

Corporate Governance & Best Practices

Taking Minutes at Board of Directors' Meetings

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Best Practices – where to find answers?

- Bylaws Rule!
- Case law – requires someone to consolidate comments
- Books - Nathan's Company Meetings including Rules of Order, 10th Edition, 2012, CCH Canadian Limited, Toronto.

Best Practices – what have we learned?

- There is no statutory requirement that Boards must take minutes.
- But there is a statutory obligation on a Corporation to maintain copies of any minutes of meetings or resolutions of directors and shareholders.

(see s. 20 SBCA and CBCA)

- If taken, there is no statutory format that minutes are required to follow.

Best Practices – so why take minutes?

- Taking of proper minutes of board meetings is important for several reasons:
 - Facilitates good corporate governance
 - Provides continuity and historical record
 - Provides record of what was reviewed, presented to the board, agreed to or authorized
 - Most importantly, proper minutes provides evidence that the board has (or has not) met its fiduciary obligation to stakeholders.
- Minutes are evidence only that a meeting was held and that the subject matter in the minutes was discussed. (See *Brandt Investments Ltd. v. Keepright Inc.* (1987), 60 O.R. (2d) 73; aff'd (1991), 3 O.R. (3d) 289 (ON CA))

Best Practices – should minutes be signed?

- No statutory requirement
- Best practices suggest... yes
- Why?
- By whom?
- When?

Best Practices – what if there is disagreement?

- Dealing with errors and omissions
- Preserving integrity of the corporate record
- Dealing with differences of opinion/recall

Best Practices – Content Requirements

- Again, no statutory guidance
- Best Practices suggest:
 - Date, time and place of meeting
 - Who was in attendance (Board and guests)
 - Who was not in attendance (of those whose attendance was expected)
 - Quorum requirement having been met
 - Approval of prior minutes (if applicable)

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Best Practices – Content Continued

- Highlights of any discussions or reports received by the board.
 - General Rule: not necessary to identify each speaker or the text of their questions verbatim
 - Exceptions to the General Rule.
- Full text of any resolutions passed
 - Unanimous? Abstentions? (s. 118 SBCA/123 CBCA)
- Disclosure of any declared conflicts (see s. 115 SBCA/ 120 CBCA)

Who is entitled to review the minutes?

- Finally, some statutory guidance
- Any director and the Corporation's auditor are entitled to review the minutes of any meeting of the directors (see s. 20(4) SBCA and CBCA and 164 SBCA/170 CBCA)
- Any interested person (including directors, shareholders, the auditor and creditors of the company) are entitled to review the minutes of any meeting of the shareholders (see s. 21 SBCA and CBCA)
- Shareholders are not generally able to review or have access to the minutes of the directors meetings (but see s. 120(6.1) CBCA re access to disclosure of conflict)

What about special committee or *in camera* meetings?

- Same rules apply – although for *in camera* meetings there is typically discussion but no minutes kept as access and disclosure can be an issue.
- The chairman of that special committee or *in camera* meeting should, as one of the first orders of business, determine whether formal minutes of the ensuing discussion are to be kept.

Should Board members keep their own notes?

- Yes – for the reasons given previously
- Notes are just evidence of what transpired but do not necessarily represent the truth of what transpired at the meeting
- Personal notes are a reflection of the author's perceptions of what occurred and was agreed to
- Keeping notes allows author to refresh their own memory

Best Practices – agenda items

- person calling the meeting sets the agenda
- To meet due diligence and fiduciary obligations typical Board meetings generally include reports on:
 - Company Performance – comparison to budget or projections
 - Current financial position – identification of known, contingent and perceived liabilities (outside the ordinary course)
 - Material changes to business since last meeting
 - Confirmation that PST, source deductions, corporate income tax and GST have been remitted and/or provided for

Who can call a Board meeting?

- Subject to the Act, the Bylaws govern when and where
- Typically the Chairman of the Board or President or CEO calls meeting, but the Court can order meeting too
- Minimum notice requirement typically set out in Bylaws (s. 99(2) SBCA and 104(3) CBCA speaks of 5 days' notice for organizational meeting only)
- Meetings can be attended by conference call or other electronic means that permit all members in attendance to freely and instantaneously communicate with each other (s. 109(9) SBCA and 114(9) CBCA)
- A written consent resolution may suffice – but must be signed by all directors entitled to vote on the matter to be valid (see s. 112 SBCA and 117 CBCA)

Questions?

- For further information, contact:

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