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Proxy Fraud

Condo Board Elections and Voting

The Ontario Condominium Act Must Consider The Limitations and Risks of Proxy Forms and Abolish Them In Favour of Electronic Voting



The condominium lifestyle has exploded in Ontario, and the influx of a new and younger generation among condominium owners poses an interesting problem. With over 11,000 condominium corporations registered throughout the province, each governed by a board of directors typically comprised of inexperienced owners who step forward as volunteers, how can condos dovetail board governance with today's increasing expectations of online engagement? Central to the destiny of each condo corporation is the quality of its governance. Yet the weak link in board governance often is the manner by which board elections are conducted, frequently resulting in disputes about legitimacy of directors and ultimately having direct financial consequences on the owners. Board members are entrusted with decision-making authority over all aspects of operating a condo corporation. Although boards will rely on management providers to do the day-to-day operations of running a condo corporation, the board's governance authority remains supreme,

yet the way they achieve consensus and canvass their membership remains archaic. Boards need to start thinking long-term, as widespread owner apathy and low turnout at annual general meetings (AGM) leaves board elections vulnerable to individuals who can target board elections in order to gain control of a condo corporation.

Historically, proxy forms have been — and remain today — the principal vehicle by which board elections can be used for improper motives. Voting procedures used by condo corporations have remained essentially the same for the past 50 years. New condo owners are likely be googling “proxy” on their iPhone 11's since this voting process involves either a paper ballot cast in-person at an AGM, or a proxy form signed by an owner who designates a representative — or, if left unspecified, the forms typically designate the board president or secretary as default proxy holder. The idea that someone else can vote on your behalf is anathema to anyone

attuned to recent headlines of electoral integrity and manipulation. Opportunities for widespread fraud are common, since form photocopies and forged signatures can be submitted at the last minute before the start of the AGM, leaving no time to validate and allowing compliant condo managers and meeting chairpersons to expediently turn the other eye. Proxy forms have been used as a method of voting since the Condominium Act was introduced in the late 1960s. The proxy form gives the person named the right to vote for the owner signing the proxy. It is interesting to note that proxies have all but disappeared in other types of elections and voting around the world, including homeowner associations in the U.S.

Knowing all the integrity problems with proxy forms — plus their long history of proxy battles, court decisions and very divisive owner meetings — one may wonder why they are still around or even legally allowed for condo corporation elections in Ontario. So, how did proxies originate?

ILLUSTRATION BY JASON SCHNEIDER

Proxies first were introduced in the U.K. in the 1800s so wives could vote on behalf of their husbands who were out colonizing various corners of the world or cutting down trees in a faraway town. How this managed to stay on as a “best practice” and incorporated into Ontario’s Condominium Act is bewildering. In November 2017, when the most recent amendments to Ontario’s Condominium Act came into effect, the focus was on “consumer protection” — reinforcing the interests of condo owners as well as buyers. One of the most forward-thinking changes to the Act in 2017 was the introduction of electronic voting for condo elections.


Electronic voting has been used for a number of years in federal elections in Switzerland and Estonia. Electronic voting also is used in 144 municipalities across Ontario and Nova Scotia, by various political parties in leadership contests and in elections by Indigenous communities. Ontario is the first province in Canada to introduce electronic voting for condo corporations and Alberta soon will adopt electronic voting under its proposed amendments to the Alberta Condominium Property Act. This form of voting allows condo owners, otherwise unable to attend the AGM in person, to vote directly from their smartphone, tablet or a computer through an email link. Not only is this a secure form of advance voting but more importantly, it is direct empowerment that allows owners to vote for themselves rather than blindly submitting a proxy form and trusting that it will not be misused at the AGM. Electronic voting for condo owners is a real

solution to proxy fraud and manipulation. Although electronic voting is a very positive change, what Ontario’s legislation failed to address in 2017 is the use of proxies. Instead of eliminating the proxy form and strictly using electronic voting and paper ballots, the amendments to the Act introduced a three-page template as the prescribed proxy form for mandatory use in all condo elections.


The result has been a great deal of confusion and chaos — even among condo lawyers. In 2018 the forms underwent some minor modifications — which only further confused owners — and were accompanied by an instruction guide developed on “how to complete the proxy form” — a bureaucratic response that did not address the root problem of these forms. In an effort to deal with some of these issues, “electronic proxies” have been developed by some service providers. However, at their core these remain a proxy form that gives voting control to a third party at the AGM. Notably, electronic proxies do not supplant the use of paper proxy forms, and thus many board elections continue to witness handfuls of paper proxy forms of dubious reliability being submitted at the last moment — again resulting in board election outcomes of questionable legitimacy. It is understandable that for over 50 years, condo owners, directors, managers and lawyers have become accustomed to a certain way of conducting board elections. They find it is difficult to let go of the old methods and old habits. But in all too many cases, the motivation for not letting go of proxy forms may be to ensure that governance authority and


spending power remain with the incumbent players who themselves control the voting process.


Accessibility is a prime issue in Ontario, with Elections Ontario leading the call to ensure that the entire election cycle from renting of polling locations, to procurement of election supplies all conform to accessibility best practices. Condo corporations should promote methods that allow owners to vote in advance of the AGM without assistance or obstacle, due either to linguistic challenges or physical disability. Electronic voting can increase display font size so visually impaired persons can manage their own ballots. Language translation can be offered at the touch of a screen option. Electronic voting offers full accessibility to condo owners without regard to limitations inherent in the prescribed proxy forms. Using an electronic direct-voting service for condo AGMs transcends all these problems. Those condo corporations that have now adopted electronic voting are finding that owners appreciate dispensing with the old confusing three-page proxy forms and are simply voting by their own hand, conveniently and electronically, in advance of AGMs that they are otherwise unable to attend in-person. Participation rates increase, and so does the legitimacy of election outcomes and strengthening of condo governance. It will be a very positive step if the next phase of amendments to Ontario’s Condominium Act reconsiders the limitations and risks of proxy forms and moves towards their abolishment in favour of electronic voting — as has been done successfully in many other jurisdictions. **CV**





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