



Kingsdale Client Update

March 28, 2017

Proxy Access' Foray into Canada

Ushering in the 2017 proxy season, for the first time, we see proxy access shareholder proposals emerging in Canada. The Toronto-Dominion Bank ("TD") and Royal Bank of Canada ("RBC") received nearly identical proposals sponsored by individual investor Lowell Weir, requiring the banks to include in their proxy materials shareholder-nominated director candidates provided certain criteria regarding the nominating shareholder (or group) are met. We will monitor the TD vote on March 30, where RBC's asset management arm is its largest shareholder, and RBC's vote on April 6, where TD's asset management arm is its largest shareholder. Heated discussions are expected regarding proxy access as part of shareholder engagement, before and after the banks' meetings, regardless of the support levels for the shareholder proposals.

Current Version of Canadian Proxy Access

Proxy access, as proposed at TD and RBC, differs somewhat from the version endorsed by the Canadian Coalition of Good Governance ("CCGG") (May 2015, [Enhanced Engagement and Proxy Access](#)), notably the three-year holding requirement included in the shareholder proposals.

Canadian Proxy Access Proposed for Banks	CCGG-Endorsed Proxy Access
<ul style="list-style-type: none"> A single shareholder or a group holding 3% continuously for three years shall have the right to nominate directors not exceeding 25% of the board The nomination shall be accompanied with a 500-word statement for each nominee and inclusion of shareholder nominees on the proxy card and information such as the name of the shareholder nominees in the proxy circular Where there are competing shareholder nominations, the shareholder proposal asks that the board shall adopt procedures for promptly resolving disputes including the priority to be given to multiple nominations exceeding the 25% limit 	<ul style="list-style-type: none"> Stratified share ownership levels (5% ownership for a company with a market capitalization of less than \$1 billion, and 3% for a company with a market capitalization of \$1 billion or more) No holding period requirement Right to nominate lesser of three directors or 20% of the board No limit to nominator's statement Where there are competing shareholder nominations, each eligible shareholder will select one nominee until the maximum permitted, in order of largest to smallest shareholder

In its own statement, TD serves to delineate the corporate backdrop of Canada and the U.S. While proxy access bylaws have gained popularity in the U.S., TD argues that provisions exist in Canadian corporate statutes and are codified for the bank in the *Bank Act* allowing shareholders who have held 5% of outstanding shares for six months to nominate an unlimited number of directors (*Bank Act Subsection 143(4)*). Further, TD also believes the proposal is noncompliant with the *Bank Act* and cannot be implemented as proposed. RBC echoes similar sentiments and also highlights its enhanced mechanisms for board accountability including annually elected directors, a majority voting policy, and shareholders' ability to communicate with the independent board chair among other items. RBC, after carefully considering whether to further extend proxy access, has stated that the proposed proxy access bylaw is not aligned with rules of proxy access set out in the *Bank Act*. RBC also references proxy access as a bypass to its current processes for identifying nominees, which may serve to invigorate contested board elections more frequently disrupting the functioning of the board, thereby deterring qualified individuals from board service. Additional concerns include the potential of board factions, and special interest groups' augmented influence.

Proxy Advisors Split on Proxy Access

Major proxy advisors have issued opposing views on proxy access shareholder proposals in Canada. Institutional Shareholder Services Inc. (“ISS”) has supported both proposals whereas Glass, Lewis & Co., LLC (“Glass Lewis”) has recommended against both. In the U.S., however, ISS and Glass Lewis both generally support proxy access.

Key ISS Arguments	Key Glass Lewis Arguments
<ul style="list-style-type: none">• While proxy access rights exist in law, they are seldom used• Board control over the process of shareholder proposal nominations (extent and placement of information) do not provide an even playing field for shareholders to nominate directors• The shareholder proposal is non-binding, majority support would not automatically yield proxy access rights and proxy access does not automatically entitle a shareholder nominee to a board seat, majority shareholder support will still be required for election	<ul style="list-style-type: none">• Glass Lewis is concerned with the feasibility and legality of companies regulated under the <i>Bank Act</i> in adopting the requested proxy access provisions• Recognizes current provisions already in place allowing a shareholder owning 5% of the bank’s shares for six months to nominate a director candidate• Believes the adoption of proxy access at this time would not serve the best interests of shareholders

What This Means for Canadian Corporate Issuers

Following the issuance of ISS’ recommendations in support of proxy access, both banks released statements reiterating their stance against the shareholder proposal and providing additional colour and context on their continuing and evolving discussions with stakeholders. Both banks highlight discussions initiated by the CCGG regarding the evolving Canadian regime prior the receipt of the shareholder proposal. In conclusion, the banks are aware that some shareholders support proxy access in principle but want to ensure that it is implemented in a manner appropriate for the banks. Both TD and RBC have committed to a continuing dialogue with stakeholders, including the CCGG, and to consider an enhanced proxy regime at the 2018 annual meetings.

As of the date of this article, CPPIB has voted in favour of both shareholder proposals along with at least five institutional shareholders outside Canada. Based on Kingsdale’s discussions with other large Canadian pension funds, we believe most, if not all, will support proxy access shareholder proposals that are either consistent with the CCGG version or the version prevalent in the U.S. It also appears that ISS will continue to support such proposals after TD and RBC. We can expect that other issuers may receive similar proxy access proposals as various stakeholders contend the correct fit for the Canadian regime. By having the three-year holding period, the proxy access proposals submitted to the banks are noticeably more consistent with the U.S. market practice, which may make it easier to win broader shareholder support. We see this as a tactical approach by shareholder proponents to test the waters with a low tidemark in hopes of starting the proxy access discussion. We anticipate that leading up to the 2018 meetings of TD and RBC more focus will be placed on exploring the technical complexities of implementation, such as proving continuous three-year shareholder ownership (which will not be an easy task for shareholders hoping to utilize proxy access). Based on the market cap of TD and RBC, shareholders will need to own shares worth approximately C\$4 billion to be able to use the proposed proxy access.

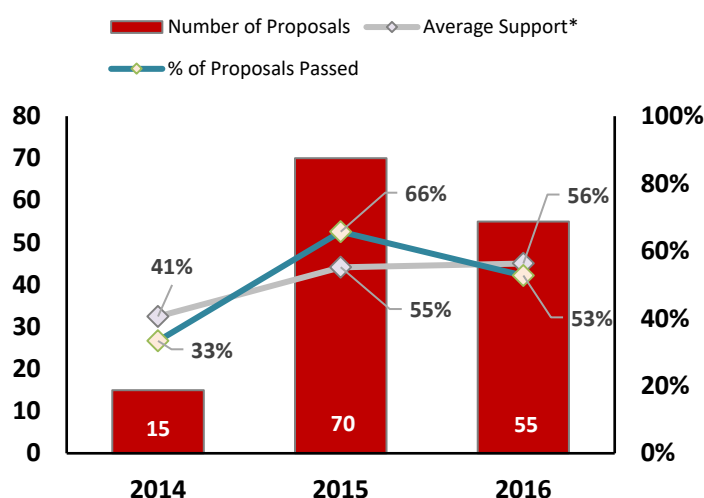
The TD shareholder meeting will occur on March 30, 2017, with RBC’s meeting taking place on April 6, 2017. Kingsdale will continue to monitor these developments, including the voting results of the shareholder proposals, and provide timely client updates as they become available. As recent corporate governance developments have reminded us, like the separation of Chair and CEO positions, Majority

Voting, and Say on Pay, the largest Canadian banks will be the first to hoist their sails with the rest of corporate Canada to follow, which may result in a proxy access inevitability in the near future. Given the established presence and recognition of proxy access in the U.S., we expect to see Canadian companies which are dual-listed in both Canadian and U.S. exchanges be the first pioneers to adopt such bylaws.

Recent Developments

In the U.S., over half of the S&P 500 companies have adopted proxy access. Of both shareholder and management endorsed proposals voted on at the S&P 500 companies, we observe an increasing trend of average support.

Proxy Access Proposals (2014 - 2016)



Note: Proposals in the U.S., sourced from SharkRepellent; Average support represents for as % of votes cast.

Hedge fund Gamco Asset Management ("Gamco") was the first investor to utilize proxy access in the U.S. through a Schedule 14N filing on November 10, 2016, nominating one director at National Fuel Gas Company ("National Fuel Gas"). The nomination was challenged by National Fuel Gas, arguing that the proxy access protocols were "limited for use by an investor who wants to nominate a board candidate but has not advocated and is not advocating to change or influence control of the Company". The Gamco nomination was withdrawn shortly thereafter. Several other shareholders have since filed a Schedule 14N including Kanen Wealth Management LLC at MagicJack VocalTec Ltd. (withdrawn), individual shareholder Paul M. Posner at MagicJack VocalTec Ltd. (nominee included in

the Preliminary Proxy Statement), and individual shareholder Barry Honig at Bioptix Inc. (Bioptix appointed one dissident nominee and another director to the board subsequently.)

In Canada, the recently announced *Bill 101, Enhancing Shareholder Rights Act, 2017* to modernize the *Business Corporations Act (Ontario)* ("OBCA") seeks to lower the threshold ownership requirements for shareholder nominations of individuals for election of directors, as well as shareholder meeting requisitions from 5% to 3%. Similar amendments, however, have not been proposed under the *Canada Business Corporations Act* overhaul announced in late 2016, despite CCGG advocating for such changes. On one hand, the proposed OBCA amendments may serve to further eliminate the need for proxy access in Canada. On the other hand, the push for legislative changes in conjunction with introducing proxy access bylaws at Canada's largest banks indicates a multi-faceted approach by champions of corporate governance to actualize a more shareholder-friendly future.

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