



# About Condo

## A BIT ABOUT PROXIES

When the *Condominium Act, 1998* (the “Act”) came into force, it changed some of the long established procedures for use of proxies in condominium meetings.

### WHAT IS A PROXY?

The word “proxy” has many uses, not all of which are the same as its use in the Act. Speaking generally, a proxy is similar but not identical to a Power of Attorney. It is usually a document by which certain rights and authority of the person granting the proxy are delegated to another person to act as agent for the granter. Thus, the person receiving the proxy stands in the place of the granter of it and exercises such specified rights or authority on their behalf and not in accordance with the interests or desires of the proxy holder.

The term may refer to the authority itself or to the delegate or to the form of the document.

The use of the term in the Act is its most typical use, being in relation to a proxy for attending and participating in meetings. In particular, the sole application of the term in the Act is to refer to the grant of authority to attend and participate in a meeting of the owners of a condominium corporation, on behalf of one of the owners. No other use of proxies is provided for in the Act.

### NO PROXIES FOR DIRECTORS

Accordingly, proxies may only be used for meetings of owners. Proxies cannot be used to allow representation of absent directors at board meetings.

One reason for this is that a director has been delegated certain decision making authority from the condominium corporation by virtue of her or his election. The law does not contemplate a delegate of authority being able to further delegate that authority. A proxy given by a director would constitute an unauthorized further delegation of the director’s authority.

Additionally, a director is ideally elected because of who he or she is and what he or she is expected to be able to do. That is, it is the personal character, or the characteristics, of a person that qualify him or her for the job. A director is expected to exercise the care, diligence and skill that a reasonably prudent person in similar circumstances would exercise. Even a director whose position is acclaimed is expected to bring such personal traits and dedication to the position. Such traits, character or characteristics and dedication cannot be delegated.

It does not meet the reasonable expectations of unit owners to have their elected representatives further delegate their decision making authority and responsibilities for the corporation to unelected persons, or to allow less than an actual, present majority of the directors to make decisions for the corporation.

## OWNERS' PROXIES

Sub-sections 42(10), 50(2), 52(1) and section 53 of the Act permit a unit owner to be present at and participate in an owners meeting by proxy.

An owner who attends a meeting either personally or by proxy:

- (a) counts toward quorum (subject to meeting the other qualifications set out in subsection 50(2) of the Act),
- (b) is entitled to vote (subject to meeting the other qualifications set out in subsection 51(1) of the Act), and
- (c) is deemed to have waived the right to object to a failure to give the required notice of meeting unless the person expressly objects to the failure at the meeting (see sub-section 47(11) of the Act).

Depending on the specific instructions set out in the proxy form, the proxy holder may be entitled to exercise all of the rights of the unit owner at the meeting, but cannot do anything that the proxy form does not indicate the holder is authorized to do. It is therefore imperative that the proxy granter carefully considers what his or her proxy should be entitled to do.

For example, if a form of proxy states only something like this,

*The Proxy may attend the meeting on my behalf and may vote on my behalf in favour of proposed By-law No. 2,*

and does not also provide some more general authority, such as,

*and may vote on my behalf in respect of all matters that may come before the meeting, as I could do if personally present at the meeting,*

such form would effectively limit the proxy holder's authority to attending the meeting and voting in favour of By-law No. 2. The proxy holder would not be entitled to cast a vote on the owner's behalf in regard to any other matter.

Likewise, if the proxy form authorizes the holder to vote in favour of or against a particular item, such as a proposed by-law, but does not provide that the holder can vote on a proposed amendment to the proposed by-law, if a motion is made to modify the by-law at the meeting the proxy holder will not be entitled to vote on it. It is advisable that proxies including specific instructions in relation to particular motions, such as the passage of a proposed by-law, rule or section 97 changes to the common elements, also expressly state that the proxy holder has authority to vote in respect of any modification or amendments thereto.

## WHO CAN HOLD A PROXY?

It should be noted that there are no restrictions on who may hold a proxy. The proxy holder need not be an owner of a unit in the corporation.

In choosing who will act as proxy, unit owners should thoughtfully consider who they trust to carry out their wishes, as stated in the proxy, and who will not seek to use the proxy for their own purposes.

Owners should be wary of persons who solicit their proxies. While it is not always wrong to grant a proxy to a person who requests it, sometimes other owners and even directors or property managers with their own agendas will seek to obtain proxies in order to use them to vote for matters of concern to them personally. Their intentions might not always be consistent with what the owner's interests or what the owner considers to be best for the condominium corporation.

If someone is soliciting your proxy and you do not know them or their intentions well enough to trust them to exercise the proxy responsibly in accordance with your instructions, you should not give it to them. Instead, ensure you give your proxy to someone you can trust without question. Alternatively, you can give the proxy to the soliciting party, but should limit their authority strictly within the document. You should be entitled by the corporation to review your proxy document after the meeting to ensure nothing was changed by the person to whom the proxy was given.

Anyone soliciting proxies should keep in mind that improper or incomplete disclosure of the issues to be dealt with at the meeting, or of the purposes for which it is intended that the proxy be used, may invalidate the proxy or its use in particular cases.

## REVOCATION

The proxy granter has authority to revoke a proxy any time up until the time the power granted under the proxy has been exercised. If a person grants a proxy but still attends at the meeting, the proxy is instantly invalid.

## PROXIES AND POWERS OF ATTORNEY

An owner can also give a Power of Attorney to a trusted person. Some condominium by-laws permit an owner to be represented at a meeting by an attorney pursuant to a Power of Attorney. However, the Act is not clear that an attorney can actually count towards quorum or vote. Therefore, the better course of action is to clearly authorize the attorney (in the appointing Power of Attorney document) to appoint a proxy for the owner for any owners' meeting. This is expressly allowed under sub-section 52(4) of the Act.

The Power of Attorney document should go on and say that the attorney is authorized and actually encouraged to appoint the attorney him or herself to be a proxy.

The person holding the Power of Attorney should lodge a notarial copy of the document with the board and, if possible, obtain the board's written assurance that it will respect proxy instruments signed by the attorney without repetitive production of the Power of Attorney document.

If the board will not cooperate in this regard, the attorney should take a notarial copy of the Power of Attorney document to all meetings and be prepared to produce it if the authority of the attorney's proxy is challenged.

## FORMS OF PROXY

The authority or discretion to determine the proper and acceptable form of proxy instrument belongs to the board of directors of the corporation. Unit owners are not entitled (unless expressly authorized by the corporation's by-laws) to insist that their particular form of proxy be accepted. Therefore, it is usual and advisable for the board to provide its acceptable form of proxy, and related instructions, with the notice of meeting to unit owners.

The Regulations made under the Act contain some forms of proxy that are referred to in sub-section 52(6) as "prescribed" although that section only states that such forms "may" be used. Therefore, it is open to corporations to use alternative forms of proxy.

Having said this, it should be noted that the prescribed forms contained in the Regulations effectively represent several expectations associated with the proper use of proxies and protection of the democratic rights of unit owners. Therefore, it is generally advisable for corporations to use the prescribed forms, making only such minor modifications as are necessary to accommodate any unique circumstances of the condominium corporation or special functions of the meeting in question.

The Act sets out additional provisions relevant to the form and drafting of proxies.

Sub-section 52(4) provides,

*Subject to the regulations made under this Act and subsection (5), an instrument appointing a proxy shall be in writing under the hand of the appointer or the appointer's attorney and shall be for a particular meeting of owners.*

This does not mean that the person granting the proxy must hand-write the entire form, but the owner must actually complete and sign the proxy him or herself (or by his or her attorney holding a Power of Attorney).

If a proxy instrument is provided at a meeting of owners and contains blanks, neither the person holding the proxy (unless he or she also holds a Power of Attorney granting authority to do so) nor the board or property manager may complete the form. This may limit the effectiveness of the proxy. In addition, if the form is not signed by the owner granting the proxy (or his or her duly authorized attorney) the proxy cannot under any circumstances be treated as valid.

Another point made in this sub-section is that the proxy form may only be used for one meeting. It is not possible to draft a valid form of proxy that seeks to cover more than one meeting or for purposes other than attendance and participation in a meeting. There must be a separate proxy for each meeting.

It may be noted that this can create problems for persons on extended vacation or with failing health, especially if that health deterioration relates to mental capacity.

Eventually, such an owner may be legally or physically incapable of signing an instrument appointing a proxy.

If such circumstances are anticipated it may be advisable for the owner to ensure someone has been appointed with a Power of Attorney as discussed earlier in this memorandum.

Sub-section 52(5) provides,

*An instrument appointing a proxy for the election or removal of a director at a meeting of owners shall state the name of the directors for and against whom the proxy is to vote.*

This means that a proxy can only vote for or against directors who are named in the proxy instrument. It is therefore not sufficient to authorize the proxy holder to vote for whomever he or she pleases. The owner must provide specific instructions as to how to cast the owner's vote(s) in respect of candidates for election to or removal from the board.

In some cases, owners have failed to indicate any instructions in this regard. In these cases, a few boards and property managers have assumed this gives either them or the proxy holder the right to insert names of persons to be voted for with the proxy. This is not appropriate. Where an owner fails to indicate whom the proxy should vote for, the result is simply that no vote may be cast in the election on behalf of that owner.\*

## **IDENTIFYING CANDIDATES IN PROXIES BEFORE THE MEETING**

Given the foregoing facts, the question arises as to how an owner who is not present at a meeting can know who is running for election if there is no mechanism to inform owners of their names in advance.

The solution provided by the Act is that the corporation must include the names of candidates in the notice of meeting if certain time limits (for submission of candidates' names) are adhered to (see sub-sections 28(2) and (3) of the Act). However, the Act does not require the corporation to advise its owners of when a notice of owners' meeting is going to be sent out, so that they are informed of the aforementioned time limits.

To overcome this issue, most condominium corporations will advise their owners, by a "pre-notice of meeting" of some sort, as to when notice of a meeting where directors are being elected is to be sent out, so that those who wish to be candidates can send in their names in time to be included in the notice.

Despite this, the Act does not restrict candidates to those who provide their names before the notice of meeting goes out. Therefore, there is still the possibility that there might be further candidates of whom the proxy granter cannot have knowledge in

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\* It is recognized that there are instances at law where a proxy holder has implied authority to fill in some blanks in a proxy prior to the time that the proxy is deposited with the meeting. However, it is not clear such circumstances apply to a proxy made under the Act. Even if they do, though, such authority would likely extend only to allow completion such items as of the granter's name, the date of the proxy or the date of the meeting, and not to substantial matters such as the names of the directors for whom the proxy may vote.

advance of the meeting. Some corporations have addressed this concern by placing restrictions in their by-laws that prevent nominations "from the floor" at the meeting if enough candidates to fill available positions have provided their names to the corporation before the notice of meeting is sent out

In any event, and whatever is done, where proxies are used for an election the chair of the meeting must be able to establish that the proxies have only voted for directors named in and authorized by the proxy instrument as prepared by the unit owner granting the same.

## **OTHER PROCEDURAL MATTERS**

There is often some confusion as to how proxies are to be handled at meetings. The following are a few points of clarification and information. However, it should be noted that these principles are set out in the abstract, not in reference to a particular case; in respect of concerns or conflicts arising in actual circumstances it would be advisable to seek legal counsel.

1. As noted earlier in this memorandum, the acceptable form of proxy is to be determined by the board. Subject to the by-laws of the corporation or the particular parliamentary rules adopted by the corporation, it is typically the chair of the meeting that has authority to examine and determine the validity of all proxies deposited at the meeting. This authority may be delegated to scrutineers. Often corporate counsel is asked to comment on difficult questions. The chair's determination as to the validity of a proxy is to be considered final, although appeal may be had to the court after the meeting.
2. Subject to the by-laws of the corporation, the board also determines when proxies are to be deposited for the meeting. In many cases, proxies may be provided up to just prior to the time the proxy is used; i.e., just prior to a vote. However, practically speaking, proxies for condominium corporation meetings should be required at the start of the meeting, or at least at the time that the proxy holder arrives and checks in, so that the determination of whether quorum has been met can be completed. Requiring proxies far in advance of a meeting is not appropriate nor, in most cases, practical. Refusing to accept proxies of latecomers to the meeting might also be unfair. In any case, the time for depositing proxies should be clearly set out in the notice of meeting if it is to be fairly and reasonably enforced.
3. It is not necessary to insist that the deposited proxy be an original copy. For unit owners who are in remote locations, it may be impossible to provide a proxy other than by fax or other electronic means of transmission. Provided the proxy appears properly made and signed by the granter, a fax copy, etc., should be acceptable.
4. When a proxy is received, it should be carefully reviewed to identify its specific instructions and any restrictions that may be in it. It is the responsibility of the chair to ensure the proxy is used only in accordance with its terms.
5. A proxy may be used as a ballot. This is particularly useful in an election, but might be done in other cases as well. Whether and how this is to be done may

- be addressed in the corporation's by-laws, to ensure clarity and consistency in practice.
- Pursuant to sub-section 52(7), proxies must be retained by the corporation for ninety (90) days following the meeting at which they are used. This is the case even if the proxies are used as ballots and there is a motion to destroy ballots at the meeting.

## PROXIES AND ADJOURNED MEETINGS

As a final consideration: what happens to proxies if a meeting is adjourned?

It should be noted that "adjourned" does not mean "ended". A meeting is "adjourned" if the attendees at the meeting set another specified date, time and location for its continuation.

A typical reason for doing this is lack of quorum, although there can be other reasons. Where a meeting lacks quorum, the only thing that can legitimately be done at the meeting is to adjourn it. If this is not done properly (i.e., if a new, specific time and location for the meeting are not set), then the meeting has concluded without being "adjourned" and is therefore simply ended.

As noted earlier in this memorandum, the Act specifies that a proxy can only be used for one specific meeting. The proxy ceases to have authority after the meeting specified in the proxy had ended. Therefore, if the meeting ends without a date, time and place being set for its continuation, the proxy immediately expires.

Even if the meeting is properly adjourned, it is not certain that just any form of proxy will be able to be used at the adjourned meeting. This would appear to be what is contemplated by the Act, since the forms of proxy prescribed in the Regulations under the Act include a statement that the proxy can be used, "*at the meeting...and at any adjournment of the meeting.*" A proxy that does not contain this language may not be considered valid for use at an adjournment of a meeting.

To ensure the validity of proxies are not at issue, all proxies should contain a provision that they can be used at any adjournment of the meeting for which the proxy is made, and if a meeting is to be adjourned the chair should be certain that a date, time and location for the continuation of the meeting are set at the meeting.

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\* With input from prior written materials prepared by Craig Robson, Robson Carpenter LLP.