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In this edited collection of blog posts, Fraser Milner Casgrain LLP Partner, [Timothy M. Banks](#), discusses his take on writing board minutes from the perspective of litigation risk-management.

Board Minutes for Peace of Mind: The Corporate Secretary's Herculean Task

Board meeting minutes are required by nearly all business corporation statutes in Canada. More importantly, maintaining board minutes is prudent. Failing to accurately record the board's deliberations with appropriate detail may lead to adverse inferences regarding whether directors have fulfilled their duties. Nevertheless, there is a natural 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. And, of course, drafting well-written and well-structured board minutes is time consuming!

In my blog posts on this topic, I outlined five litigation-driven suggestions that the corporate secretary might consider when preparing minutes. In summary, those suggestions are:

1. **Use the “Front Page of the Newspaper” Test.** There is no substitute for writing board minutes with a critical eye. The corporate secretary should not assume that the minutes will remain confidential if litigation ensues. Assume that the minutes will be read by an adversary and could be accessible to the public generally. This seems obvious but is often forgotten.
2. **Keep the Purposes Front and Centre.** Board minutes are a key record of the deliberations, decisions and resolutions of the directors. But more than that, they are documentary evidence of whether the directors have acted honestly,

prudently and in good faith. Board minutes should demonstrate that the directors acted in the best interests of the company, made an informed decision in an independent fashion, had reasonable grounds for the decision, and conducted a reasonable analysis of the situation.

3. Draft to Minimize Unnecessary Production.

Even though only one part of a minute of a meeting may be relevant in litigation, there is a good chance that the entirety of the board minute will be produced as a “document”. As I’ll discuss in upcoming posts, the flexibility provided by the business corporation statutes means that there are a number of strategies the corporate secretary can take to ensure that sensitive deliberations are recorded in separate documents.

4. Draft to Protect Privilege and Confidentiality.

Well-drafted board minutes can assist litigators in seeking to protect portions of minutes from disclosure on the basis of privilege or confidentiality. It is important that the minutes reflect the criteria necessary for privilege or confidentiality. The corporate secretary should be aware of the test for solicitor-client privilege, litigation privilege, common law privilege and sealing orders for confidential information (each of which will be discussed in upcoming posts) and reflect those elements in the minutes.

5. Be Alert to Process Issues. Process issues can undermine the corporation’s attempt to protect board minutes. The cross-appointment of in-house counsel to the office of corporate secretary may result in the notes of counsel not being considered privileged. 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 completeness of the board minutes. As discussed in our article, routine destruction is a possibility but the corporation and its directors must be careful to avoid spoliation of evidence if litigation is anticipated.

So, why a "Herculean Task"? Let's face it; the preparation of Board minutes is often a thankless job, more in the nature of a penitence for the corporate secretary. Perfection (if it exists) must give way to pragmatism or the job will never get done. The purpose of this series is to throw a fresh gloss on the task to encourage the corporate secretary that however thankless this task, it is very important.

The “Front Page of the Newspaper” Test

In this post, I discussed the overarching point when thinking about board minutes from a litigation perspective: the “Front Page of the Newspaper Test”. But first, let’s set the legal scene.

The Legal Scene

The *Canada Business Corporations Act* (“CBCA”) and, with one exception, all other business corporation statutes in Canada, prescribe that corporations maintain board minutes as part of the corporation’s records.

Maintaining minutes of board meetings would be prudent even if they were not statutorily required. Failing to accurately record the board’s deliberations in appropriate detail may lead to adverse inferences regarding whether directors have fulfilled their duties. Nevertheless, as noted before, there is a natural 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.

The “Front Page of the Newspaper” Test

It goes without saying that board minutes must be accurate. However, in considering the level of detail, the format of the minutes and the words chosen to describe the business of the meeting, the corporate secretary should consider how the board minutes would look on the front page of the newspaper.

The primary audience of board minutes is normally the directors, subsequent directors appointed to the board, and third parties conducting minute book reviews in connection with major transactions.

In the ordinary course, shareholders and creditors do not have an automatic right to inspect board minutes. Neither the CBCA nor any other Canadian business corporation statute requires a company to provide access to board minutes to shareholders, creditors or non-officer or non-director stakeholders. British Columbia is perhaps unique in that the British Columbia *Business Corporations Act* provides that the articles of the corporation might allow shareholders or other persons a right of access to board minutes.

However, from a litigation perspective, the primary audience will be the adversary in the litigation and, most importantly, the trier of fact in any judicial or arbitral proceeding. If litigation is commenced, board minutes are difficult to protect from disclosure if the minutes contain information that is relevant to the dispute. Canadian courts, particularly in Ontario, may be reluctant to accede to claims of confidentiality. It is well-entrenched in Ontario, for example, that corporate minutes do not enjoy any special protection in litigation from production and discovery. Moreover, and perhaps most problematic, some judges have ruled that redaction (deletion) of portions of documents, including minutes, for relevance is not permitted. This may mean that the whole of the board minute must be produced even if only a portion of it is relevant to the dispute.

Even outside of the litigation context, there are situations where board minutes may become producible. For example, board minutes might become producible under a personal information access request under privacy legislation to the extent that the board minute contains information about the requester.

In later posts in this series collected here, I discussed how, in very limited cases, it may be

possible to protect privileged or highly confidential commercial information and strategies to limit what is produced.

However, in many cases it may be very difficult to protect the minutes from public disclosure. If entered into the court record, they will be there for every competitor or interested person to read and to copy. Therefore, the “front page of the newspaper” test is the most prudent starting point when drafting and editing board minutes.

Keep the Purposes Front and Centre

In this post, I discussed the purposes of board minutes and then set out some suggestions for keeping those purposes in the foreground when drafting these important corporate records.

The Purposes

The primary purpose of board minutes is to function as a corporate record of the deliberations, decisions and resolutions of the directors. However, board minutes are not simply of relevance to the archivist or corporate counsel conducting a minute book review. From a litigation perspective, a board minute is documentary evidence of whether and how the directors 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. As one judge has said, directors wishing to defend themselves against allegations of a breach of duty ought to be prepared to document their deliberations or conclusions. If directors do not do so sufficiently and accurately, they must accept that adverse inferences may be drawn against them.

Canadian courts are predisposed to be deferential to business decisions of directors. The so-called “business judgment rule” operates to shield the decisions of directors from microscopic examination with the benefit of perfect hindsight. However, the decisions of directors are still examined. In order for directors to claim the benefit of the business judgment rule, they

should be able to demonstrate that their decisions have been made honestly, prudently, in good faith and on reasonable grounds.

Board minutes are a crucial contemporary record of the board's decision-making process. If drafted appropriately, board minutes can be powerful documentary evidence that a decision was made prudently and on reasonable grounds and in the context of a sound process. Accordingly, board minutes should provide compelling documentary evidence to support the application of the business judgment rule. The minutes should demonstrate that:

- The directors exercised their judgment in an informed and independent fashion.
- The directors engaged in a process of analysis of the situation.
- The directors acted with reasonable grounds to believe the decision was in the best interests of the company.

How the Purposes affect the Content

Appropriately drafted board minutes will keep front and centre the purposes of (1) being an accurate and reliable corporate record and (2) establishing the prerequisites to the "business judgment rule". To do this, board minutes should set out clearly the problem on which the board was deliberating, the range of options that the board concluded were reasonably available, the advice obtained from financial and legal advisors appropriately retained and consulted in the circumstances, information obtained from management, and consideration of any conflicts of interest.

Narrative detail is important in minutes to provide context for the directors' decisions. However, this does not mean creating a verbatim transcript of what the directors discussed. The narrative detail should be a high-level summary of the matters discussed, with a focus on recording the board's process, including such elements as the length of time, extent of consultations and information

received by the directors during and prior to the board meeting. It is not sufficient to record that the board "had a detailed and lengthy discussion of the issues involved". These types of minutes do nothing to facilitate record-keeping or to establish objective evidence of the board's prudence and diligence.

Instead, board minutes with appropriate detail will provide a reader (who was not in attendance and who is unfamiliar with the activities of the board) with the following information:

- The origin of any important issues before the board, if that is not clear from the minutes of previous meetings.
- The substance of the matters discussed with respect to those issues and a summary of any discussions that occurred informally between meetings.
- Any questions asked of management, external consultants, advisors and experts, and the responses given by them.
- The concerns raised by board members and the responses to those concerns.
- The factors taken into account in arriving at the decision made by the board.
- The specific decision made by the board and the text of any resolution.
- Formalities with respect to the decision or resolution, such as who moved a motion and whether the vote was unanimous.
- Any conditions, limitations or qualifications made with respect to the decision or to the power given to management to implement the decision.
- Whether and when management was expected to report to the board with respect to the implementation of the decision.
- The approximate length of time spent discussing the matter.

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.

Draft to Minimize Unnecessary Production

In this post, I expanded on the issue of board minutes in litigation by discussing how the corporate secretary might assist litigation counsel in limiting production of board minutes.

Discovery and Confidentiality

The discovery process during litigation is a major intrusion on (1) a corporation's ability to protect the confidentiality of its data (and that of other individuals or entities with which it has contracted) and (2) the corporation's ability to ensure orderly disclosure to the market in accordance with good business judgment and with securities laws.

For example, only one part of a board minute for a meeting may be relevant to litigation. However, very often the whole document must be produced. As a result, sensitive or embarrassing information on unrelated matters may end up disclosed even though they are irrelevant to the issues in the litigation.

For example, minutes of a mining company might, for example, contain references to confidential information regarding labour relations, cost estimates, drilling results, community, aboriginal and governmental negotiations, reports on permitting, and discussions with potential suitors. In addition, board minutes may refer to confidential information obtained from another company under a confidentiality agreement.

Much of the foregoing information may be irrelevant to the actual issues involved in the litigation. It may also be misleading without the

context of other documents, prior board minutes or subsequent board minutes. The company may rely on a deemed undertaking of the other party not to use the information for any purpose other than the litigation. However, there will be no restriction on the other party (short of court order or mutual consent) from filing the document as an exhibit in the legal proceedings. If that should occur, the board minute will be available for anyone to review.

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. The process of obliterating a document to omit privilege parts (redacting) is well-accepted. However, the same process of obliterating sensitive but irrelevant material has not become sufficiently accepted that the corporate secretary can rely on the availability of that practice when drafting board minutes.

Form of Board Minutes

The good news for the corporate secretary of a Canadian company is that there is significant legislative latitude with respect to the form of board minutes. This allows for some creativity in severing minutes to minimize production of irrelevant information when dealing with sensitive issues.

The [Canada Business Corporations Act](#), for example, provides that minutes, like all corporate records, may be maintained "in a bound or loose-leaf form or in a photographic film form, or may be entered or recorded by any system of mechanical or electronic data processing or any other information storage device that is capable of reproducing any required information in intelligible written form within a reasonable time" (s. 22(1)). Apart from that broad requirement, the corporation is free to determine the structure and form of its board minutes.

The Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick,

Newfoundland, Yukon, Northwest Territories, and Nunavut provisions are either identical or substantially the same. Nova Scotia limits the form of board minutes to bound or loose-leaf documents. Legislation in Prince Edward Island provides no guidance on the form of the minutes although reference to the books of the company suggests a printed form. The Québec [Business Corporations Act](#) requires that the “corporation must be able to reproduce, in intelligible form and within a reasonable time” the information contained in the records it is required to maintain under the statute (s. 37).

Accordingly, there is some latitude for corporate secretaries to devise record-keeping practices to ensure that sensitive, non-routine deliberations are recorded in separate stand-alone documents. One way to accomplish this is to call two or more meetings of the board to be held sequentially. This practice will be too cumbersome to be manageable as a general corporate governance practice. However, it might be considered when dealing with one or more highly sensitive matters. One meeting can deal with routine or non-sensitive items and then adjourned. Sensitive items may be dealt with sequentially in separate meetings called to order to deal with those specific items. In this way, the meetings are stand-alone meetings with their own separate minutes. Only the minutes dealing with the relevant meeting should be produced in the litigation.

Another possibility is to draft minutes in such a way that there are main minutes and supplementary minutes. The main minutes would state that the next item on the agenda was, for example, a report on drilling results and a notation that confidential minutes for that portion of the meeting are kept separately in supplementary minutes. If corporate secretaries adopt a numbering system for corporate minutes, this should not create any difficulty in the organization of the board minute book. The downside to this approach is that a court could conclude that the separate minutes have been

incorporated by reference and must be produced. However, referring to the confidentiality rationale for the separate minutes and the irrelevance of the separate minutes to the issues in the proceeding may assist the corporation in resisting production of irrelevant material.

These are not the only possibilities. Depending on the nature of the company’s business and the typical format of its board meetings, there may be other effective means of drafting to limit production.

Draft to Protect Privilege and Confidentiality

In this post, I discussed suggestions for drafting to protect privilege and confidentiality.

Drafting to Assist the Litigator

Even though the corporate secretary should presume that minutes of board meetings may be produced in litigation, the corporate secretary can take steps to assist the company’s litigator in defending against production on the basis of privilege or confidentiality. The argument for protection against disclosure will be more persuasive if the minutes appear on their face to be privileged or confidential, since a judge may inspect the minutes before making a ruling.

Therefore, the most important step is to ensure that the minutes contain the elements that satisfy the legal test for privilege or confidentiality. To do that, the corporate secretary should be familiar with and watchful for three types of privilege when preparing board minutes: (a) solicitor-client privilege; (b) litigation privilege; and (c) common law privilege.

Solicitor-Client Privilege

Solicitor-client privilege applies to confidential communications between a lawyer and his or her client for the purpose of seeking lawful legal advice.

When external counsel attends a board meeting it is usually obvious that the advice given by

external counsel is subject to solicitor-client privilege. However, the role of in-house corporate counsel at board meetings presents complications. It may not be obvious whether corporate counsel is providing legal advice or business advice, particularly if in-house counsel attends regularly in more than one capacity. For example, corporate counsel may report on an environmental compliance issue. It may not be obvious whether in-house counsel gave the report as part of legal advice or as the compliance officer of the corporation.

To enhance the likelihood that solicitor-client privilege will be recognized and maintained, consideration should be given to identifying in the minutes that the board “received confidential legal advice” from the lawyer (whether external counsel or in-house corporate counsel).

Another complication may arise because other persons are in attendance when the advice is being given, such as financial advisors or other invited guests. It has been said that [confidentiality is the sine qua non of solicitor-client privilege](#). With some exceptions (discussed below), the attendance of third parties may destroy a claim that the advice given was confidential.

If there are observers or other participants at the board meeting, those persons should be requested to absent themselves for the portion of the meeting dealing with the legal advice. The board minutes should reflect that those persons were not in attendance during that portion of the meeting.

From time to time, the presence of observers or participants, such as financial advisors, may be necessary because they are part of the “team” dealing with the issue on which legal advice is being given. Courts in Ontario, at least, accept that privilege may not be lost in these circumstances. It is prudent to get legal advice to see if the criteria for protecting privilege will be met. As a general rule, if privilege is available, the board minutes should reflect the role of those third parties and why the board requested that

those persons remain in attendance during the receipt and discussion of legal advice.

Litigation Privilege

Another important type of privilege is litigation privilege. Litigation privilege is a zone of privacy in which a litigant may prepare its case “[without adversarial interference and without premature disclosure](#).” Every litigant (whether represented by a lawyer or not) is entitled to litigation privilege. Unlike solicitor-client privilege, litigation privilege covers non-confidential communications with third parties and documents of a non-communicative nature (such as draft argument and research). Litigation privilege will only attach to those documents and communications whose dominant purpose is to respond to actual or apprehended litigation.

The applicability of litigation privilege is usually clear once litigation has been commenced. However, in the run-up to litigation, it is prudent to note that the board was considering an issue that was apprehended to be litigious. Be aware, however, that once litigation is contemplated, there are document preservation responsibilities for the corporation.

If litigation privilege is available, the minutes should reflect that the dominant purpose of the agenda item is to receive a confidential report from management regarding potential or actual litigation and for the directors to discuss and to prepare for or to respond to the litigation. If third parties are present, the purpose of their attendance should be noted. For example, financial or other advisers may be present to assist the directors with evaluating or preparing a response to the real or apprehended litigation.

Common Law Privilege

Common law privilege is a residual category of privilege from disclosure. It is available on a case-by-case basis after the court considers the following criteria:

- (a) The communications originate in confidence that they will not be disclosed.
- (b) This confidence is essential to the full and satisfactory maintenance of the relationship between the parties.
- (c) The relationship is one which, in the opinion of the community, ought to be sedulously fostered.
- (d) The injury to the relationship by the disclosure of the communications is greater than the benefit gained in the litigation process.

Common law privilege may be available when the board is conducting an investigation, such as, for example, in response to a whistle-blower complaint.

The court exercises significant discretion when deciding whether common law privilege is available. Legal advice should be sought when dealing with matters such as an internal investigation arising out of a whistle-blower complaint or other matters that might attract common law privilege so that the corporate secretary has guidance on how to manage these types of activities.

The guidelines with respect to confidentiality and third-party participation discussed above in connection with solicitor-client and litigation privilege apply equally to common law privilege. In addition, it would be prudent for the minutes to reflect the board's consideration of the importance of confidentiality to the matter being addressed and the board's concerns with respect to any breach of confidentiality. For example, if a third-party investigator is reporting to the board on an investigation, the board should consider (and the minutes should reflect) the importance of confidentiality to the integrity of the investigation and the harm that could occur to the organization and the investigation if confidentiality is not maintained, such as, for example, employees may be less willing to speak with the investigator about the potential misconduct of a colleague or supervisor if confidentiality is not assured.

Confidentiality or Sealing Orders

Another litigation issue that corporate secretaries should consider is the potential availability of a confidentiality order or a sealing order in the event that the minutes are required to be produced. In general, a confidentiality order restricts the persons with whom documents and information are to be shared and applies only to the parties and any specific third parties who are involved in the litigation process (such as experts). A confidentiality order will often contain a protocol requiring a standard form confidentiality agreement, restricting onward sharing of information, and requiring the destruction of the information when it is no longer necessary to be kept by the third party. A sealing order prevents records in the court file from becoming public. In Ontario, subsection 137(2) of the [Courts of Justice Act](#) provides the authority for a sealing order. Subsection 137(2) provides that the court "may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record." The trend has been for courts to restrict the availability of these orders, given the importance of the openness of judicial proceedings.

However, in many business-to-business contracts, organizations will require confidentiality agreements as an essential term of the relationship. These terms are so frequently required that they have become part of the boilerplate of most commercial agreements. At any given time, an organization may have in its possession, power and control, significant amounts of information received from contracting parties to whom the organization owes duties of confidence. Conversely, the organization may have placed significant confidential information into the hands of third parties who are restricted from using that confidential information for non-approved purposes so long as the information is not in the public domain. If the information is disclosed during discovery, it will be at risk of public disclosure in a court proceeding.

The Supreme Court of Canada has suggested that this type of obligation is one that might qualify as an “important commercial interest” worthy of protection by court order. Again, this is an area in which the corporate secretary should get legal advice in advance of the board meeting.

As a general rule, board minutes should expressly identify that matters presented to the board or discussed by the directors are subject to third-party confidentiality obligations. If the matters being discussed are not subject to third-party confidentiality obligations but are of significant commercial interest, reference to the fact that what is discussed is material non-public information or a trade secret or a potential patent issue should be recorded in the minutes. If observers or participants are present, they should be reminded of their confidentiality obligations and this reminder should be recorded in the minutes.

Be Alert to Process Issues

In the last post I dealt with process issues relating to the protection of board minutes from unnecessary production.

Circulation of Minutes

There are a number of process issues that can undermine a corporation’s attempt to protect corporate minutes from production. An obvious process issue is how broadly the minutes are circulated. If board minutes are widely circulated or routinely made available to third parties, then it should not be surprising if a court concludes that there is no confidentiality to protect, notwithstanding how many assertions of confidentiality and privilege are contained in the board minutes.

Confidentiality Designations

Another obvious but over-looked process issue arises because directors typically receive a significant amount of briefing material prior to a board meeting, which will later be appended to the board minutes. This material may include

documents that are confidential or privileged. If the material is subject to third-party confidentiality obligations, consideration should be given to marking that material as “subject to confidentiality obligations.” If the material is privileged, the documents should be marked so that the claim for privilege is evident on the face of the document.

In-House Counsel as Corporate Secretary

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 are 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.

It is prudent for in-house counsel to maintain two sets of notes when attending board meetings. Notes that are being taken as corporate secretary for the purpose, for example, of preparing or vetting the minutes, should be taken separately from those prepared for the purpose of following up on items as corporate counsel or as preparation for giving legal advice.

Draft Minutes and Notes

Another process issue concerns whether to retain draft minutes, the source notes from which the minutes are prepared, and notes prepared by directors. Very few of us are excellent note-takers. A notation may reflect a private thought or capture only half of the thought. The notes may simply be our way of paying attention and not meant to record accurately what occurred. If available for production, these documents may be

cast doubt on the accuracy, integrity and completeness of the board minutes.

Although routine destruction is a possibility, the corporation and its officers and directors must be careful not to engage in spoliation (the intentional destruction of evidence). Documents that are relevant to a litigious matter should be preserved as soon as litigation is reasonably anticipated. This may be before any demand is made or any claim is asserted.

There is no avoiding the reality that the destruction of notes and drafts is a sensitive topic and fraught with danger. Even if innocently done, the destruction of notes and drafts can simply look bad. A more practical approach is to avoid creating unnecessary notes and drafts in the first place.

The corporate secretary can avoid multiple drafts and source notes by using a template that prompts the corporate secretary to take notes that contain the appropriate details for the minutes (but without a blow-by-blow of the meeting). This will require less revision to put it into an appropriate form of minute of the meeting. There is also less chance of something being omitted innocently in the final minute due to editing that an adversary might seize on as evidence of manipulation of the board minute.

When dealing with a particularly sensitive matter, board members might be reminded that if they take notes, they should take care to prepare accurate and complete notes. If the practice in such circumstances is for the minutes to be prepared and circulated shortly after the meeting for an initial review (and then inserted in the board packages at a later date for approval), directors may find it unnecessary to take personal notes since they will have the opportunity to conduct a review while the matter is fresh in their minds. The contemporaneous preparation and review of the minutes can only serve to enhance their reliability.

Conclusion

There is no glamour in preparing board minutes and they are often put on the “back burner.” Apart from the statutory requirement in almost all Canadian jurisdictions to keep these records, board minutes are a critical piece of documentary evidence when there is a challenge to the conduct of directors. Careful preparation of board minutes is worth the effort. Moreover, with some care, the preparation of board minutes may also subsequently assist a litigator in persuading a court that the board minute or a portion of the board minute should be protected from disclosure either to an adversary or to the public in general.

Contact Information

For further information on this topic, please contact [Timothy M. Banks](#).