MINUTES AND NOTES OF BOARD MEETINGS

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I. CORPORATE REQUIREMENTS TO KEEP MINUTES

Both the *Canada Business Corporations Act* ("CBCA"), and the *Ontario Business Corporations Act* ("OBCA") set out the requirements for keeping minute books.

Corporations are required to prepare and maintain records containing minutes of meetings and resolutions of directors (CBCA 20(2), OBCA 140(2)(b)). The minutes may be kept in a bound or loose-leaf book, or electronically (CBCA 22(1), OBCA(139(1)). The corporation must take reasonable steps to prevent the loss or destruction, or the falsification, of the minute books (CBCA 22(2), OBCA 129(2)).

Minute books are admissible in court as proof of all the facts contained within in the absence of any evidence to the contrary, (OBCA (139(3)).

Finally, as per recent amendments under the CBCA, shareholders may review minutes of meetings where a director has declared a conflict of interest (CBCA 120(6.1)).

II. HOW MINUTES ARE TO BE KEPT

General Comments

While corporate statutes set out the requirement that corporations keep minutes, there is little direction on how minutes are to be kept. One writer states:[1] that, at a minimum, minutes of a meeting should contain:

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[1] Nancy Sylvester, "Empowering You and Your Organization" *How to Write and Keep Meeting Minutes*, available online at <http://nancysylvester.com/docs/Resources/articles/meeting_minutes.html>

*This article is an adaptation of a paper delivered to the Directors College on April 27, 2012. The full text can be viewed at: http://www.mindengross.com/publications/2012/Directors_College_Speech_-_Minutes_of_Board_Meetings.pdf

(a) Kind of meeting (regular, special, etc.);

(b) Name of organization;

(c) Date, time and place of the meeting;

(d) Name of presiding officer and secretary;

(e) Approximate number of members present;

(f) Establishment of a quorum;

(g) Recording of the action taken on the minutes of the previous meeting;

(h) Motions, whether passed or failed; and

(i) The signature of secretary and president.

Level of Detail

The question arises as to what level of detail should be contained in the minutes.

On the one hand, since the minutes may support a "due diligence" defence, one may be inclined to include everything that occurred in the meeting. As one judge stated in an early case[2]:

> Directors ought to place on record, either in formal minutes or otherwise, the purpose and effect of the deliberations and conclusions. If they do this insufficiently or inaccurately they cannot reasonably complain if false inferences are drawn from their report.

On the other hand, except in rare circumstances, minutes will not be privileged and may be produced in the context of litigation. Another writer[3] notes, "there is a tension between providing sufficient detail to avoid any adverse inference being drawn against the directors and a lingering apprehension that an innocuous record might, with hindsight, be twisted out of context in litigation".

[2] *Re: Liverpool Household Stores Ass'n* (1890), 59 L.J. Ch. 616 per Kekewich J., p. 619.
[3] Tim Banks, "*Writing Board Minutes for Peace of Mind*", available online at <http://www.securitiesmininglaw.com/writing-board-minutes-for-peace-of-mind>

Best Practices

There are a handful of best practices that when followed provide a good governance control, are an effective record of what transpired at the meetings, and should withstand the scrutiny of regulators, shareholders and litigators, as the case may be.

(a) Minutes must be clear, accurate and objective.

(b) Minutes should reflect the directors' thoughtful deliberation and level of discussion for matters reviewed and discussed at the meeting – sufficient to establish a due diligence defence in case of a later dispute.

(c) Minutes should evidence the extent of challenge and review of important matters before the board. The board's engagement in such matters as reviewing strategy and setting risk appetite should be clear from the minutes.

(d) Minutes should capture an objection or abstention expressed by a director

(e) Minutes should **not** reflect all questions asked and the responses given, nor as a general rule should they identify which director asked a particular question.

Reasons for Vote

Individual directors are not required to state the grounds of their judgment for or against a proposed action. The board of a corporation may state reasons for a recommendation if it so chooses: however, if this is done, the statement of those reasons must not be misleading[4].

Legal Advice

Special care must be taken when discussion at a board meeting involves legal advice by the general counsel or external counsel. The minutes should indicate that the board participated in a privileged discussion with counsel with only a general reference to the subject matter. Privileged discussions must be redacted from minutes prior to their review by an authorized party, including the external auditors and regulators.

[4] See *Newman v. Warren* (1996), 684 A. 2d 1239 (Del. Ch).

Signing Minutes

It is good practice to have minutes of meetings signed by both the Chair and secretary of a meeting. While signing the minutes strengthens the evidence, failure to sign minutes does not invalidate them. There is also no requirement to approve minutes of a meeting at a subsequent meeting.

III. NOTES OF MEETINGS

Another question which typically arises with respect to minutes of meetings is whether directors should keep their own notes. Directors may be inclined to do so to ensure they may assess the draft minutes, especially where there may be a concern the secretary is not acting impartially. However directors' notes may contradict or undermine the minutes of meetings.

The Corporate Director's Guidebook states[5]:

> Directors are not obligated to take notes. Those who do take notes to help them participate should consider whether to retain them. Notes are not subject to a careful process of drafting, review, and approval, and may contain statements or notations that may be misinterpreted, taken out of context, or in fact, be incorrect, particularly if produced in litigation. For example, notes often capture only part of a discussion or fail to distinguish between words spoken and the note taker's thoughts. Similarly, notes and drafts of the secretary of the meeting should normally not be retained after approval of the official minutes.

In any event, it is good practice to put into place a policy or guideline on managing notes and working files relating to meetings that is clear on the destruction of notes of meetings. Generally written notes are destroyed following approval of the minutes at the next meeting. If directors do decide to keep written notes to protect themselves, the notes should follow the same rules as minutes, and be clear, concise and complete.[6]

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[5] 6th edition reproduced in (2011) 66 The Business Lawyer 1007.

[6] For a recent case where notes taken at a board meeting come under scrutiny, see *Harris v. Leikin Group Inc*. (2011), 88 B.L.R. (4th) 1 (S.C.J.).

CONCLUSIONS

In the context of private companies, where directors will not have to face shareholder scrutiny in hindsight, "bare-bones" minutes may be adequate.

The minutes can demonstrate that the court should defer to the board's judgment under the business judgment rule, by proving the directors considered other courses of action, and the pros and cons of each, before embarking on a particular course of action.

The minutes can set out the documents and materials that were before the board when it made its decision, thus setting out the foundation for a "due diligence" defence.