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The Ottawa Region 2017 *Charity & Not-for-Profit Law Seminar*

Ottawa – February 16, 2017

KEEPING MINUTES: GETTING IT DOWN RIGHT

By Ryan M. Prendergast, B.A., LL.B.

rprendergast@carters.ca
1-877-942-0001

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rmp@carters.ca
1-877-942-0001

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CARTERS PROFESSIONAL CORPORATION
TOLL FREE: 1-877-942-0001 Toronto Ottawa Orangeville Mississauga
www.carters.ca www.charitylaw.ca www.anti-terrorismlaw.ca

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OVERVIEW OF TOPICS

- Why Keep Minutes?
- What to include in Minutes?
- How to Keep Minutes?
- Issues in Minutes for Board Meetings
- Issues in Minutes for Members' Meetings
- Concluding Comments

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A. WHY KEEP MINUTES?

1. Legislative Requirements

- Incorporated registered charities and not-for-profits are generally required to maintain minutes of meetings:
 - *Corporations Act* (Ontario) ("OCA"), s. 299(1)
 - *Not-for-Profit Corporations Act, 2010* (Ontario) ("ONCA"), s. 92(1)
 - *Canada Not-for-profit Corporations Act* ("CNCA"), s. 21(1)
- e.g., Both the ONCA and CNCA require records containing:
 - The minutes of meetings of members and any committee of members
 - Minutes of meetings of directors and any committee of directors
- Special act corporations should also review their legislation for any additional requirements

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- In addition to legislated requirements under corporate statutes, other statutes may also have books and records requirements that include minutes
- *Income Tax Act* (Canada) ("ITA")
 - registered charities must keep books and records (s. 230(2))
 - NPOs are required to keep books and records in accordance with s. 230(1))
 - Regulation 5800 requires incorporated registered charities or non-profit organizations to keep meeting minutes of directors and members
- Generally, a CRA auditor will review the minutes of the corporation during an audit - a lack of minutes may put into question whether or not an organization can demonstrate compliance with the ITA

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- Examples:
 - Complete and detailed records will make it easier for the charity to demonstrate to CRA that its fundraising complies with the ITA
 - e.g., minutes of board meetings or other meetings where decisions on a fundraising contract were made
 - CG-002 *Canadian Registered Charities Carrying Out Activities Outside Canada* recommends good minutes in demonstrating direction and control
 - CRA states that minutes of meetings or other written records of decisions are one way to show that a charity has given instructions
 - Evidencing compliance with the *Trustee Act* (Ontario) in making investment related decision, i.e., consideration of mandatory criteria

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2. Evidence of Decision Making by the Board and Membership

- Clear minutes must be kept for all board meetings and members' meetings
- Purpose of minutes
 - Provide a concise record of deliberations and decisions
 - Inform directors, members and agents of the organization
 - Inform the courts of decisions made by the organization in future litigation
- In the absence of evidence to the contrary, minutes of meetings are records of proof as to what transpired at the meeting

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B. WHAT TO INCLUDE IN MINUTES?

1. General Recommendations

- What goes into minutes?
 - Date, time, place of meeting
 - Nature of meeting
 - Who attended the meeting - include guests, when a person departed, etc.
 - Procedural formalities - e.g., call to order, quorum, etc.
 - Order of agenda or topics
 - Mover, seconder, presenter (not legally required)
 - Summary of key points of discussion
 - Decisions made, any dissents recorded, any conflicts declared
 - Termination of meeting

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2. Finding the Right Balance

- Minutes can serve as a double-edged sword
- Generally, access to minutes may be limited
 - e.g., minutes of board meetings are generally confidential and only accessible by other board members
- However, minutes can also be viewed by others in various circumstances:
 - Courts;
 - Litigation
 - Other regulators, e.g., Ontario Public Guardian and Trustee;
 - Audit, or other contractual obligations with third-parties, i.e., funding agencies, government ministries, etc.

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- Overly detailed minutes may have adverse consequences should they be reviewed in the course of litigation or an audit
 - Inadvertent omissions may create an inference that it was purposefully omitted
- Minutes with few details or specifics may not be sufficient to demonstrate the consideration of the meeting
- The type of detail may depend upon whether the meeting is a board meeting, a members meeting, or a committee meeting
- However, minutes should generally not include:
 - Verbatim records of discussion, emotional or personal interjections, legal advice
 - Consider what you would not want appearing on the front page of a newspaper

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C. HOW TO KEEP MINUTES?

1. Form of Minutes

- OCA requires that minutes be “entered in books kept for that purpose”
- However, modern not-for-profit corporate legislation like CNCA and ONCA require that minutes, “may be in any form, provided that the records are capable of being reproduced in intelligible written form within a reasonable time.”
- Under the ITA, records (including minutes) can be kept electronically if they are retained in “an electronically readable format” (s. 230(4.1))

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2. Where to Keep Minutes

- Both CNCA and ONCA require the corporation to:
 - “take reasonable precautions to prevent the loss or destruction of the registers and other records required by or under this Act, to prevent the falsification of entries in those registers and records and to facilitate the detection and correction of inaccuracies in them”(ONCA s. 100(2), CNCA s. 26(2))
- Therefore, minutes need to be kept in a secure place
- Minutes belong to the corporation, not to the person who drafted them, e.g., the secretary, or any other person
- While minutes may be kept electronically, a good practice would be to maintain physical copies in minute books
- The board should also give consideration to the security of minutes if stored electronically

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- Generally, minutes are to be kept at the registered office of the corporation
- While CRA permits electronic record keeping, it does not consider electronic records kept outside Canada, but accessible electronically from within Canada, to comply with the ITA, i.e. the server must be located in Canada
- Minutes of directors meetings should only be available for review by directors, but special act corporations may have different requirements
- However, minutes of members meetings are to be available to members, and creditors, on payment of a reasonable fee

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- Corporate legislation does not generally deal with reports, or other documents made at meetings
 - e.g., the report of the president provided at an annual meeting of members, a report to a committee of the board, etc.
 - Documents referred to in meetings should be kept as records of the corporation with the minutes
 - Be careful when referencing sensitive documents, e.g., legal advice, etc.
 - Privilege attached to legal opinions may be waived in minutes that are disclosed to third parties

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3. Signing and Approval of Minutes

- Do we need to have the minutes signed?
 - There is no legal requirement for the minutes of a directors or members meeting to be signed
 - However, special act corporations may have mandatory requirements, e.g., *Boards of Trade Act* (Canada) requires signature and prescribes who can sign, etc.
 - However, a general practice would be for the chair and secretary to sign the minutes once they have been approved by the meeting
 - Unsigned minutes may still be valid, but the signature by the chair or secretary meeting may enhance the evidentiary use of the minutes

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- Do minutes need to be approved at the subsequent meeting?
 - There is no legal requirement for minutes to be approved at the next meeting
 - Lack of approval of minutes may lessen the evidentiary use of the minutes
- How quickly after a meeting should minutes be prepared?
 - Minutes should be promptly drafted following the meeting while the content of the meeting remains fresh in the mind of the secretary
 - Waiting too long to have minutes prepared may appear self-serving

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4. Ensuring the Minutes are Accurate

- How to amend minutes once approved
 - Minutes that have been signed by the chair or secretary, and approved by the meeting should not be changed again
 - A resolution rescinding or amending the previous resolution should be passed in order to permit the minutes to be amended
 - Generally, only people who were present at the meeting should be voting on the amendment or verification of minutes
- Note that the court may also be called upon to rectify the minutes:
 - See CNCA s. 255, and ONCA s. 186

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D. ISSUES FOR BOARD OF DIRECTOR MINUTES

1. Purpose of Board of Director Minutes

- Directors generally have a common law or statutory duty to manage or supervise the management of the corporation
- In addition, directors must demonstrate due diligence in exercising the care, care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances
- Therefore, minutes should reflect:
 - The engagement of the board in the issues;
 - The deliberations of the board; and
 - The process of the board in its decision making

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2. Recording of Dissent

- Under the CNCA and the ONCA, directors who are absent from a meeting of directors are "deemed to have consented to the resolution or action" unless they:
 - cause a dissent to be placed with the minutes of the meeting; or;
 - they submit their dissent to the corporation. (CNCA s. 147(3), ONCA s. 45(3))
- It is in the interests of the board to have minutes circulated as soon as possible after a meeting so that a board member who was not present can exercise his/her dissent rights
- Where a board member attended a meeting and dissented, also important to confirm that it was recorded

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3. Recording Conflicts of Interest

- Many corporate statutes include procedures where directors or officers are to declare their conflicts in relation to any contract or transaction with the corporation
 - See:
 - CNCA s. 141;
 - ONCA s. 41;
 - OCA s. 71
- Generally declarations of conflicts are to be entered into the minutes of the meeting
- It is important to note on review of the minutes that such conflicts have been declared

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4. Do Directors Need to Provide Reasons for their Vote?

- Directors do not generally need to provide any reasons concerning how they voted
- Generally, boards vote collectively, rather than individually
- The minutes may, however, include recitals which would demonstrate how/why the board made a particular decision

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5. Individual Notes Taken by Board Members

- Some commentaries recommend that board members maintain their own notes for liability reasons
 - May help to protect the board member from liability
 - May assist the director in reviewing the minutes once available to confirm that they were accurate

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- However, the generation of notes by board members may also create issues
 - Which record of the meeting is accurate? The minutes produced by the corporation or those kept by the director?
 - May be produced during litigation
- Corporation may wish to implement policy whereby once the minutes of a previous meeting have been approved that personal notes are to be destroyed
- May also want to consider the same approach with notes/drafts taken by secretary

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6. Audio/Video Recording of Minutes?

- Corporate statutes do not generally address the use of audio or video recording of meetings
- In the absence of anything in the by-laws or other rules of procedure, use of such devices generally requires the consent of the meeting
- As with personal notes, electronic audio/video recordings of a meeting may have the same concerns
- The same issue may arise with respect to a recording made by the secretary to assist in preparing minutes later
 - Board members may try to get access to such records if they don't trust the minutes generated

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7. Minutes of Committees

- Minutes of committees may be just as significant as minutes of board meetings
- Courts and other regulators have in the past taken minutes of committees in consideration to determine whether directors have met their fiduciary duties
 - Deliberations by an audit committee or similar committee are important to record as minutes

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8. In Camera Meeting Minutes

- Just because a meeting is *in camera* does not mean that no minutes are to be maintained
- Minutes of *in camera* meetings should still be maintained
 - Same balanced approach should be used, do not include comments you would not want on the front page of the news
- The board may want to consider implementing a policy to address the storage of *in camera* minutes and their access
- The use of *in camera* meetings should not be abused, generally, decisions of directors should be open and transparent

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E. ISSUES FOR MEMBERSHIP MEETINGS

1. Audio/Video Recording

- May be important for contested annual meetings
 - Can serve as evidence that an election was properly conducted
 - Can be relied upon later in court if a party to a meeting wishes to challenge the results
 - As with directors meetings, generally the consent of the meeting should be obtained in the absence of any legislative authority or basis in the by-laws
- However, audio/video recording of a meeting may have a negative effect on the meeting
 - e.g., members may feel less willing to express themselves during the meeting because of the recording

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2. Contested Annual Meetings of Members

- Preparation of minutes of meetings of members at an annual general meeting or special meeting at which an election or other action is contested need to be carefully considered
- Minutes should be objective in recording decisions or other determinations made by members
- Need to review how minority or aggrieved members would consider the minutes once available

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CONCLUDING COMMENTS

- Important to ensure that accurate minutes of member, director, and committee meetings are maintained
- While the rules of corporate minute taking are generally the same as with other corporations, there are select issues for the NFP sector that require due consideration
- Good minutes can protect the board of directors, and provide an open and transparent record of decisions made by the members

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