of nominees of AirCo.⁷

On August 30, 1999, the Board adopted a shareholder rights plan (the “Plan”). In a press release issued the following day, the Board stated that the purpose of the Plan was to ensure that Air Canada shareholders had “a reasonable amount of time to consider any valid proposals that might come forward, including any that Onex and American Airlines may put forward.”⁸ The Board also established in this press release that January 7, 2000 was the date on which a special meeting of shareholders would be held “to consider valid proposals, including the proposal of Onex Corporation and American Airlines, that may be presented and to consider the shareholders rights plan.”⁹ The record date for the special meeting was also established in the press release as being November 18, 1999.

⁵ S.C. 1996, c. 10.
⁶ Offer, supra note 3 at 52-53. One of the purposes of creating a new class of shares was to address issues arising from the Air Canada Public Participation Act, R.S.C., 1985, c. 35 [hereinafter Air Canada Act], which prohibits one person from having more than a 10% ownership of Air Canada shares carrying the right to vote for directors.
⁷ Offer, ibid. at 53.
⁸ Airco, supra note 1 at 376.
⁹ Ibid.
A crucial event for the purposes of interpreting section 143 of the CBCA then arose. Just after the issuance of the press release announcing the date of the meeting, AirCo delivered a requisition to the directors of Air Canada pursuant to section 143 of the CBCA. The document requisitioned the Air Canada directors to call a special meeting of shareholders between November 4 and 8, 1999. The purpose of the meeting, as noted above, was to consider numerous items including the creation of a new class of shares and the removal of the current board of directors. The Offer expressly stated that, because of timing considerations and an order issued by the federal government under section 47 of the Canada Transportation Act it was necessary to hold a meeting of Air Canada shareholders before the previously established date of January 7, 2000.

Section 47 of the Canada Transportation Act provides that if an extraordinary disruption to the effective continued operation of the national transportation system exists or is imminent, an order may be issued by the federal cabinet directing the Minister of Transport or Minister of Industry to take any steps essential to stabilize the national transportation system.10 Such an order would be effective for a 90-day period. On August 13, 1999, the Canadian government announced the issuance of a section 47 order with the express purpose of facilitating a restructuring of the Canadian airline industry. The effect of the section 47 order was to authorize Air Canada, Canadian Airlines and others to negotiate and enter into conditional agreements during the 90-day period without restraints that would otherwise be imposed by the Competition Act.11

Thus, on August 31, 1999, AirCo, together with other Air Canada shareholders, requisitioned the Board to call a special meeting of shareholders between November 4 and 8, 1999. AirCo also applied to the Ontario Superior Court of Justice for an order to this effect.12 The timing of the meeting was crucial because the

10 Supra note 5.
11. Airco, supra note 1 at 374; supra note 3 at 61 and R.S.C. 1985, c. C-34.
12. Supra note 3 at 52.
Offer was set to expire on November 9, 1999. The immediate issues before the Ontario Superior Court of Justice centered upon the interpretation of two sections of the CBCA. Blair J. outlined the issues as follows:

1. Was the Air Canada board required under subsection 143(3) to call and hold a special meeting of shareholders pursuant to the requisition?
2. If not, is AirCo entitled under subsection 143(4) to call such a meeting on its own?
3. If the answer is "no", should the court exercise its discretion under section 144 to order a meeting of Air Canada shareholders to consider the Offer?13

Blair J. held that this case was not a circumstance in which the court was prepared to exercise its discretion and call a meeting pursuant to section 144 of the CBCA. However, Blair J. held that the AirCo requisition was a "valid one in the proper form under s. 143 of the CBCA"14 and that AirCo was entitled to call the meeting itself since the Air Canada directors had failed to do so within 21 days of receiving the requisition by virtue of section 143(4) of the CBCA.15

Therefore, AirCo received the relief it sought: an opportunity for Air Canada shareholders to consider the terms of the Offer at a special meeting.16

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13. Airco, supra note 1 at 377.
14. Ibid. at 389.
15 Ibid.
16. On October 6, 1999, Air Canada issued its "Notice of Special Meeting of Shareholders and Management Proxy Circular". The meeting which was the subject of the requisition in this case was to be held on November 8, 1999. However, as a result of the decision in Air Canada v. Airline Industry Revitalization Co. [1999] Q.J. No. 4880 (Sup. Ct. (Civ. Div.)) (judgment November 5, 1999), online: QL (Q.J.), the meeting was not held. This case effectively quashed the proposed merger of the two airlines by holding that the Offer violated the 10% rule in the Air Canada Act, supra note 6. The case does not affect the legal issues raised by this case comment.
II. Statutory Interpretation

Subsection 143(1) of the CBCA provides that "the holders of not less than five per cent of the issued shares of a corporation that carry the right to vote at the meeting sought to be held may requisition the directors to call a meeting of shareholders for the purposes stated in the requisition." The requisition must be in a particular form: it must contain a signature by one or more shareholders and a statement of the business to be transacted at the meeting. Once directors have received the requisition in the proper form, they are obliged to call a meeting of shareholders to transact the business stated in the requisition. The relevant exception to this obligation is contained in section 143(3)(a): directors are obliged to call the meeting unless a record date has previously been fixed and notice has been given pursuant to subsection 143(2) and subsection 143(4) of the CBCA. Subsection 143(4) states that if directors do not call a meeting after receiving a requisition, any shareholder who signed the requisition may call a meeting. Section 144 provides that the court may order a shareholders meeting if it thinks fit upon the application of a director or shareholder.

Prior to making the Offer, AirCo held 3.1% of the Air Canada common shares and 6.6% of Air Canada's Class A non-voting shares. In making the requisition, it was joined by The Royal Trust Company ("Royal Trust") which held two blocks of Air Canada shares as trustee. Blair J. found that AirCo, together with Royal Trust, met the requirement in subsection 143(1) that the party making the requisition hold not less than 5% of the outstanding shares.

Blair J. looked at the Air Canada press release of August 31, 1999 which stated that the January 7 meeting would consider "

17. Supra note 2.
18. Ibid. s. 143(2).
19. Ibid. s. 143(3).
20. Ibid. s. 143(3)(a) [emphasis added].
21. Airco, supra note 1 at 376.
... 'valid proposals, including the proposal of Onex Corporation and American Airlines' . . . "22 However, he then noted that in Air Canada's factum, filed in response to the AirCo application, the corporation stated that, "the [Air Canada] board has not to date agreed to place the proposed AirCo amendments on the January 7 agenda" (para. 24), and that 'the Air Canada board has never agreed to hold a meeting to transact the business set out in the requisition' (para. 37)."23

Thus, Blair J. held that the exception in section 143(3)(a) did not apply since the Offer that is the subject matter of the requisition would not be considered at that meeting. He reasoned that, "a 'record date' as contemplated in paragraph 143(3)(a) must be a 'record date' for a meeting at which there is some reasonable chance that the business stated in the requisition will be considered."24 Blair J. further stated, "I interpret 'record date' in paragraph 143(3)(a) of the CBCA [CBCA] to refer to a record date for a meeting having been fixed prior to receipt of the requisition but at which the requisioners' business may nonetheless be considered."25

Note must be taken of the grave tactical error made by Air Canada in ostensibly denying Air Canada shareholders an opportunity to consider the terms of the Offer at the January 7 meeting.26 Despite Blair J.'s interpretation to the contrary, the statute is clear: directors must take heed of a requisition made under section 143 only if a record date has not previously been

22. Ibid., citing Air Canada factum.
23. Ibid. at 380, citing Air Canada factum [as in Airco original].
24. Ibid. [emphasis added].
25. Ibid. at 381 [emphasis added].
26. One questions whether the decision in this case would have differed had the Air Canada board agreed to consider the Offer at the January 7 meeting even though the meeting would have occurred after the expiry of the Offer. In addition, one questions why more emphasis was not placed on section 137 of the CBCA in deciding this case. Section 137 states that:

A shareholder entitled to vote at an annual meeting of shareholders may submit to the corporation notice of any matter that he proposed to raise at the meeting . . . and discuss at the meeting any matter in respect of which he would have been entitled to submit a proposal [emphasis added].
fixed and notice has not been given. On a strict interpretation of section 143, Air Canada was exempt from having to call a meeting pursuant to the AirCo requisition, since prior to receiving the requisition the directors had fixed a record date of which notice had been given to shareholders. Unsurprisingly, historical documents which underpin the CBCA say nothing about the need for there to be a reasonable chance that the business at the meeting, which is requisitioned by shareholders, will be considered at the meeting for which a record date had previously been set.  

Blair J. did not favour a strict interpretation of the statute. He chose instead the interpretive technique of “reading in”, a method not commonly used in interpreting the CBCA. A primary difficulty is that it is not entirely clear what words Blair J. read into the statute. As mentioned, he first states that there must be some “reasonable chance that the business stated in the requisition will be considered.” He then states that the meeting must be one at which the requisitioner’s business “may” be considered. The word “may” implies that a mere possibility is sufficient while the term “reasonable chance” connotes a much higher threshold.

There is a possibility that any matter may be considered at a meeting of shareholders given the usual “boiler plate” clause in a Notice of Meeting. This clause allows “any other matter (i.e. in addition to the matters already listed in the notice) which

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29. Airco, supra note 1 at 380.
30. Ibid. at 381.
properly comes before the meeting” to be considered. 31 Whether there is a reasonable chance that a matter will be considered is a different question.

This deviation of the strict wording of the statute which may be appropriate in this circumstance requires further reasoning from the court. With respect, Blair J. needed to specify the particular standard that he was adopting and the way in which that standard should be interpreted. It goes without saying that the term “reasonable” carries with it interpretive hurdles of its own, as the term is used in many contexts.

III. Responding to the Issues

Timing was a central issue in this case. The Offer and the section 47 order were set to expire in mid-November 1999. However, a special meeting of Air Canada shareholders had already been set for January 7, 2000, just prior to the filing of the requisition, long after these crucial dates had passed. Because no meeting of Air Canada shareholders was scheduled to occur before the Offer expired, Air Canada shareholders stood to have no opportunity to consider the Offer at all.

Counsel for Air Canada, Mark Dunphy, argued that the directors had no obligation to call the shareholders meeting prior to the expiry of the offer. Mr. Dunphy contended that amendments to articles of incorporation may only be initiated at an annual meeting of shareholders, not at a special meeting of shareholders. Blair J. rejected this submission, relying on

31. However, it is unclear whether an unrelated item could be added to the agenda for the shareholders' meeting pursuant to such a clause. For instance, if a notice of meeting had been mailed to shareholders in which no reference was made to matters identified in the AirCo requisition, it is doubtful that those matters could properly come before the meeting pursuant to an "other business" provision.
subsection 175(1) and subsection 175(2) of the CBCA. Mr. Dunphy also argued that because of the public policy considerations underlying the Air Canada Act, the Air Canada board is not required to call or hold a meeting to consider a bid such as that contained in the Offer. Blair J. stated that since the question is being considered in another jurisdiction, he would not pronounce on the matter.

These arguments on behalf of Air Canada sidestepped a crucial issue in the case relating to the duties of the board of directors of a corporation. Counsel for AirCo, Neil Finkelstein, argued that the issue is whether the Air Canada board has the right to prevent shareholders from considering the Offer. Blair J. explained this argument:

On behalf of AirCo, Mr. Finkelstein submits that, in spite of all “the sound and fury”, these considerations revolve around a simple issue. He defines that issue as whether the shareholders of Air Canada should be deprived of their opportunity to consider the AirCo offers before they expire . . . . The Air Canada board has arrogated to itself the right to say ‘No’ to the AirCo bid by refusing to hold a meeting . . . .

Despite recognizing that the duty of the board was an issue in the case, Blair J. decided the case solely on the basis of an interpretation of sections 143 and 144 and, to a limited extent, case law which supported his interpretation of these sections. However, in addition, counsel for AirCo asked if the Air Canada board was entitled in law to insulate itself from the wishes of its shareholders by precluding them from considering the terms of the Offer at a special meeting. Could the Air Canada board “just say no” to its shareholders’ request to call a meeting to consider the Offer?

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32. Section 175(1) entitles directors or shareholders entitled to vote at an annual meeting to make a proposal to amend articles. See supra note 1 at 382-383.
33. Supra note 6. See also supra note 16 at paras. 80-81 of the Quebec decision.
34. Airco, supra note 1 at 383.
35. Ibid. at 377-378.
Counsel for AirCo approached the issue first by citing section 102(1) of the CBCA, which confers on the directors of a corporation the power to manage the business and affairs of the corporation. Counsel then argued that "[a]s a result, short of an oppression application, shareholders can only influence the corporation's affairs through the exercise of their voting rights at shareholder meetings." This statement was counsel's segue into the argument that shareholder meetings play a crucial role in enabling shareholders to express their views on corporate business. Both counsel and Blair J. conflated two separate issues. First, what were the rights of the Air Canada shareholders? Second, what was the duty of the Air Canada board?

IV. Shareholder Rights

In support of his interpretation of section 143 of the CBCA, Blair J. asserts that his conclusions are in keeping with the decision in RioCan Real Estate Investment Trust v. RealFund. He states:

This conclusion is consistent with the principles enunciated in RioCan, supra. It preserves the important right of a threshold number of shareholders to requisition meetings, although at the same time it requires adherence to the statutory framework set out in section 143 of the CBCA [CBCA].

Blair J. then cites a lengthy passage from the RioCan decision, a decision that he rendered, which ends his discussion on the matter. The passage contains a quotation from Isle of Wight Railway Co. v. Tabourdin to the effect that shareholder meetings are one of the few avenues that shareholders have to interfere in

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38. Airco, supra note 1 at 386.

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directors' decisions. The passage also contains a cursory reference to *Trans Mountain Pipe Line Company v. Inland Natural Gas Co. Ltd.*\(^4\), in which the British Columbia Court of Appeal held that there must be a very strong case to authorize and justify a court in restraining a meeting of shareholders called to settle its own affairs.

With respect, Blair J.'s statement that "'it' preserves the right of threshold number of shareholders to requisition meetings" is ambiguous. Does the word "it" refer to his conclusion regarding the interpretation of 143 or the decision in *RioCan*? Further, his judgment in the present case contains no discussion of the cases he mentioned in *RioCan*. Is one to assume that he is applying the *RioCan*, *Isle of Wight* and/or *Trans Mountain Pipeline* cases to the present case? In terms of legal reasoning, it is unsatisfactory to cite a lengthy quotation from a case without discussing the way in which that case, as well as the cases mentioned in the quotation, are relevant to the case at hand.\(^4\) Perhaps Blair J. is correct in concluding that the case law supports the statutory framework. However, if the right of shareholders to call a meeting is so fundamental, then certainly those cases deserve some consideration in the *AirCo* case.

\(^39\) *Airco*, supra note 1 at 387, citing *Isle of Wight Railway Co. v. Tabourdin* (1883), 25 Ch. D. 320 at 329 [hereinafter *Isle of Wight*].


\(^41\) In some respects, the relevance of the decisions is not obvious. The facts of *RioCan* differ significantly from the facts of the *AirCo* case in that the parties in *RioCan* were unincorporated trusts. In addition, the *Isle of Wight* case is an 1883 case from another jurisdiction. The facts of that case are again much different from the *AirCo* case but do contain some similarities. In particular, in that case shareholders of a company were entitled to call a meeting pursuant to a shareholder requisition which sought, *inter alia*, "[t]o remove ... any of the present directors, and to elect directors to fill any vacancy on the board." (*Isle of Wight, supra* note 39 at 322.) One of the items on the list of items to be considered at the special meeting of Air Canada shareholders was to remove the Air Canada board and replace the directors with nominees from AirCo which would be effective only on the take-up of shares under the AirCo offer.
Blair J. considers the applicable sections of the CBCA but fails to discuss relevant provisions in the Ontario Securities Act. Blair J. cites several cases which hold that shareholders' ability to requisition a meeting is a fundamental right. However, a crucial point to note is that the OSA contains specific provisions relating to the deposit period for a take-over bid. Section 95(1) states, "[t]he offeror shall allow at least twenty-one days from the date of the bid during which securities may be deposited pursuant to the bid." Blair J. does not consider the interrelationship between shareholders' right to requisition a meeting under the CBCA and the minimum bid period under the OSA. Why should an offeror that takes advantage of the shorter time frame in the OSA for a take-over bid be able to force a shareholders' meeting on the schedule that the offeror proposes? Indeed, the fact that a shareholders' meeting has not been called to consider a bid does not preclude shareholders from tendering to an offer. This simply prevents the take-up and payment for shares under the offer if the approval of shareholders is a condition of the bid.

V. Directors' Duties

In managing the business and affairs of the corporation, Canadian corporate statutes require directors to "act honestly and in good faith in the best interests of the corporation" and to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." This duty is owed to the corporation and its shareholders as a whole and not to any group of shareholders.

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43. Ibid. s. 95(1). See also s. 95(2).
44. CBCA, supra note 2, s. 122.

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Yet Canadian courts have struggled to delineate the precise duties owed by the directors. Initially, Canadian courts applied the “proper purpose” test, which was founded on the principle that boards could not exercise their authority for an improper motive or purpose. In other words, “directors’ powers must be exercised for the purpose for which they were granted.” If they were not, the action taken would be set aside. The proper purpose test over time came to be replaced by the rule in Teck Corporation Ltd. v. Millar et al. that “directors must act in good faith. Then there must be reasonable grounds for their belief.”

In the United States, directors are bound by the “business judgment rule”. This rule is based on “the presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken is in the best interests of the company.” It is questionable whether the business judgment rule has been specifically adopted in Canada. In WIC, Blair J. applied the business judgment rule in reaching a decision that the board did not breach its fiduciary duties in the face of competing bids for

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672 (2000) 25 Queen’s L.J.)
the target. However, Canadian courts have not otherwise explicitly adopted the business judgment rule.

Blair J. chose not to address the conduct of the Air Canada Board. Two other cases dealing with section 143 of the CBCA suggest that an interpretation of this section also entails an assessment of whether there was bad faith on the part of directors in dealing with the requisition. The crucial question to be examined is whether the refusal by the Board to hold a meeting to consider the Offer was an action that was in keeping with its fiduciary duties.

In a take-over bid situation, board conduct is closely scrutinized because of the potential conflict of interest between the directors' duty to the corporation and their interest in maintaining their positions as directors. At least two facts support the validity of the management entrenchment hypothesis in this case. First, the Board sought to prevent shareholders from considering the Offer at a meeting of shareholders. Second, it adopted a shareholder rights plan without shareholder approval. The Air Canada rebuttal to these points would undoubtedly centre on the argument that the Offer is illegal pursuant to share ownership

50. WIC, ibid. at 777.

51. In any case, the version of the rule adopted in WIC differs significantly from the rule applied in the United States. In the case of Unocal Corporation v. Mesa Petroleum, 493 A.2d 946 (Del. 1985) it was held that before the business judgment rule is applied to a board's adoption of a defensive measure, the burden will lie with the board to prove (a) reasonable grounds for believing that a danger to corporate policy and effectiveness existed and (b) that the defensive measure adopted was reasonable in relation to the threat posed.

52. See, for example, Oppenheimer & Co. v. United Grain Growers Ltd. (1997), 120 Man. R. (2d) 281 (Q.B.).


54. For theoretical arguments concerning the management entrenchment hypothesis, see M. Ryngaert, "The Effect of Poison Pill Securities on Shareholder Wealth" (1988) 20 J. Fin. Econ. 377 at 380. See also J.G. MacIntosh, "Poison Pills in Canada: A Reply to Dey and Yalden" (1991) 17 C.B.L.J. 323 at 324. Admittedly, securities regulators have allowed rights plans adopted in the face of a take-over bid to stay in place if for a short period of time and for the legitimate purpose of maximizing shareholder value.

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the conduct of directors pursuant to their fiduciary duties, Blair J. chose to base his decision on an interpretation of section 143 of the CBCA. Thus, while the result that Blair J. reached appears to be correct (i.e. the Air Canada shareholders should not be prevented from having a meeting at which they can consider the Offer), the legal basis on which the decision rests is weak. Had Blair J. considered the duties owed by directors under section 122 of the CBCA, he may well have concluded that denying shareholders the right to consider the Onex proposal exemplified a lack of good faith.

What then is the response to Mr. Finkelstein’s question: can the Air Canada Board “just say no” to the Offer? In the United States, courts have permitted directors to “just say no” in defending a company against an unwanted or hostile merger. The classic case on this issue is Paramount Communications, Inc. v. Time Incorporated, where the unwanted bid conflicted with a previously conceived and well-developed business plan which was to unfold over the long-term. But in Canada, such a decision would be closely scrutinized. As the Ontario Securities Commission stated in Re Canadian Jorex (citing National Policy 38, the predecessor to National Policy 62-202):

The primary concern of the Commission in contested take-over bids is not whether it is appropriate for a target board to adopt defensive tactics, but whether those tactics “are likely to deny or severely limit the ability of the shareholders to respond to a take-over bid or a competing bid” (paragraph 6) or “may have the effect of denying to shareholder the ability to make a [fully informed] decision and of frustrating an open take-over bid process” (paragraph 2).

60. 571 A.2d 1140 (Del. 1989) [hereinafter Paramount]. Yet the Paramount case can be distinguished from this case on its facts. In Paramount, the board had clearly adopted a long-term business strategy which justified its refusal to accept a competing bid. In this case, no long-term strategy was apparent.

61. (1992), 15 O.S.C.B. 257 at 266, online: QL (OSC) [as in original].
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61. (1992), 15 O.S.C.B. 257 at 266, online: QL (OSC) [as in original].
Thus, a primary question to be asked in evaluating the conduct of the board in any take-over bid is whether shareholders’ opportunity to respond to a bid has been denied or severely limited.

In this case, a distinction must be drawn between whether the Board was saying “no” to the shareholders’ meeting or to the Offer in toto. Mr. Finkelstein’s argument was that “the Air Canada Board has arrogated to itself the right to say ‘No’ to the AirCo bid by refusing to hold a meeting”. 62 In other words, by preventing shareholders from calling and holding a meeting to consider the Offer, Air Canada was saying “no” to the Onex bid.

Practically speaking, shareholders may tender to a bid regardless of whether a shareholders’ meeting has been called to consider the terms of the bid. If shareholder approval is a condition of the bid, take-up and payment for shares under the offer will simply be delayed until that approval has been obtained. Thus, even in this case, one cannot argue that the shareholders have been denied the opportunity to respond to the Offer.

However, in this particular case, a refusal to call the meeting essentially meant that the Board was saying “no” to the bid. As noted above, the Air Canada factum indicated that the Board had no intention of considering the proposal at the next scheduled meeting of shareholders. It had not initiated a canvass of the market to assess this offer in relation to other offers for the company. It appears that the Board simply did not want shareholders to have an opportunity to consider this bid, either prior to the expiry of the bid itself or at the January 7 meeting. In this way, the actions of the Board “severely limited” shareholders from responding to the Offer.

Conclusion

In Airco, Blair J. elected to base his decision on principles of statutory interpretation. In doing so, he failed to outline the precise standard to be applied in interpreting subsection 143(3).

62. Ibid. at 378.
He also failed to explore the legal bases on which this meeting should be held. Noticeably absent from the decision was a consideration of the duties of the board in allowing shareholders to consider the Offer. In my view, Air Canada's directors were obliged pursuant to their fiduciary duties to accede to AirCo's requisition pursuant to section 143 and to call a special meeting of shareholders. In this case, the Board could not "just say no" to its shareholders' request for a meeting.