

CCGG POLICY

UNIVERSAL PROXY POLICY

SEPTEMBER 2015

Canadian Coalition for
GOOD GOVERNANCE
THE VOICE OF THE SHAREHOLDER

The Need for a “Universal Proxy” in Contested Director Elections

Under Canadian corporate and securities laws, if there is a contested director election then shareholders who attend a shareholder meeting in person are able to vote for any combination of director candidates they choose from among those nominated by the company or those nominated by dissident shareholders. Accordingly, shareholders who vote in person are not restricted to voting for only the company nominees or only the dissident shareholder nominees but rather are free to choose the selection of individuals they believe will make the best board of directors for the company. The majority of Canadian public companies are widely held, however, and in practice very few shareholders attend shareholder meetings in person, so the present day proxy voting system has developed to address this reality. The proxy voting system is one of the most fundamental means by which shareholders, management and directors communicate and CCGG believes that the proxy voting system should re-create as closely as possible the rights and abilities shareholders have if they attend a shareholder meeting in person.¹

Standard practice in Canada is for each side in a proxy contest to have only its own nominees on its proxy form and therefore shareholders can vote only for one set of nominees and not a combination. This practice results in shareholders who vote by proxy in contested elections not having the same ability to select directors as shareholders attending a meeting to vote in person. There are also practical problems associated with the use of different proxy forms; for example, the last proxy form received by the company from a shareholder will revoke any earlier proxies from that shareholder, so shareholders attempting to use more than one proxy form to vote for their selection of candidates will have their wishes frustrated.

Accordingly, CCGG encourages the use of universal proxies whenever there is a contested director election at a Canadian public company. By universal proxy we mean a form of proxy that lists the names of all director nominees on a single form of proxy, regardless of whether they are nominated by the company or by dissidents.

¹ This same belief also is an important factor which underlies CCGG’s view that shareholders should have a right to proxy access, that is, to directly nominate directors to the company’s proxy under certain conditions. See CCGG’s policy entitled “Shareholder Involvement in the Director Nomination Process: Enhanced Engagement and Proxy Access”.

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Proxy contests are pivotal events for a company and its shareholders. CCGG believes that the mandatory use of universal proxies in contested director elections will improve director accountability and enhance shareholder democracy by ensuring that shareholders can choose the best candidates from among those nominated.

Universal Proxies are permitted by Canadian corporate and securities laws

While companies and dissidents are free to use universal proxies in Canada if they agree to do so, CCGG believes that the use of universal proxies should be mandatory and that corporate and securities laws should be amended to prescribe their use in order to ensure that shareholders can vote for the selection of candidates they prefer, just as shareholders can if they attend a shareholder meeting in person.

Universal proxies have been used very rarely in Canada, with the most high profile case being the proxy contest between Canadian Pacific Railway and Pershing Square in 2012. In that case Canadian Pacific Railway and Pershing Square each used its own form of universal proxy, with each proxy form showing all director nominees. Accordingly, shareholders were able to select directors from each side of the contest no matter which proxy form they decided to use.

Implementing the use of Universal Proxies

As noted above, companies and dissidents can decide to use universal proxies and CCGG encourages them to do so. It is a simple way to enhance the shareholder franchise by allowing shareholders to choose in a straightforward manner those candidates they believe to be the best for the company. It also helps to insulate shareholders from technical and practical problems associated with the use of different proxy forms mentioned above.

Ideally both the company and the dissident in a proxy contest will use a single form of universal proxy but we recognize that in practice the company and the dissident likely will each send out its own universal proxy form to shareholders. Even if two separate universal proxy forms are used, however, each one should identify the same set of nominees and thus avoid the confusion caused by presenting shareholders with proxy forms which have different combinations of names.

To ensure that shareholders voting on director elections by proxy have the same freedom to choose among candidates as shareholders attending a meeting in person, the form of universal proxy should name all company nominees and all dissident shareholder nominees and should provide every nominee equal prominence on the form of proxy.² If and when securities regulators or corporate lawmakers do adopt a universal proxy requirement, they should make clear how the goal of equal prominence is to be met, for example by stipulating that the same size and font be used for all nominees.

² CCGG does not object to listing the company nominees and shareholder nominees separately provided they are presented on the same page.

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CCGG understands that there are also technical issues that will need to be addressed to facilitate vote tabulations, such as in situations where shareholders do not cast a vote with respect to a full slate of nominees.³

We expect that each side in a proxy contest would still solicit proxies on behalf of its respective nominees and that solicitation materials used by one side would include biographical information only about its respective nominees (as was the case in the Canadian Pacific Railway/Pershing Square proxy battle).

We encourage securities regulators and corporate lawmakers to make the use of universal proxies in contested director elections mandatory. Until that time, we urge companies and dissidents to voluntarily adopt the use of universal proxies.

³ CCGG believes, for example, that if votes are cast for less than a full slate, then the omitted votes should be treated as withheld and thus not voted for nominees in the discretion of the company or the dissident, as the case may be.