THE DIRECTORS COLLEGE

APRIL 27, 2012

MINUTES OF BOARD MEETINGS

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By: HARTLEY R. NATHAN, Q.C.*

I. INTRODUCTION

Thank you Chris.

My topic is Minutes of Board Meetings. This will also include a discussion of note-taking of meetings. I have provided each of you with copies of my formal paper. I intend to cover its highlights and come some anecdotal comments and leave some time for questions at the end.

It has been said that a board meeting is an event where minutes are taken and hours are wasted. While hopefully hours are not being wasted at board meetings, it is imperative that minutes are indeed taken. Minutes are the records of the proceeding of a meeting. **Under corporate statutes, corporations are required to prepare and maintain minutes of meetings**. Although some may view minutes as an unnecessary administrative chore, one should avoid passing off the taking of minutes to an inexperienced clerical assistant. Indeed, the importance of taking accurate and concise minutes cannot be overstated.

Minutes are admissible in court and serve as *prima facie* proof that the matters contained within actually occurred unless the contrary is shown. We will talk about the James Hardie's case a little later. Minutes may serve as proof that the board granted to its officers the authority to take actions necessary for the business. In addition, a director who on the record dissents from a course of prohibited activity may shield himself from liability by relying on the minutes. In the context of litigation, minutes may form the basis of a "due diligence" defence or that the directors were entitled to rely on the "business judgment rule", by demonstrating that the directors considered alternative courses of action.

The writer is a senior partner in Minden Gross LLP. He wishes to thank Benjamin Radcliffe, Student-at-Law at Minden Gross LLP for his assistance in connection with the preparation of this paper.

Let me mention the business judgement rule.

Under the business judgment rule, directors' decisions are presumed to have been made on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Under this presumption, directors' decisions will not be disturbed unless a plaintiff is able to satisfy the burden of proof in showing that a board of directors has not met its duty of care or loyalty.

Conversely, minutes can be used to impugn directors' conduct. Directors who vote in favour of prohibited actions may be jointly and severally liable with the corporation. Furthermore, adverse parties may use minutes to show that insufficient steps were taken to establish a corporate defence.

II. 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.
A form of By-law for a CBCA corporation is attached as Appendix "A".

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)).

As mentioned, 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)).

INSPECTION OF MINUTES

Right of Inspection of Minutes

Under the OBCA corporate records must be available to any person lawfully entitled to examine the records, namely, the directors, shareholders and the auditors. The right of inspection of corporate records is broader for directors than for shareholders.

Subsection 144(1) of the OBCA (subsection 20(4) of the CBCA) provides that the directors may inspect minutes of meetings and resolutions of the shareholders, the board of directors and any committee thereof during a corporation's normal business hours. The statutory authority for shareholders' inspection rights is contained in section 145 of the OBCA (section 21 of the CBCA) which allows shareholders and his/her agents and legal representatives to examine articles, by-laws, unanimous shareholders' agreements and minutes of meetings and resolutions of shareholders. It is interesting to note that neither the OBCA nor the CBCA grant shareholders the right to inspect minutes and resolutions of directors. Section 120(6.1) allows shareholders of a CBCA corporation to inspect minutes of directors meetings where directors has declared a conflict of interest.

III. ROLE OF SECRETARY

1 Appointment of Secretary

Section 121(a) of the *CBCA* (*OBCA* s. 133(a)) provides that the directors may designate the offices of the corporation, appoint officers, specify their duties and delegate to them powers to manage the business and affairs of the corporation. **The secretary is an officer of the corporation.** Although there is no obligation that a corporation have a secretary, the by-laws will normally require or provide for such an appointment**. Section 6.1 of the Standard Form By-Law requires the board to appoint a secretary.**

In Canada, there are no qualifications in the corporate statutes to act as a corporate secretary. Who should act as a secretary will depend on the nature of the corporation. In private corporations the responsibilities of a secretary will often be much less extensive than those of a secretary of a public corporation. While lawyers are often suggested to act as a secretary as a result of their legal training, there is a risk the lawyer may be sued for negligence, and that any existing insurance policy may not cover the alleged breach.

Werner _____ case - discuss facts and D& O Insurance.

2 Role of the Secretary

Section 6.8 of the Standard Form By-law reads as follows:

> **The secretary shall attend all meetings of the directors, shareholders, and committees of the board and shall enter or cause to be entered in books kept for that purpose minutes of all proceedings at such meetings**; he shall give, or cause to be given, when instructed, notices required to be given to shareholders, directors, auditors and members of committees; he shall be the custodian of the stamp or mechanical device generally used for affixing the corporate seal of the Corporation and of all books, papers, records, documents and other instruments belonging to the Corporation; and he shall perform such other duties as may from time to time be prescribed by the board.

IV. HOW MINUTES ARE TO BE KEPT

1 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:

(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;

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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>

(e) Approximate number of members present;

(f) Establishment of a quorum; - **Stress**

(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. - **no obligation to sign minutes**

2 **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".

One does not know what may happen in a corporation. I will discuss the Harris case later; a portion of which is attached as Exhibit "B"

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[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>

J.B. Colburn, author of *The Efficient Corporate Secretary in Strategies for Success: Management Techniques for Small and New In-House Law Departments*[4] states the following:

> There are two schools of thought in respect of the minutes: the "bare-bones" type with little narrative and the more informative narrative style. There is no question that the "bare-bones" approach or meetings by resolution in writing is appropriate for private companies and wholly owned subsidiaries. However, with today's legal environment the "bare-bones" approach is not appropriate for public companies as minutes of that type do nothing to satisfy third parties that the board members are properly entitled to rely on the "business judgment rule" to protect themselves from potential liability. Minutes are prima facie evidence of what transpired, and while preferably not voluminous, should succinctly and accurately reflect the material aspects of the board's deliberations. The formal record should be a self-serving record of discussions and decisions on material issues. Merely recording formal resolutions is no longer sufficient or advisable.

3 **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 <u>not</u> reflect all questions asked and the responses given, nor as a general rule should they identify which director asked a particular question.**

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[4] (Canadian Bar Association: Ontario, June 1, 1987) at 9.

I would add no need to include: (f) motions that were withdrawn or defeated.

4 Regulatory Scrutiny

When the secretary prepares board meeting minutes for a company that operates in a regulated industry, the scrutiny of supervisory and tax regulators should be taken into consideration. Minutes of meetings are regularly reviewed by regulators to validate formal processes and assess the level of engagement by the board in carrying out its independent oversight role.

5 Protection of Directors

(a) Dissent Rights

Provision is made in corporate statutes allowing directors to register their objections to certain corporate proceedings in the minutes. If a dissent is recorded, a director who makes this disclosure may be exonerated from liability for certain corporate proceedings. The filing of a statutory dissent may also have a psychological effect on other directors, who may feel that if at least one director considers the proposed conduct questionable, they should perhaps reconsider the proposed action.

A director who wishes to dissent at a meeting should request at the meeting that the secretary have the minutes show the opposition to the resolutions and the reasons therefore if they are specified. The director may also wish to follow this statement with a letter to the secretary confirming the director's intention to dissent.

S. 123(1) CBCA, S. 123 OBCA

(b) Dissent of Absent Directors

A director who is not present at a meeting is deemed to have approved of any board resolutions passed at that meeting, unless he or she votes against it or objects in writing within seven days after first becoming aware of the resolution. As a result, directors should carefully review

minutes, to determine whether to object to any resolution and to ascertain the veracity and completeness of the minutes.

S. 118 CBCA; S. 123(3) CBCA

(c) **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[5].

IT IS UNNECESSARY IN MOST CASES FOR THE MINUTES TO ADDRESS WHICH DIRECTOR ASKED A PARTICULAR QUESTION OR HAD A PARTICULAR CONCERN. ULTIMATELY, THE BOARD MAKES A DECISION AS A BODY. IF A DIRECTOR WISHES TO DISSENT FROM A DECISION, THAT DISSENT SHOULD BE RECORDED. IF THE DISSENTING DIRECTOR REQUESTS IT, A CONCISE BASIS FOR THE DISSENT MAY BE ENTERED INTO THE MINUTES.

IN THE NEXT POST IN THIS SERIES, I WILL EXAMINE DRAFTING SUGGESTIONS TO AVOID UNNECESSARY PRODUCTION IN LITIGATION.

6 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.

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

7 Hints For Drafting Minutes

A writer[6] suggests the following five points to keep in mind when drafting minutes of meetings:

(a) **Use the "Front Page of the Newspaper" Test**. Assume that the minutes will be read by an adversary and could be accessible to the public generally. It is well-entrenched in Ontario that corporate minutes do not enjoy any special protection in litigation from production and discovery. Moreover the whole of board minutes may be produced even if only a portion is relevant to a dispute. Even outside of the litigation context board minutes may become producible, such as under a personal information access request under privacy legislation.

(b) **Keep the Purposes Front and Centre**. Board minutes should demonstrate that the directors have fulfilled their duties to (1) manage or supervise the management of the business and affairs of the corporation, (2) act in the best interests of the corporation, and (3) exercise due care. Under the "business judgment rule" courts are inclined to be deferential to business decisions of directors. Minutes should be able to demonstrate that these decisions have been made honestly, prudently, in good faith and on reasonable grounds.

(c) **Draft to Minimize Unnecessary Production**. One of the problems for the corporate secretary is that courts in Canada have not universally accepted the ability of a litigant to "redact" a document for relevance. As a result sensitive matters may be disclosed in the process of producing minutes. One option is to draft minutes in such a way there are both main minutes and supplementary minutes. If the main minutes have to be produced, there is the possibility that the sensitive information in the supplementary minutes will not have to be disclosed.

(d) **Draft to Protect Privilege and Confidentiality**. Well-drafted board minutes can assist litigators in protecting portions of the minutes from disclosure on the basis of privilege or confidentiality. The corporate secretary should be aware of the tests for solicitor-client privilege, litigation privilege, common law privilege and sealing order for confidential information.

(e) **Be Alert to Process Issues**. Process issues can undermine the corporation's attempt to protect board minutes. Retaining source notes or directors taking personal notes may result in alternative records of the meeting that can be used to challenge the accuracy, integrity and

[6] Per Tom Banks, *supra*, note 3.

> completeness of the board minutes. While routine destruction of notes is a possibility, corporations must be careful to avoid spoliation of evidence.

I would add:

Consider interpreting your minutes from the perspective of an adverse party in a lawsuit and then write your minutes accordingly.

While accuracy is important, you have to have flexibility in deciding what to include.

Finally, 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. **HOWEVER IT IS THE PRACTICE THAT FOLLOWING A MEETING THE MINUTES ARE THEN CIRCULATED AMONG THE DIRECTORS FOR REVIEW, AND THEN APPROVED AT THE NEXT MEETING. ANY CORRECTIONS NOTED AT THE SUBSEQUENT MEETING SHOULD BE MADE IN THE MINUTES UNDER REVIEW. IF AN ERROR IN THE SIGNED MINUTES IS SUBSEQUENTLY NOTED, THE CORRECT PROCEDURE IS TO PASS A RESOLUTION RESCINDING OR AMENDING THE PREVIOUS RESOLUTION APPROVING THE MINUTES.**

See Nathan's commentary to Rule 202 at p.152.

V. 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. As one prominent writer states:[7]

> Notes can be a double-edged sword. It is often prudent for there to be only one record of the deliberations of the board of directors – the minutes which are approved by the board and inserted with the company's corporate records. It may create problems if the official record is subsequently

[7] Carol Hansell: *Corporate Governance* (Toronto: Carswell, 2003) at 86-7.

> challenged by conflicting notes kept by individual directors. Accordingly, the company's corporate secretary will often suggest that the directors keep their own notes, if they wish, until the minutes have been approved and then destroy them.
>
> On the other hand, directors remember that while action is taken by the board as a whole, directors may incur liability on an individual basis. Accordingly, it may be important for individual directors to be able to prove that they raised certain objections or were unaware of a particular course of conduct being proposed by the company's management or by its controlling shareholders. Directors who do not have their own record of critical situations may find themselves unable to establish their due diligence defence.

However, notwithstanding the value to individual directors of their own notes to support their version of a particular set of events, directors should recognize that if litigation arises it is unlikely these notes will remain private. The informality of these notes can potentially be damaging, such as if one director's notes contains a doodle in the margins suggesting distraction or superficial discussion. Similarly, directors should exercise caution with respect to making negative written comments regarding other members of the board. Do not be critical of a director asking a question and not following up if a further follow up question should have been asked. **I can hear counsel in cross examination saying: "Why didn't you ask the follow up question?" The notes have to be produced if litigation ensues.**

A more complicated issue arises with the cross-appointment of in-house corporate counsel to the corporate secretary role. This is frequently the case, particularly in smaller organizations. However, this raises complications. For example, when in-house corporate counsel takes notes at the board meeting, it is not evident that these notes being taken in the role of a lawyer whom the board has asked to participate in or to monitor the meeting for the purpose of giving legal advice and, therefore, the notes are privileged. More likely, these notes are the notes of an officer of the corporation whose responsibility includes ensuring that minutes of the meeting are prepared and, therefore, without a claim to privilege.

The Corporate Director's Guidebook states[8]:

> **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. **NOTE: DESTRUCTION OF NOTES IS A SENSITIVE TOPIC.** 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.[9]

REFER TO HARRIS CASE AT APP. B

VI. THE *JAMES HARDIE* DECISION

The *James Hardie* decision in Australia [10]serves as a stark warning against the failure to keep complete and accurate minutes of meetings. James Hardie Industries Limited ("JHIL") was in the business of manufacturing and producing asbestos products through two wholly owned subsidiaries. In early 2001, **the board of directors created the Medical Research and Compensation Foundation. The purpose of this Foundation was to manage and pay out for asbestos claims against the James Hardie Group. Subsequent to the creation of this Foundation, a draft announcement was sent to the Australian Stock Exchange ("ASX") setting out the assets of the James Hardie Group and stating the Foundation had sufficient funds to meet all legitimate asbestos claims.** Similar announcements and press releases were made by certain officers

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[8] 6th edition reproduced in (2011) 66 The Business Lawyer 1007.

[9] **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.). See Appendix "B" for the relevant portion of the case.

[10] *ASIC v Macdonald* (No. 11) 2009 NSWSC 287, reversed in part by the New South Wales Court of Appeal as *Morley & Ors v. ASIC* [2010] NSWCA 331.

of JHIL. The Australian Securities & Investments Commissions ("ASIC') initiated civil proceedings against JHIL and its directors alleging that these statements were false and misleading. **One of the major issues in these proceeding was whether the members of the board had approved the release of the ASX Announcement, and would therefore be jointly and severally liable.** The facts relating to the board proceedings were as follows. On February 15, 2001 a board meeting was held by the directors of JHIL. The minutes of the board meeting were signed as a correct record by the chairman at the next meeting of the board on April 4, 2001. The minutes contained the following entry:

"**ASX Announcement**

The Chairman tabled an announcement to the ASX whereby the Company explains the effect of the resolutions passed at this meeting and the terms of the Foundation (ASX Announcement) as follows:

> Resolved that: (a) The company approves the ASX announcement; and (b) The ASX announcement be executed by the Company and sent to the ASX."

At trial, neither of the witnesses had an actual recollection of what had actually occurred in the meeting. Nonetheless the trial judge was satisfied, given the senior vice-president's usual practice, that a draft of the news release was taken to the meeting and distributed among the members of the board. **The trial judge also found that the draft news release must have been approved by the board given the strong correlation between the draft news release and key messages that were likely to have been stated by management. On appeal, the Court of Appeal held that ASIC had not discharged its burden in proving that the Board tabled and passed a resolution approving the ASX announcement.** While the Court agreed with the trial judge that the evidence showed the draft ASX announcement was brought to the meeting, and there was a discussion regarding the draft, the Court could not conclude that the discussion was anything more than a work in progress, with management to finalize and approve at a later date. With respect to the entry in the minutes regarding the ASX Announcement, the Court found their reliability was very much open to question. **Evidence was led that the minutes were substantially prepared in advance of the meeting by the solicitor on the basis of what the solicitor thought ahead of time would be appropriate to**

discuss. Furthermore the minutes contained substantial inaccuracies in other respects. Finally, the board members testified that they were unaware of the ASX Announcement entry in the minutes, and had either only superficially reviewed the minutes or not all. In the result, the non-executive directors were eventually relieved of liability. (my emphasis)

The importance of setting out in the minutes all material discussions by the directors cannot be understated. Simply stating that a resolution has been passed will not explain the basis of the decision and on what material the decision has been premised on. Had the minutes of the meeting been more thorough, it would have been readily apparent whether the draft ASX announcement had been tabled and approved.

If the directors of JHIL had reviewed the minutes, they would have noticed the ASX Announcement entry, and could have amended the minutes before approving them, thereby avoiding the entire litigation.

Strategy Tip

Several lessons can be learned from the decision.

- **Minutes should be critically and carefully reviewed by directors before being approved;**
- **Directors should be more inclined to ensure that the bases of their decisions at board meetings on crucial matters are understood and noted in the minutes;**
- **Management should be clear as to whether it is seeking the directors' approval or providing documents for information where no immediate action is required;**

The case also confirms that the fact of an event being recorded in minutes of a boarad meeting will be of no evidentiary value where, on the whole of the evidence, the opposite is found to be true.

VII. CONCLUSIONS

In the context of private companies, where directors will not have to face shareholder scrutiny in hindsight, “bare-bones” minutes may be adequate. However, as we have seen from the James Hardie decision, directors of public companies do not have that luxury. Instead, directors of public companies may be called upon to justify certain decisions, or to show they considered other alternatives.

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. Similarly 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.

Rather than treating minutes as a necessary evil prescribed by statute, it is up to directors to use minutes effectively and make minutes their best friends.