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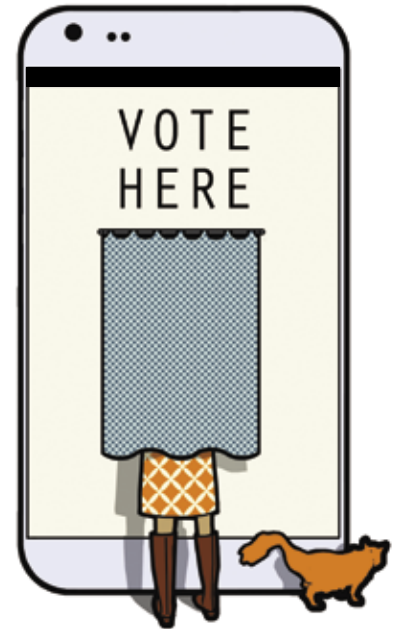


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**Electronic Voting**

# Electronic Ballots Versus Proxies

Owners Can Submit Electronic Ballots for the Election of Directors and Other Matters Prior to the Meeting



Recent amendments to the Condominium Act, 1998 permit condominiums to pass by-laws that allow for electronic voting. This has prompted lawyers and others in the industry to come up with ways to use electronic voting to increase owner participation in meetings.

The approach to electronic voting that has emerged is one that allows owners to submit electronic ballots for the election of directors and other matters that will come before a meeting, prior to the meeting.

Electronic voting has been the subject of much discussion and a lot has been written on the topic. Two diverging views seem to be emerging on the topic. One takes the view that electronic voting is a game changer that will increase owner participation in meetings. The other view is that electronic voting does not introduce anything new that will increase owner participation that is not already available with electronic proxies which provide owners with a greater ability to participate and that electronic ballots may in fact limit an owner's ability to participate in a meeting.

In this article, we will address both the pro and con sides of the arguments.

**PRO E-VOTING, by Joy Mathews**

Although there are concerns growing in the condominium industry that the increased use of new electronic voting technology may create a condo world that is less democratic and transparent, I just don't see it.

Here are my thoughts.

**1. Let's Be Clear: The Legislature Has Spoken!**

Before discussing the merits of e-voting in condominiums, it is important to note that a condominium corporation must pass a by-law before they can engage in e-voting. By-laws require the support of at least 51% of ALL owners in a condominium, which often is difficult to obtain depending on the size of the condominium. For example, in a condominium of 100 units, this would mean at least 51-unit owners must vote in favour of the proposed by-law.

Electronic voting by-laws are considerably easier to pass than other by-laws. Why? Because the legislature says so! Or,

in condo-geeky-legal speak, see Subsection 14(2)(a) of the Ontario Regulations 48/01 under the Condominium Act, 1998. Unlike passing a traditional by-law, this section of the Regulations provides that only a majority of the owners who ATTEND the meeting for which the e-voting by-law is being passed are required to vote in favour of the by-law, not a majority of ALL the owners in the condominium. In other words, in a condominium of 100 units, provided you have established quorum for the meeting of the owners (which is only 25% or 25 units), the e-voting by-law is passed if a majority of those who show up at the meeting and vote in favour of the by-law (which would only be 13 units). This is a significant difference in the numbers required, from 51 owners to only 13 owners for a 100-unit condominium!

In the author's view, the lower threshold to pass e-voting by-laws speaks to the legislature's intent to facilitate e-voting to improve the electoral governance of condominiums and, accordingly, the condo industry should look to ways to make it work effectively.

ILLUSTRATION BY JASON SCHNEIDER

## 2. Keep Your Privacy to Yourself!

Confidential voting is an important concern to maintain electoral integrity at all levels of government, which equally applies to condominiums. Electronic voting should maintain this integrity, not degrade it. The author's understanding of the standard approach used by e-voting service providers is that the results of the electronic vote would be delivered via a report to the designated point of contact for the condominium, which could be anyone, including the manager or another person (such as the auditor or lawyer). The report would not indicate how each owner voted so confidentiality is always maintained.

## 3. E-Voting is a Condo Universe Game-Changer!

Electronic voting, although not as radical as  $E=mc^2$ , will be a game-changer in the Condo Universe.

The main reason is that electronic votes are basically the same as the current standard proxies with the 3rd box checked. For those who are not familiar with the new standardized proxies, there are now three ways for owners to participate in an owners' meeting when submitting a proxy, which are as follows: 1st box: quorum purposes only, or 2nd box: routine procedures only, or 3rd box: as per the voting instructions indicated in the proxy (or if no instructions are indicated, giving

their vote to their proxy holder with full discretion to vote in any way that he or she chooses).

Electronic votes are most similar to when an owner selects the 3rd box, and the proxy holder is to vote as instructed by the owner directly in the proxy. Once an owner signs a proxy and provides it to the proxyholder, they usually are no longer engaged in the meeting. The proxy holder merely attends the meeting with the executed proxy and when it comes time, the

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proxy is read for the respective vote.

In one way, the new e-voting protocols are just a shinier version of the same traditional proxy. In fact, it makes the process fairer since the owner is in full control of their vote and can submit it directly without the need of a proxy.

## 4. Ok – Well, Not Everything Is Perfect In E-Voting World....

Proponents of electronic voting anticipate that making quorum will be significantly easier.

Well, yes but....

Although e-voting is likely a Condo Universe game changer, it's not a complete solution to the lack of owner participation. The real concern facing the issue of participation in condominiums during owners' meetings is owner apathy. E-voting will not solve this problem.

Why?

Voting is not equivalent to participation. Anyone can vote, just like anyone can sign a proxy and check off box #3. Participation is more specific and purposeful than mere voting – it's engagement. Despite being a shiny new toy, e-voting will not solve the problem of owners' lack of engagement, which is the real cause of not making quorum. In our beautiful condo-world, although we change the tools, add some shiny bells and whistles, people are still the same.

### *The Solution: More Candidates & More Information*

E-voting's biggest impact, however, may cause boards to focus more on their preliminary notices and, more specifically, request that any interested candidates put their best foot forward by requiring additional information from the candidates.



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Although it is common to find the candidates' resumes or brief statements indicating their interests and qualifications in the notice of meeting package, it is not required under the Act. However, if e-voting takes off as its proponents claim, then it may encourage boards to pass by-laws in accordance with the Regulations to stipulate additional information that must be included in order to be a candidate for the board. In this regard, with more information and the efficiency of e-voting, we really might see a sea of change in the democratic governance of condominiums.

## **CON E-VOTING, by Warren Kleiner**

### **1. The Legislature Has Spoken!**

The legislature has spoken, but what has it really said or what was it really trying to say?

The Act provides that owners may be present at a meeting in person or by proxy. The original intention to allow electronic voting was to allow those who could not participate in person, to participate online. Electronic voting by-laws are now being drafted to provide that an owner who submits an electronic ballot prior to the meeting is deemed to be present at the meeting. By-laws must be reasonable. Therefore, a question arises whether a by-law that provides that an owner who is not in fact "present" and who is not able to participate contemporaneously at a meeting (whether in person, by attending online or via teleconference, etc...) is deemed to be present is reasonable and therefore valid.

This also relates to the question of whether those who submit electronic ballots count towards the quorum for the meeting. Is the meeting valid if less than 25% of the owners attend the meeting in person or by proxy and the 25% threshold is met by counting the units for which electronic ballots were submitted? We do not yet know the answer.

It is my view that to be present in person, as opposed to being represented by proxy, an owner should be able to participate in the meeting, whether by being physically present at the meeting or being present by electronic means, such as participating through a form of webcast that allows the owner to submit questions contemporaneously. However, we do not yet have any

guidance from the courts.

### **2. Keep Your Privacy to Yourself**

Electronic voting has been designed to protect the privacy of the owners with respect to how they vote. However, privacy of votes by ballots and proxies are protected by the provisions of the Act. This was not an issue that required a fix.

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### **3. E-Voting is a Game Changer**

Contrary to what many proponents of electronic voting have argued, although there is certainly a place for electronic voting in condominiums, it is not a game changer and does not eliminate the need for proxies. Proxies are not just about voting, but also about participation in meetings generally. Through a proxy, the owner can give the proxy holder the right to ask questions of the board and management at the meeting. This is an inherent and important right of owners. There has been discussion in the industry about electronic voting replacing the need for proxies, but it does not. Even with electronic voting, there is still a need for proxies for those owners who wish to appoint a proxy holder to attend a meeting with authority to participate and vote on an owner's behalf.

Electronic voting is an important development in condominium law, but does not replace or eliminate the need for proxies. What it does is provide an additional tool to allow an owner to participate in a meeting. However, such participation is limited to voting on matters prior to the meeting only.

Prior to the recent amendments to the Act that allow for electronic voting, electronic proxy platforms were developed allowing owners to submit proxies

electronically. With electronic proxies, owners have the choice of giving the proxy holder full discretion to vote on the owner's behalf or of voting directly on the proxy, in which case the proxy, for all intents and purposes, acts as a ballot. This has proven to be of great benefit to increase owner participation at meetings in many condominiums that have traditionally had difficulty getting quorum for meetings, and has helped many condominiums to conduct other business, such as passing by-laws. There really is not anything new with electronic voting that we do not have with electronic proxies, except that participation with an electronic ballot that is limited to solely voting on the specific matter on the electronic ballot. Therefore, electronic voting does not seem to offer any benefits over using electronic proxies.

How is that a game changer?

### **4. Ok – Well, Not Everything is Perfect in E-Voting World....**

On this point I am in complete agreement with my co-author. E-voting and electronic proxies do increase owner participation but will not solve the overriding problem of owner apathy.

As noted by my co-author, electronic voting may cause boards to focus on improving the information given to owners with notices of meeting so that they have more useful information to make a decision on a matter before submitting an electronic ballot. This would happen in a perfect world, but in reality and more often than not, it is unlikely to happen and owners wanting to submit an electronic ballot will have to make a decision on less than full information.

Electronic voting is promising and represents an additional tool to increase owner participation in meetings, which is a welcomed development in condominiums. However, there are still significant questions about how it will be applied. Until the courts have addressed issues with electronic voting in condominiums, it is my view that using electronic proxies appears to be the safer alternative, and offers the same benefits as electronic voting and more. 