

KEEPING CURRENT

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Lawyer removed as counsel of record for non-profit corporation (*Fodjo v. NufiCanada*)

By James R.G. Cook

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Lawyers owe a duty of loyalty to their clients. Effective representation of a client's interests may be compromised where a lawyer is tempted to prioritize the interests of others over those of their client. When representing a corporation, a lawyer must be aware of potential conflicts between the corporation's interests and those of individuals involved in its affairs. The lawyer must maintain independence to ensure that their representation is aligned with the corporation's best interests.

The appearance of a conflict between a corporate client's interests and the individuals who are providing instructions on the corporation's behalf may be sufficient to disqualify a lawyer from acting for the corporation, as demonstrated by *Fodjo v. NufiCanada*, [2025 ONSC 6330 \(CanLII\)](#).

The case arose during the course of an application brought by a member of an Ontario not-for-profit corporation seeking to appoint an inspector to investigate the corporation's financial affairs.

The application was commenced under [section 310\(1\)](#) of the [Corporations Act](#) in 2018, on the grounds that one

of the directors of the corporation and the corporation's treasurer may have misappropriated corporate funds. Among other things, the member, who was the head of the corporation's Finance Committee, claimed that there were discrepancies between the treasurer's reports and the corporation's bank records, leading him to suspect that there had been a failure to deposit membership dues and report certain transactions, among other irregular transactions.

The application faced extensive delays. An initial court attendance was adjourned to allow the corporation time to retain a lawyer, with conditions including freezing the corporation's bank accounts. The corporation failed to retain a lawyer by the court's deadline, leading to another motion by the director and treasurer for access to the bank account to obtain funds for legal representation, which was eventually dismissed as abandoned. The application was further delayed due to disputes over the admissibility of affidavit and other evidence.

The respondent lawyer was retained to represent the corporation in January 2019.

Notwithstanding that the retainer agreement with the lawyer had been widely distributed to members of the corporation, the corporation refused to produce a copy of the retainer agreement for the application, claiming solicitor-client privilege. The court found that the agreement's wide distribution constituted a waiver of privilege and was therefore admissible, referring to the doctrine of waiver of privilege discussed in cases such as *R. v. Ward*, [2016 ONCA 568 \(CanLII\)](#), at paragraph [35](#).

The applicant member brought a motion for removal of the lawyer as counsel for the corporation on the basis of conflict of interest, as the lawyer had been taking instructions from the very individuals suspected of financial misconduct. The retainer agreement between the corporation and the lawyer was signed by the director and treasurer.

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While the agreement stated that the lawyer was being retained to represent the interests of the corporation in the litigation, it also stated that the lawyer could not accept instructions from anyone other than the director and treasurer.

The motion judge noted that a corporation's directors have the power to retain and instruct counsel pursuant to [section 20](#) of the *Not-for-Profit Corporations Act*, which entrusts them with the duty to "manage or supervise the management of the activities and affairs of the corporation." However, the motion judge determined that the lawyer was being instructed by the respondent director and treasurer, who was

not a director, instead of the corporation's board.

A court has inherent jurisdiction to disqualify a lawyer from litigation in three circumstances: (1) to avoid the risk of improper use of confidential information; (2) to avoid the risk of impaired representation; and/or (3) to maintain the repute of the administration of justice: *Canadian National Railway Co. v. McKercher LLP*, [2013 SCC 39](#), at paragraph [61](#).

The case at hand involved the second and third situations, namely whether there was a substantial risk of impaired representation and whether removing the lawyer as counsel for the corporation was necessary to protect the integrity and repute of the administration of justice.

The motion judge noted that in cases where a lawyer agrees to represent a client whose legal interests are adverse to the legal interests of another client in a different proceeding, there is a risk that divided loyalty may cause the lawyer to "soft peddle" their representation of a client out of concern for their other client's interests, referring to the Supreme Court of Canada's decisions in *R. v. Neil*, [2002 SCC 70 \(CanLII\)](#), at paragraph [31](#) and *Canadian National Railway Co. v. McKercher LLP*, [2013 SCC 39](#), at paragraph [26](#).

In this case, the lawyer was not acting for the director or treasurer personally, yet she was taking instructions from them exclusively notwithstanding their involvement in the affairs that prompted the application to have the corporation's financial affairs investigated. The motion judge determined that these individuals had "glaring conflicts of interest" relative to the corporate client to whom the lawyer owed a duty of loyalty. With the respondent director and treasurer providing instructions to the lawyer, there was a substantial risk that she

could be misled or manipulated to prefer their interests over the interests of the corporation. The retainer agreement itself recognized this risk by stipulating that the lawyer would not accept instructions from individuals who have a conflict of interest.

The motion judge noted that the court was not tasked with assessing the lawyer's compliance with her professional obligations and there was no allegation that she had engaged in any professional misconduct. However by taking instructions from the two individuals who had glaring conflicts of interest relative to the corporation, the lawyer was put in a position that compromised her ability to ensure that the interests of the corporate client were properly being served and protected, as required by her professional obligations under [Rule 3.2-3](#) of the [Rules of Professional Conduct](#).

In the motion judge's view, the public's confidence in the integrity and administration of justice would be compromised if the court permitted the lawyer to continue to represent the corporation in these circumstances.

In the result, the court ordered that the lawyer be removed as counsel of record for the corporation. This removal will require the corporation to retain a new lawyer and authorize individuals without conflicts of interest to instruct counsel.

The application to appoint an inspector and investigate the corporation's financial affairs will be heard at a later date. It remains to be seen whether or not the underlying allegations that precipitated the application will be established.

Contact Us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or jcook@grllp.com.

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