Making Minutes Matter

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Introduction

While the most appropriate style for minute taking (i.e., "detailed" v. "minimalist") is often debated, from a legal perspective, there is no debate on the importance of boards adopting an effective minute-taking process. Properly prepared minutes provide board members with protection against certain liabilities by providing a written record for evidentiary purposes, while at the same time serving as a guideline in implementing decisions and providing direction to management.

As the director liability climate worsens, it is important to consider best practices in keeping minutes as the official record of the actions of any board. Although s.20 of the *Canada Business Corporations Act*[2] imposes a statutory requirement for corporations to take and maintain minutes of board and committee meetings, it provides neither examples nor detailed requirements for these minutes.

The Courts have stressed the importance of keeping accurate and complete minutes. As stated by the Court in *Re Liverpool Household Stores Ass'n Ltd.*:

> "Directors ought to place on record, either in formal minutes or otherwise, the purport and effect of their deliberations and conclusions, and... if they do this insufficiently, or inaccurately, they cannot reasonably complain of inferences different from those which they allege to be right." [3]

Well-kept minutes not only assist in the effective and efficient operation of a corporation, they can protect directors and management from liability.

The Role of Minutes

The fundamental role of minutes is to provide an official record of the actions and deliberations of a board or committee meeting. As such, minutes not only inform management and the board about the matters considered, the actions taken or approved, and other decisions the board makes, but they can also make the board more or less vulnerable to potential legal action. Well-kept minutes, reflecting a careful deliberative process, can help prove that directors have met their fiduciary obligations, while poorly kept minutes deny the board this valuable resource from which to defend their conduct and decision making process.

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[1] Karen Wiwchar and David Weyant gratefully acknowledge the assistance of Kristin Long who prepared this paper. Any errors are the responsibility of Karen Wiwchar and David Weyant.
[2] *Canada Business Corporations Act*, RSC 1985, c. C-44 ("CBCA").
[3] *Re Liverpool Household Stores Ass'n Ltd.* (1890), 59 Ch. D. 616, at 619, as seen in H.R. Nathan and M.E. Voore, *Corporate Meetings – Law and Practice*, 2nd ed (Toronto: Thomson Carswell, 2010) ("*Corporate Meetings*").

Simply put, minutes have two main purposes – to protect and to inform.

TO PROTECT

Minutes Can Help

The CBCA provides the overriding rule respecting the obligations of directors. It states the following:

> "Every director... of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."[4]

Furthermore, case law has made it increasingly clear that if a director does not discharge his or her fiduciary duties or general duty of care, that director can be found liable.[5]

To satisfy the duty of care imposed on directors, a director must conduct the appropriate level of due diligence in exercising his or her judgement. Since minutes are essentially the official record of the proceedings of a board meeting, they are legally crucial in demonstrating how a director exercises this judgement, and therefore, fulfills his or her duty of care.

Courts often look to minutes as one of the most reliable sources for evaluating whether directors met this duty of care and related fiduciary obligations. In fact, as seen in the Ontario *Business Corporations Act*[6] and the Alberta *Business Corporations Act*[7], minutes are considered to be *prima facie* evidence of what actions an entity actually took. The minutes may be displaced by other evidence, but the burden of proof is on the person challenging their accuracy. [8]

Being *prima facie* evidence, minutes are often an organization's first line of defence. When a plaintiff considers bringing a claim for breach of fiduciary duty against the board, complete minutes reflecting a sound deliberative process can often stop the litigation before it starts. On the other hand, inefficient minutes can result in lengthy litigation to determine whether the board fulfilled its fiduciary obligations and duty of care.

The Delaware Court in *Smith v. Van Gorkom* showed us that if the board instructs management to take certain actions and management does not follow these instructions, the minutes reflecting this request could protect the board from liability.[9] In this case, the directors testified that they instructed management to add various protection provisions to a merger agreement. There was no record of these instructions in the minutes of the meeting in which the board approved the merger. No other

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[4] *Supra*, footnote 1, s.122(1).
[5] *Smith v. Van Gorkom* (1985), 488 A. 2d 858.
[6] *Business Corporations Act* (Ontario), RSO 1990, c. B.16 ("OBCA"), s.266(2).
[7] *Business Corporations Act* (Alberta), RSA 2000, c. B.9 ("ABCA"), s.260(2).
[8] *Supra*, footnote 2.
[9] *Supra*, footnote 4.

documentary evidence of these instructions was produced, and liability was imposed on the directors. *Corporate Meetings* summarized this case as follows:

> "Clearly, if the board instructs the officers to take certain actions and the officers do not do it, the board members must have the record available to protect them. The way to do so is to ensure that the minutes reflect that such instructions were given."[10]

It is important to note that minutes cannot reflect that directors have acted legally, honestly and in good faith, when in fact they have not. However, when directors do act in good faith, with diligence, it is very important that the minutes demonstrate this.

Importance of Reflecting the Deliberative Process

Although minutes should reflect the specific decisions made at the meeting (whether they involved a decision to take action or not to take action), the consideration that went into the decisions should also be reflected. The decision-making process taken by the board or the committee is the most important content of the minutes from a legal standpoint, since it demonstrates that the board exercised due care when making a decision. Reflecting in the minutes that the directors discussed the advantages and disadvantages of a specific action invokes the Business Judgement Rule.[11] Under the Business Judgement Rule, directors of a corporation are protected from liability, so long as their decisions are made in good faith and with reasonable skill and prudence. Courts are slow to "second guess" the decision of directors who can demonstrate they acted prudently and on a reasonably informed basis.[12]

The Delaware Court in *Re Walt Disney Company Derivative Litigation*[13] demonstrated that Courts give substantial weight to the contents of minutes when evaluating whether director fiduciary duties have been met when making business decisions. In this case, the minutes of the board and compensation committee of Disney were evidence of the quality of the deliberative process the directors took when approving Disney executive Michael Ovitz's employment package. When Disney's board met to discuss the hiring of Mr. Ovitz, the minutes did not reflect: (i) any presentations or reports regarding the terms of the employment agreement, (ii) any questions raised by any board members or any discussion amongst board members, or (iii) the employment agreement being authorized. Only the hiring of Mr. Ovitz was approved. This case demonstrates that even though the minutes reflected the approval of the hiring of Mr. Ovitz, the deliberative process of the directors needed to be reflected in order for them to be absolved from liability. Ultimately, the board was not found to have been in breach of their fiduciary responsibilities, but a lengthy, expensive law suit could have been avoided if the minutes spoke to the decision-making process the directors took in hiring Mr. Ovitz.

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[10] *Supra*, footnote 2 at 4-10.

[11] *Supra*, footnote 2.

[12] *People Department Stores Inc. (Trustee of) v. Wise* [2004] 3. S.C.R. 461.

[13] *Re The Walt Disney Company Derivative Litigation,* No. 411, 2005 ("*Walt Disney Company*").

Where appropriate, minutes should include the amount of time devoted to each topic. If the minutes show that the directors deliberated over a decision for a lengthy period of time, this would consequently help to discharge their duties. Consider referring to the actual amount of time spent on a topic, or saying phrases such as, "the board then discussed this matter at length". However, if the board did not in fact discuss the decision at hand for a substantial amount of time, recording the exact time spent on the decision can do more harm than good.

Importance of Reflecting the Exercise of Due Diligence

In order to satisfy their fiduciary responsibilities, directors must take steps to become fully informed before making a decision. The minutes can be instrumental in showing that the directors were fully informed and acted diligently.

In fact, the time a board devotes to an issue or the depth of discussion about that issue may not be the key to understanding whether the board took due care in making a decision. Sometimes, the quality of the information provided and presented to the board is so detailed that the board does not have any questions or a discussion does not result. In these cases, the minutes should reflect the information and specific materials presented to the board and any documents that were provided to the directors in advance of the meeting. The title and date of such materials or documents should be reflected accurately in the minutes. Furthermore, it is important that the minutes demonstrate that the directors had sufficient time to review documents before acting on them.

It is common for directors to rely on professional advisors (legal, tax, accounting or other professionals) when becoming informed and making decisions. The participation by these advisors should be reflected in the minutes, as well as whether or not the board relied upon such advisor's advice. Reliance can often be demonstrated with a simple statement that the board "took action in reliance upon (or having considered) the advice of...". However, when relying on an independent advisor, it is crucial that the board has reviewed the expert's qualifications and disclosure of interests. The decision must clearly be that of the board itself, not of any advisors. This should also be reflected in the minutes.

Minutes Can Hurt

Cases such as *Walt Disney Company* demonstrate that poorly written minutes can further expose directors to legal risk.[14]

While minutes must be sufficiently detailed to reflect the decisions made and the deliberations surrounding those decisions, for evidentiary purposes, minutes should not be too detailed or be a "transcript" of what occurred. If minutes are so detailed that every statement is recorded, they can be used as evidence of what was NOT considered by the board, and therefore, create undue liability upon a board. Minutes do not have to be overly detailed in order to reflect that a board considered relevant issues before making a decision.

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[14] *Ibid.*

It is important to note that it is not necessary or sometimes even advisable to reflect when individual directors dissented from an action or decision of the board. As seen in the CBCA, a director who is present at a board or committee meeting is deemed to have consented to any resolution passed or action taken at the meeting.[15] Singling out a director makes that person a potential target and erodes the integrity of the board. However, since director liability has recently become a cause for concern, a director's wish for his or her dissented vote to be reflected in the minutes should be accommodated.[16] Either way, after the board has made its decision, it must always present a united position on such decision, including the dissenters.

The other circumstance where a director should be singled out in the minutes is if that director discloses a conflict of interest, whether or not the nature of the conflict of interest requires that the director refrain from participating in a discussion or voting on the resolution affected by the conflict of interest. The CBCA provides a legislative requirement that a director disclose, either in writing or by requesting to have it entered in the minutes, the nature and extent of any conflict of interest that he or she may have.[17]

It is also important to note that seemingly small errors in the minutes, such as indicating the absence of a present director, can call the entire record into question. In *Walt Disney Company*, the board failed to ensure that the minutes were correct. Among other things, the minutes were incorrect in reflecting who attended the meeting. Incorrect or sloppy minutes, even about non-substantive items, increases the risk that a court will not be comfortable relying upon them as an accurate record. Minutes should be carefully reviewed and edited to eradicate these mistakes.

Discussions subject to Solicitor-Client privilege should not be included in the minutes, as these communications could expose directors to undue legal risk and result in a waiver of privilege. Instead, the minutes should indicate that the directors participated in privileged discussion with legal counsel, and only the general subject matter of the discussion should be reflected.

TO INFORM

As well as serving to protect the board from undue liability, minutes are important for informational purposes, as they preserve an official record of the board's decisions. Each recorded action and approval or authorization of such action provides reference and guidance in the future to management (such as determining which officers are authorized to execute various documents). Minutes are often also used to reduce misunderstandings as to the intent of the board.

Furthermore, minutes provide information that the basic procedural requirements of a meeting, such as quorum being met, are satisfied. Related to this, minutes should record all of the essential elements of the meeting. They should state the date, time and place of the meeting, whether the meeting is a

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[15] *Supra*, footnote 1, s.123(1).
[16] *Supra*, footnote 1, s.123(1)(a).
[17] *Supra*, footnote 1, s.120(1).

regular or special meeting, the names of attendees and those absent, and the names of presenters and other participants.

Summary of What to Include in the Minutes

- instructions from the board to management
- the amount of time devoted to each item (where appropriate)
- include the board's reliance on reports by management
- references to briefing materials distributed in advance
- any information provided or presented to the board at the meeting
- the board's reliance on professional advisors
- procedural requirements (date and location, type of meeting (i.e., regular, special), identification of directors present (whether in-person or by teleconference) and absent, beginning and ending time of meeting, whether quorum was met, names of presenters or other participants)
- description of any conflicts of interest disclosed by any director in accordance with statutory requirements

Summary of What Not to Include

- privileged discussions
- names of dissenting board members (unless such board member requests his or her name to be inserted in the record)

Best Practices

Document Retention

Since the minutes are the official record of a board meeting, minutes should be the *only* record of the meeting. Notes of meeting attendees, including the Corporate Secretary, should be destroyed once the minutes are approved. For this same reason, recording meetings as a means of facilitating the drafting of minutes should be avoided.

The Review Process

After the meeting, minutes should be drafted and circulated to directors for review as soon as possible. This minimizes potential uncertainty over what occurred. Each director must then make a *bona fide* effort to promptly review and approve the minutes. This may require a change in practice by many

directors. Also, excessive, substantive edits from management should be discouraged to ensure that the record is accurate.

Seeking Clarification

As difficult as it may be to do so, the Corporate Secretary may need to seek clarification with respect to the discussion during a board meeting. This should be encouraged in circumstances where the clarification is necessary to provide an accurate record of the meeting.

Committee Minutes

Walt Disney Company demonstrates that the minutes of committee meetings are just as important as those of full board meetings, and therefore, should be given the same amount of attention as full board meetings. [18]

Amendment to Minutes at the Meeting

If minutes have been signed and a subsequent error is noticed, best practice is for the board to pass a resolution amending the previous resolution approving the minutes. Signed minutes should not otherwise be amended.[19] Many boards find it useful to delegate to the Corporate Secretary the ability to make "housekeeping" changes to minutes, even after they have been signed. These changes include spelling errors or similar non-substantive changes, but never substantive changes.

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[18] *Supra*, footnote 12.

[19] *Supra*, footnote 2.

ATTACHMENT 1

Minute Style Options

Resolution / Short Form

Pink Linen Procurement

UPON MOTION duly proposed and seconded, with the Board Vice Chair abstaining and Board Member 9 opposed, it was resolved that:

1. The President and Chief Executive Officer of Company X (the **"President and CEO"**) or his delegate Officer be and is hereby authorized to select, through a competitive process, a supplier of new pink linens for all Company X facilities, and to enter into a contract with that supplier for the purchase of such linens in a value not to exceed $40 million, on terms and conditions that he deems advisable.

2. The President and CEO or his delegate be and is hereby authorized to execute and deliver on behalf of Company X such agreements, documents and other writings and to take such actions as he considers necessary or desirable to give effect to the foregoing resolutions.

Narrative / Long Form

Pink Linen Procurement

The next item of business was pink linen procurement.

The Board Vice Chair declared a conflict as a foundation with which he is involved has sponsored some of the research regarding pink linens.

The President and Chief Executive Officer of Company X (the **"President and CEO"**) introduced this matter and confirmed that the Board Members had received the materials provided in the Board package mailed out on [date], including the Board Report, the Board Summary, and the draft Board Resolutions. The President and CEO advised that it was desirable to replace all of the current hospital bed linen used in Company X facilities with pink bed linens. He advised that this was recommended in response to public feedback and to take advantage of the benefits associated with such linens. He advised that those benefits include both clinical and financial benefits. He referred to clinical studies completed by medical and workplace specialists which indicated a number of clinical and staff morale benefits linked to the use of pink bed sheets. He then outlined the anticipated cost savings based on shorter hospital stays and increased staff productivity. He advised that the total cost of purchasing new

pink linens, anticipated to be approximately $35 million, would be offset by the savings within six months of implementation.

Board Member 1 asked whether the option of dying the current pink sheets would be viable if the dying process could be outsourced to avoid the requirement of purchasing a dying facility, and done in stages to avoid the necessity of acquiring linens to be used while the old ones were being dyed.

The President and CEO confirmed that management had considered those options and advised that no providers were interested in an outsourcing contract. He advised that no one was "dying for our business!" Everyone laughed. The President and CEO added that the process of dying the sheets weakens the fabric and the existing linen would need to be replaced within three months. There ensued a seventeen minute discussion in which Board Members 2, 5 & 7 participated.

Board Member 4 asked why the pink sheets were not being phased in as old sheets were required to be replaced in any event.

The President and CEO advised that management had also considered that option but that it would not provide the same cost savings due to the lack of bulk purchasing and the necessity to have the pink linens washed separately. There ensued a fourteen minute discussion in which Board Members 3, 6 & 9 participated.

Someone asked whether we could just throw a red shirt in with the regular linens and hope that they all came out pink, as they do at home. There was no further discussion on that point.

Board Member 7 explained why beds sheets were traditionally colour-coded as they currently are, and confirmed that recent journal articles have pointed to the shorter healing times for patients using the pink bed sheets. There ensued a five minute discussion in which Board Members 5 & 8 participated.

Board Member 4 inquired as to the status of the contract with the existing linen supplier and whether our actions in procuring pink linen elsewhere would be a breach of that contract.

The President and CEO advised that there would only be a breach if the existing supplier was not successful in the competitive process. If that were to happen, the President and CEO advised, we would negotiate a break fee with that supplier.

A privileged discussion with Legal Counsel ensued after which Legal Counsel left the meeting.

Board Member 9 advised that as there was no urgency to the matter and some questions still remained unanswered, he could not support the resolution.

The Board Chair asked if there were any other questions or comments. There were none. The Board Chair thanked management for the comprehensive report and indicated that he looked forward to a future report indicating the success of the linen replacement.

Legal Counsel returned to the meeting.

UPON MOTION duly proposed by Board Member 2, seconded by Board Member 5, with Board Vice Chair abstaining and Board Member 9 opposed, it was resolved that:

1. The President and CEO or his delegate Officer be and is hereby authorized to select, through a competitive process, a supplier of new pink linens for all Company X facilities, and to enter into a contract with that supplier for the purchase of such linens in a value not to exceed $40 million, on terms and conditions that he deems advisable.

2. The President and CEO or his delegate be and is hereby authorized to execute and deliver on behalf of Company X such agreements, documents and other writings and to take such actions as he considers necessary or desirable to give effect to the foregoing resolutions.

Hybrid / "Goldilocks" Form

Pink Linen Procurement

The Board reviewed the materials provided to it, including the recommendation of the Audit and Finance Committee and the Human Resources Committee and the Quality and Safety Committee. Specific references were made to Board Report ABC, included in the Board package.

Following a 45-minute discussion which included the Board's consideration of various alternatives and management's confirmation that the alternatives were explored and the associated estimated costs and savings set out in the Board Report were verified,

UPON MOTION duly proposed, seconded and carried, it was resolved that:

1. The President and Chief Executive Officer of Company X (the **"President and CEO"**) or his delegate Officer be and is hereby authorized to select, through a competitive process, a supplier of new pink linens for all Company X facilities, and to enter into a contract with that supplier for the purchase of such linens in a value not to exceed $40 million, on terms and conditions that he deems advisable.

2. The President and CEO or his delegate be and is hereby authorized to execute and deliver on behalf of Company X such agreements, documents and other writings and to take such actions as he considers necessary or desirable to give effect to the foregoing resolutions.

The Board Vice Chair excused himself from participating in both the discussion of, and vote upon, the matter. Board Member 9 voted against the motion.