Confidentiality of Board Minutes: An Important Commercial Interest

By Chris Matthews

The 2009 decision of Justice Wilton-Siegel of the Ontario Superior Court in *SRM Global Master Fund Limited Partnership v. Hudbay Minerals Inc.*¹ is notable for its recognition of the inherent confidentiality of board minutes. At the same time, however, it is clear that, despite this recognition, it will be very difficult to protect that confidentiality once the minutes become an issue in litigation.

Regardless of whether you believe the workings of a board of directors should be open and transparent, or shrouded from view, some level of confidentiality in a board’s deliberations will always be important.

In Hudbay, Justice Wilton-Siegel said the following about why this is important:

Although I agree with the applicants that no privilege attaches at law to such minutes, I think this is an important commercial interest. The board of directors of a corporation is charged with the responsibility to manage the corporation. The directors must be able to conduct open and frank discussions if they are to discharge their responsibilities to the corporation and the shareholders. In the ordinary course, it is certainly arguable that, for this reason, disclosure of minutes of board meetings and related notes of participants, would give rise to a serious risk to an important commercial interest.

This is a statement that will no doubt be used in the future to fend off requests for copies of board minutes. Although board deliberations are generally considered by the directors to be confidential, this is often not recognized by shareholders or members. There are good reasons, however, why confidentiality should be maintained, even in an age of increasing corporate disclosure.

Confidentiality not only facilitates open discussion at board meetings, it promotes the perception, if not the fact, of board unity. Once a decision is made, the board should speak with one voice. The effect and force of a decision are weakened if board members are free to discuss the level of dissent or lack of enthusiasm that some directors have for the decision. Confidentiality also facilitates the taking of proper minutes, which should reflect not only the decisions made but also the questions asked, and positions taken by various directors.

Specific requirements of confidentiality are seen most often in the by-laws of not-for-profit corporations. Many such organizations include provisions for disciplining board members for breaches of confidentiality, even to the extent that the board itself may remove the director.² The fact that such provisions exist highlights the importance some boards place on confidentiality. It may seem counter-intuitive that it is the not-for-profit sector in which confidentiality appears to be more of a concern. It is the not-for-profit sector, after all, in which transparency is most vocally demanded and most often granted. This apparent contradiction can be seen in cases where a not-for-profit has both a strict confidentiality clause for its directors but also puts the minutes of board meetings on its website.

The reason specific confidentiality covenants are required may be because volunteer directors are more likely to be inexperienced in board procedure. They may also have come to the board with an agenda that is focused on one issue or constituency and not on serving the interests of the corporation as a whole. It is no secret that not-for-profit boards can sometimes be embroiled in disputes and politics that take on an emotional, if not vicious, tone. As Henry Kissinger said, this is because “the stakes are so small.” In any case, a confidentiality covenant will at least help to control wayward board members.

Corporate statutes in both business and not for profit sectors recognize that board minutes are inherently confidential. They are not provided to shareholders as of right. Both the CBCA and the OBCA grant shareholders the right to inspect or receive copies of certain corporate books and records, including financial statements. Board minutes are not included in the documents to which access is granted. Access to the minutes is given only to the directors themselves.³

Similar provisions are included in the current Canada Corporations Act and the new Ontario Not-for-Profit Corporations Act.⁴ The new Canada Not-for-Profit Corporations Act (which

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¹ [2009] O.J. No. 797 (February 26, 2009)
² The enforceability of such a by-law is questionable. For instance, the removal of a director by the board (as opposed to the members) does not appear to be permitted by the Ontario Corporations Act. This impediment may be overcome, however, by the directors personally agreeing to such a provision upon joining the board.
³ See OBCA ss. 140(1), (2), 144(1), 145(1); CBCA, ss. 20(1), (2), (4); 21 (1)
⁴ See Not-for-Profit Corporations Act, 2010, ss. 92, 95; Canada Corporations Act
was passed by the House of Commons on May 5, 2009 but not yet in force)\(^5\) does not change the treatment of board minutes. Presumably, all of these statutes restrict access to board minutes because the need for confidentiality (or at least the option for it) is seen as something that should be maintained.

Despite the uniform treatment of board minutes in the statutes, boards are often met with requests from shareholders or members for copies of minutes or for their regular disclosure. As transparency and increased access to information is generally considered a good thing, the desire for openness and the need for confidentiality will naturally cause tension. This has often led to the unhappy compromise of producing two sets of minutes, one which will include the discussion and decisions taken on all matters (including areas considered to be sensitive or confidential) and another, which will be suitable for public disclosure, with the confidential sections removed. Alternatively, the minutes will be drafted in such a way that they say very little. They do not disclose confidential information because they do not record much of anything. Minutes that include statements such as: “The board discussed several confidential matters” or “discussed matters in camera” do little to meet the requirements that the company keep a record of business transacted. Neither of these alternatives does anything to promote transparency or openness. At most, it merely pays lip service to the concept.

The better view is that, while transparency is always to be encouraged to promote participation and alleviate dissent, information should be communicated through material to which shareholders or members are entitled. This includes annual reports, financial statements, and securities filings. If the board minutes are not disclosed, the need for meaningful minutes can then be met.

Although the corporate statutes do not require the disclosure of minutes, such protection may be somewhat illusory when it comes to litigation or where minutes are subject to access to information requests. There is always a tension between openness and confidentiality in both litigation and information proceedings. Openness and disclosure, however, more often carry the day than do commercial sensitivity and privacy.

Of course, there may be instances where the company wishes to rely on the contents of board minutes in addressing allegations made in litigation. This will particularly be the case in oppression proceedings or where directors’ deliberations are directly in issue in the lawsuit. Most recently, board minutes were used by Lions Gate Entertainment Corp. in fending off an oppression application brought by entities controlled by Carl Icahn.\(^6\)

Where the minutes may not be as directly relevant or where they contain sensitive information that needs to be protected, other efforts must be made. Confidentiality may be protected by sealing orders or by the deemed or implied undertaking rules, such protections will be narrowly construed if there is seen to be an impact on the administration of justice or the public interest. As stated by Justice Dickson (as he then was) in Attorney General of Nova Scotia v. McIntyre,\(^7\)

Many times it has been urged that the “privacy” of litigants requires that the public be excluded from Court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the Court system and understanding of the administration of justice are thereby fostered. As a general rule, the sensibilities of the individuals involved are not the basis for exclusion of the public from judicial proceedings.

So how does one stop board minutes from getting into the public domain? Merely having the company’s lawyer present won’t transform the minutes into a privileged document. Only that portion of the minutes that may be considered solicitor-client or litigation privileged will be exempt. In order to protect non-privileged minutes behind a sealing order, minutes must meet the tests set out by the Supreme Court of Canada in Sierra Club v. Canada (Minister of Finance).\(^8\) The company must show that the minutes are commercially sensitive, the disclosure of which could harm the company. The information in the minutes must also have been accumulated with a reasonable expectation of being kept confidential. While this is probably enough to protect disclosure under the federal Access to Information Act, the rest of the factors in Sierra Club must also be considered, if a sealing order in litigation is sought. The court will balance the negative or deleterious effects of granting a sealing order, including the negative impact on the open court procedure and on the right to freedom of expression.

In Hudbay, the minutes had been disclosed in the context of cross-examinations on affidavits in an oppression application. The applicants wanted to use information from the minutes for a purpose outside the litigation, in particular, for inclusion in a dissident proxy circular. Hudbay had already obtained a sealing order at the beginning of the litigation and the applicants wanted the minutes released from the order.

Justice Wilton-Siegel found that the board minutes did not meet the Sierra Club tests. Although he agreed that board minutes are confidential and commercially sensitive in principle, he found that the information in the Hudbay minutes had already been disclosed in considerable detail in the affidavits filed in court. He also found that a sealing order would have a deleterious effect on the administration of justice because some of the information sought to be sealed clarified or corrected information that was already in the public record. Justice Wilton-Siegel also found the public interest would not be served by limiting the information available to dissident shareholders. He noted

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\(^5\) Canada Not-for-Profit Corporations Act, ss. 21(1), 22(1)

\(^6\) Icahn Partners LP v. Lions Gate Entertainment Corp., 2010 BCSC 1547 (CanLII)

\(^7\) (1982), 122 D.L.R. (3d) 385 (S.C.C.) at page 401-402

\(^8\) [2002] 2 S.C.R. 522
that applicable securities and corporate legislation did not prevent dissident shareholders from obtaining and disclosing information they may consider relevant “provided such information was not obtained by improper means.”

Finally, Justice Wilton-Siegel addressed the question of whether the minutes were subject to the implied undertaking rule, which prevents a party to whom documents are disclosed in litigation from using them for other purposes. He found that they were not subject to the rule because, among other reasons, the material had already been filed in court. He stated: “I do not think that a sealing order is available to implement the implied undertaking rule.” He drew a distinction between a sealing order, which “addresses a concern for confidentiality,” and the implied undertaking rule, which “addresses a concern for use.”

Although the rules and sealing order may well address distinct concerns, one must ask why a sealing order could not be used to prevent a party from breaching the implied undertaking rule. If the material is not otherwise in the public domain, the logical way to prevent the use of the material is to keep it confidential or sealed. Use of the material in breach of the undertaking or of the order could then be considered “improper means.” It must also be remembered that the deemed and implied undertaking rules also balance public and private interests. The court can always order that a party be relieved from the deemed or implied undertaking if satisfied that the interests of justice outweigh any prejudice to the disclosing party.

A different view of the implied undertaking rule is seen in Catalyst Fund v. Imax Corp. In the context of deciding whether various corporate records, including board minutes, should be produced, Justice Pepall ordered that all of the records should be sealed because they “clearly contain commercially sensitive material and, if obtained by examination for discovery, would be subject to the deemed undertaking rule.” This language appears to support the use of a sealing order to enforce the deemed or implied undertaking.

In summary, boards that want to protect the confidentiality of their minutes will first want to ensure that their own members respect the obligation. If sensitive minutes are handed over to third parties, they should be marked as confidential and the fact that they contain sensitive commercial information should be described in any transmittal letter. In litigation proceedings, it will be prudent to obtain a sealing order, prior to disclosure. Nonetheless, a sealing order will be difficult to renew if it becomes disputed and if there are public interest factors that may trump commercial sensitivity.

9 Catalyst Fund Limited Partnership II v. Imax Corporation, 2008 CanLII 46325 (September 15, 2008)