

**SUPERIOR COURT OF JUSTICE – ONTARIO**

7755 Hurontario Street, Brampton ON L6W 4T6

**RE:** ALAIN FODJO (Applicant)

**AND:**

NUFICANADA COMMUNITY CORPORATION (Respondent)

**BEFORE:** Justice C. Petersen

**COUNSEL:** William Gilmour, for the Applicant  
Alina Sklar, for the Respondent

**HEARD:** In writing

**ENDORSEMENT**

Il s'agit d'une procédure bilingue. À ce titre, la Cour peut rendre des décisions en anglais ou en français. La présente décision est rédigée en anglais, mais l'une ou l'autre partie peut demander à la Cour une traduction en français, aux frais de la Cour.

**INTRODUCTION**

[1] This is a motion by the Applicant for an Order removing Alina Sklar as the solicitor of record for the Respondent.

[2] The Respondent, NufiCanada is a not-for-profit corporation. The Applicant, Alain Fodjo is a member of the corporation.

[3] Mr. Fodjo commenced an Application under s. 310(1) of the *Corporations Act*, R.S.O. 1990, c. C38, which reads as follows:

Upon an application ... of at least one-tenth of the members of a corporation without share capital, the court may appoint an inspector to investigate the affairs and management of the corporation or may appoint a person to audit its books.

[4] Mr. Fodjo claims to have the support of at least one-tenth of the corporation's membership. I make no finding with respect to that issue; it will need to be decided by the Application judge.

[5] In his Application, Mr. Fodjo is seeking the appointment of an inspector to investigate the financial affairs of NufiCanada. He suspects that one of the Corporation's directors, Guy Wassom, and one of the corporation's Treasurers, Marie Claire Djiadeu, may have misappropriated corporate funds.

[6] NufiCanada has two Treasurers. Ms. Djiadeu became the Accounts Receivable Treasurer in 2017. In that capacity, she was responsible for collecting membership dues, revenues generated by community events, and donations; depositing the money to the corporation's bank account; and creating monthly reports on receivables. Mr. Fodjo, who was the Head of the corporation's Finance Committee, claims that he discovered discrepancies between Ms. Djiadeu's monthly reports, the corporation's bank records, and other financial records. As a result, he came to believe that she had failed to deposit membership dues into the corporation's bank account and failed to report and document certain transactions, including the receipt of End-of-Year Fundraising Party revenues, and newcomers' assistance loan repayments. Mr. Fodjo also identified certain irregular transactions, including cheques payable to Mr. Wassom, at least one of which was allegedly recorded by Ms. Djiadeu under someone else's name. These irregularities led to his suspicions about the possible misappropriation of corporate funds.

[7] Mr. Fodjo's Application was issued in 2018, but it has yet to be heard. There have been extensive delays in this proceeding due to a variety of factors, which need not be reviewed here. A summary of some of the previous steps in the proceeding will, however, provide useful context for the motion before me.

## HISTORY OF THE PROCEEDING

[8] The following summary is not comprehensive, but it provides relevant background information about the history of this proceeding.

[9] At the first Court attendance on November 13, 2018, Mr. Wassom and Ms. Djiadeu appeared with two other directors of the corporation, Justin Siani and Marie Kamga Djomboue. These four individuals requested an adjournment of the Application hearing to allow NufiCanada time to retain a lawyer and prepare responding materials. The adjournment was granted by Justice Fowler-Byrne on certain conditions. She ordered NufiCanada to either retain counsel or bring a motion for leave to be represented by another person no later than January 25, 2019. She fixed a timetable for the exchange of materials and scheduled the Application hearing for the week of June 17, 2019. She also ordered that, pending final argument on the Application, NufiCanada's bank accounts would be frozen, and no further financial transactions could be undertaken by NufiCanada without Mr. Fodjo's prior written consent.

[10] NufiCanada neither retained a lawyer nor moved for leave to be represented by another person by the January 25, 2019 deadline. Instead, Mr. Wassom and Ms. Djiadeu brought a motion, purportedly on NufiCanada's behalf, seeking (among other relief) access to its bank account for the purpose of obtaining funds to retain a lawyer to represent NufiCanada in the proceeding. Mr. Fodjo opposed the motion. He took the position that Mr. Wassom and Ms. Djiadeu were not authorized to retain and instruct counsel on the corporation's behalf.

[11] No one showed up for NufiCanada at the hearing of the motion on February 8, 2019. I dismissed the motion as abandoned, but did so on a "without prejudice" basis because it appeared that there may have been a misunderstanding by Mr. Wassom about a possible adjournment of the hearing. I noted in my Endorsement that the motion could be brought back before the Court with notice to Mr. Fodjo. (The motion was eventually revived at a Case Management Conference in October 2023, and I dismissed it that day.)

[12] Unbeknownst to Mr. Fodjo, Alina Sklar had been retained to represent NufiCanada in this matter on January 31, 2019. This information came to light after the February 8, 2019 hearing date.

[13] On February 20, 2019, the Regional Senior Judge appointed me as the case management judge for this file.

[14] On June 17, 2019, I adjourned the Application hearing to October 16, 2019. At that time, Mr. Fodjo advised of his intention to bring a motion to have Ms. Sklar removed as counsel for the Respondent. I fixed a timetable for that motion to proceed.

[15] Mr. Fodjo filed his motion material, and NufiCanada filed responding material, including an affidavit sworn by Ms. Djiaudeau dated July 30, 2019. Cross-examination of Ms. Djiaudeau was scheduled for August 15, 2019, but she failed to attend the examination. She claimed that she was unable to do so for medical reasons.

[16] The parties appeared before Justice McSweeney on September 17, 2019. They were unable to argue Mr. Fodjo's motion for removal of Ms. Sklar as the Respondent's lawyer, in part because the cross-examination of Ms. Djiaudeau had not taken place. Ms. Sklar advised the Court that NufiCanada no longer wished to rely on the affidavit of Ms. Djiaudeau and submitted that it was therefore not required to produce her for cross-examination. Mr. Fodjo took the position that he was entitled to cross-examine Ms. Djiaudeau as a necessary party. Justice McSweeney directed NufiCanada to bring a motion if it intended to withdraw Ms. Djiaudeau's affidavit.

[17] To avoid the necessity of a motion, NufiCanada then sought to replace Ms. Djiaudeau's affidavit with an almost identical affidavit dated August 26, 2019, sworn by Ms. Djomboue. Ms. Sklar advised Mr. Fodjo's lawyer that Ms. Djomboue would be made available for cross-examination. Mr. Fodjo did not consent to proceeding in that fashion.

[18] At a subsequent Case Management Conference, Mr. Fodjo asked me to order Ms. Djiaudeau's attendance for cross-examination. On November 25, 2020, I ordered NufiCanada to produce a physician's note regarding Ms. Djiaudeau's health and ability to

attend for cross-examination. A physician's note was subsequently delivered to Mr. Fodjo's lawyer.

[19] At a further Case Management Conference on March 11, 2022, the parties still could not agree on the issue of Ms. Djiadeu's compellability as a witness to be cross-examined. They mutually requested that I decide the issue on a motion in writing.

[20] On August 4, 2023, after reviewing the relevant motion materials (including the physician's note), I concluded that there was no evidentiary basis upon which I could find that Ms. Djiadeu was medically unable to attend for cross-examination. I wrote in my Endorsement, "it appears that the Respondent is attempting to shield Ms. Djiadeu from cross-examination. It should not be permitted to withdraw her affidavit and substitute a virtually identical affidavit from a replacement deponent, particularly when there is no medical justification for doing so." I ruled that NufiCanada could not withdraw Ms. Djiadeu's affidavit, and I ordered NufiCanada to produce Ms. Djiadeu to be cross-examined on her affidavit.

[21] In a further Endorsement dated October 16, 2023, I ordered that "the affidavit of Marie Djomboue sworn August 26, 2019 does not form part of the motion record."

[22] Ms. Djiadeu's cross examination was conducted on February 13, 2024.

[23] At a subsequent Case Management Conference, the parties agreed that I could decide Mr. Fodjo's motion for removal of Ms. Sklar as NufiCanada's solicitor of record. They also agreed to make their submissions in writing.

[24] I have reviewed all the evidence and written submissions. Before addressing the merits of the motion, I need to deal with some evidentiary issues.

## EVIDENTIARY ISSUES

### Admissibility of Ms. Djomboue's affidavit dated August 26, 2019

[25] NufiCanada seeks to rely on the affidavit of Ms. Djomboue dated August 26, 2019. As noted above, I previously ruled that her affidavit is not part of the motion record. I have therefore disregarded it. It is struck from the record.

### Admissibility of Daniel Freudman's affidavit dated May 15, 2023

[26] NufiCanada also seeks to rely on the affidavit of Daniel Freudman, sworn May 15, 2023. Mr. Freudman describes himself as “a colleague of Alina Sklar.” Mr. Fodjo objects to the admissibility of Mr. Freudman's affidavit on the basis that it contains “second hand evidence” from “an outsider with no personal knowledge of the events or the governance of NufiCanada.”

[27] Mr. Freudman's affidavit is filled with statements that are inadmissible as evidence because they constitute argument (paras. 9-12 and 16), speculation (paragraph 15) and hearsay (paras. 6-9 and 13-15, and Exhibit A). The latter evidence consists of Mr. Freudman's repetition of out-of-court statements made to him by Ms. Sklar, as well as his reference to statements written by Ms. Djomboue in an email sent to NufiCanada members in April 2019. Ms. Djomboue's email message, which is appended as Exhibit A to Mr. Freudman's affidavit, consists entirely of hearsay statements, the reliability and necessity of which have not been established. The principled exception to the rule against hearsay therefore does not apply.

[28] For the above reasons, I have disregarded and struck from the record all but the first five paragraphs of Mr. Freudman's affidavit.

### Admissibility of the January 31, 2019 retainer agreement

[29] In support of his motion, Mr. Fodjo seeks to rely on a retainer agreement dated January 31, 2019. The agreement is signed by Ms. Sklar and by Mr. Wassom and Ms. Djjadeu on behalf of NufiCanada. The authenticity of the agreement is not disputed.

However, NufiCanada objects to its admissibility on the basis that it is protected by solicitor-client privilege.

[30] NufiCanada submits that I previously ruled the agreement is inadmissible on this motion. That is not accurate. In an Endorsement dated July 13, 2023, pertaining to the compellability of Ms. Djiadeu for cross-examination, I stated the following:

Without making any ruling on the claimed privilege or waiver of privilege, and without deciding the issue of the admissibility of the disputed retainer agreement in the hearing of the motion to remove Ms. Sklar as solicitor of record, I have decided that I will exclude the agreement from the record before me for the sole purpose of deciding the compellability of Ms. Djiadeu as a witness. The agreement is not materially relevant to that particular issue.

[31] I am now required to rule on the admissibility of the retainer agreement in the context of the removal motion before me. There is no question that the document is covered by solicitor-client privilege. The only issue is whether that privilege was waived by NufiCanada.

[32] Solicitor-client privilege may be waived by the client to whom it belongs. The waiver may be made expressly, or it may be found by the Court through implication, based on considerations of fairness. For example, where a client relies on part of a privileged communication with their lawyer to advance their case in litigation, fairness may dictate that the entire communication be disclosed and admitted, even if the client did not intend to waive privilege over the undisclosed portion of the communication.

[33] An express waiver of privilege will occur “where the holder of the privilege (1) knows of the existence of the privilege and (2) voluntarily evinces an intention to waive it”: *R. v. Youvarajah*, 2011 ONCA 654, at para. 146, rev’d [2013] 2 SCR 720 (not on this issue). Inadvertent disclosure of privileged information will not automatically result in a waiver of privilege, nor will inadvertently disclosed documents be automatically protected by privilege. Whether privilege has been waived by accidental disclosure is a fact-specific inquiry to be decided on a case-by-case basis: *R. v. Ward*, 2016 ONCA 568, at para. 35; *Chapelstone Developments Inc. v. Canada*, 2004 NBCA 96, at paras. 42-59; *Royal Bank*

*of Canada v. Lee*, 1992 ABCA 166, at paras. 16-18; Pacciocco, D.M., et al, *The Law of Evidence* (8<sup>th</sup> ed.), Irwin Law, 2020, at pp.296-297.

[34] In this case, the documentary record establishes that NufiCanada held a General Assembly on January 26, 2019. The people present were canvassed to determine whether anyone was willing to volunteer to represent the corporation in the legal proceeding commenced by Mr. Fodjo. No one came forward. A resolution was then proposed to enable NufiCanada to use its frozen funds (with leave of the court) to retain a lawyer to represent the corporation. After discussion, a vote was taken, and the resolution passed. However, there was no resolution proposed, no vote taken, and no resolution adopted to retain the services of a specific lawyer. Nor was a resolution proposed, voted upon, or adopted to authorize specific members or directors to retain and instruct counsel on NufiCanada's behalf. The board canvassed those present for a volunteer to assume responsibility for retaining and instructing counsel, but none came forward.

[35] According to Ms. Djadeu's uncontradicted evidence, after the January 26, 2019 General Assembly, some members of NufiCanada recommended French-speaking lawyers to the Board. Ms. Sklar was one of the proposed lawyers. A meeting was scheduled with her. NufiCanada's three directors (Guy Wassom, Justin Siani and Marie Djomboue) and several members of the corporation, including Ms. Djadeu, then met with Ms. Sklar and decided to retain her services to represent NufiCanada in this proceeding.

[36] A retainer agreement was drafted by Ms. Sklar. It was executed by her, Mr. Wassom and Ms. Djadeu. Ms. Djadeu testified that she did not keep a copy of the agreement, but that the directors<sup>1</sup> had copies.

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<sup>1</sup> Ms. Djadeu testified in French. She used the word "coordinateurs", which I have translated to "directors" (rather than "coordinators") because she was referring to the corporation's Board members. I have similarly translated the word "coordination" to "Board" in my review of Ms. Djadeu's evidence.

[37] Mr. Fodjo deposed that the retainer agreement “was circulated far and wide to members of NufiCanada.” He stated that, after two membership meetings were held in April 2019, he received a copy of the agreement via an unsolicited, generalized mailing from NufiCanada to its members. Mr. Fodjo was not cross-examined on this evidence. Nor was his evidence on this point contradicted by any of the directors or other members of NufiCanada.

[38] Ms. Djiaudeau denied ever distributing a copy of the retainer agreement to anyone. She explained that she did not even possess a copy. She neither confirmed nor denied that the directors disseminated a copy of the agreement to the membership. However, she recalled that the Board shared with the full membership the fact that Ms. Sklar had been retained. She noted that, after Mr. Fodjo opposed the motion for access to NufiCanada’s frozen funds by arguing that Ms. Sklar was effectively acting for Mr. Wassom and Ms. Djiaudeau rather than for NufiCanada, dozens of members wrote to Mr. Fodjo’s lawyer, asserting that Ms. Sklar represented the corporation, and not Mr. Wassom or Ms. Djiaudeau personally.

[39] No directors provided evidence on behalf of NufiCanada in this motion. None denied distributing the retainer agreement widely to members via a general email, nor did any witness depose that the distribution to members was done inadvertently.

[40] Mr. Freudman’s affidavit contains an allegation that Mr. Fodjo obtained the retainer agreement unlawfully by hacking into the corporation’s email accounts. Mr. Fodjo denies this serious allegation. The allegation constitutes speculation based on unreliable hearsay, which I have already ruled inadmissible.

[41] Ms. Djiaudeau also alleged (during her cross-examination) that Mr. Fodjo hacked into the corporation’s internet domain and used its executive email account without authorization. She stated that she reached this conclusion because she and other members of the corporation received an email signed by Mr. Fodjo’s wife sent from an executive email address, and because directors of the corporation subsequently experienced difficulties accessing their executive email accounts. The latter evidence is

inadmissible hearsay. Even if it were admissible, it is insufficient evidence upon which to infer that Mr. Fodjo hacked into the corporation's internet domain and hijacked the executive email accounts, let alone that he obtained a copy of Ms. Sklar's retainer agreement by doing so. It would not be reasonable to draw those inferences on a balance of probabilities without more compelling evidence. There is no evidence that NufiCanada took any steps to investigate whether the accounts had been accessed by an unauthorized user. Ms. Djiadeu simply jumped to the conclusion that Mr. Fodjo had done so.

[42] There is no credible admissible evidence that Mr. Fodjo did anything inappropriate or unlawful to obtain a copy of the retainer agreement. I accept his evidence that it was sent to him by NufiCanada's Board as part of a generalized email to the corporation's membership. I find it probable that a copy of the agreement was disseminated broadly by the Board when it informed members of the fact of Ms. Sklar's retainer. It is likely the basis upon which dozens of members wrote to Mr. Gilmour that Ms. Sklar represented the corporation and not Mr. Wassom or Ms. Djiadeu personally.

[43] There is no evidence that the corporation's directors were unaware of the confidential nature of the retainer agreement. Notably, NufiCanada does not make that assertion. The Board's intentional wide distribution of the agreement to the corporation's membership amounts to an unambiguous voluntary waiver of privilege over the document. This waiver applies only to the content of this one document, and not to any other confidential communications between Ms. Sklar's office and representatives of NufiCanada for the purpose of obtaining or providing legal advice.

[44] For the above reasons, I conclude that the retainer agreement is admissible as evidence on this motion.

#### Admissibility of Ms. Djiadeu's Evidence

[45] Ms. Djiadeu's affidavit includes factual assertions that are not relevant to the issues raised by this motion. For example, she states that Mr. Fodjo's membership was suspended by NufiCanada in 2010 due to his aggressive and inappropriate conduct

toward the treasurer at the time. She attaches corporate records to her affidavit to support this assertion. Both her statement and the records are irrelevant and prejudicial to Mr. Fodjo. They are therefore inadmissible on this motion.

[46] Ms. Djiadeu's affidavit also includes argumentative statements and conclusory opinions that are inadmissible. For example, she asserts that Mr. Fodjo committed perjury ("s'est parjuré") when he deposed, in his July 4, 2019 affidavit, that he was prohibited from voting at the January 26, 2019 General Assembly. She similarly asserts that Mr. Fodjo adduced falsified documents as exhibits to his affidavit, namely a 2018 NufiCanada membership list. Mr. Fodjo's credibility and the authenticity of documents produced are issues for the Court to decide. Ms. Djiadeu's opinions on those issues are irrelevant and inadmissible.

[47] Other portions of Ms. Djiadeu's affidavit and portions of her testimony during cross-examination constitute inadmissible speculation and hearsay, but the evidence in question is not relevant to the issues raised by this motion, so I will not take the time to review the deficiencies in detail. They relate to allegations that Mr. Fodjo committed fraud with respect to the corporation's bank account by presenting a falsified document to the bank. That evidence is prejudicial and irrelevant to the issues raised by this motion, so I have disregarded it.

[48] Despite deficiencies, much of Ms. Djiadeu's affidavit consists of relevant and admissible evidence, so I have not struck her entire affidavit from the record. I have, however, disregarded all the hearsay, speculation, and opinion evidence. I have taken the admissible evidence into consideration, subject to my credibility findings below.

#### Admissibility of Mr. Fodjo's Evidence

[49] Mr. Fodjo's affidavits include submissions that should not be presented as factual statements, and conclusory opinions, none of which is admissible evidence. For example, in his Affidavit sworn April 19, 2022, he asserts that Ms. Sklar "primary (sic) acts as a proxy legal counsel for Guy Wassom and Djiadeu." This assertion amounts to Mr. Fodjo's opinion on an issue in dispute.

[50] There are other arguments advanced in his affidavits, which are not admissible evidence. However, they pertain to issues that are not before me on this motion, such as whether Ms. Djadeu was too ill to attend for her cross-examination in 2019-2023. Consequently, I need not review those evidentiary deficiencies in detail. I have disregarded all argumentative statements in his affidavits.

[51] However, I have not struck all of Mr. Fodjo's affidavit evidence from the record. Much of his evidence is relevant and admissible, and therefore has been taken into consideration.

#### MOTION FOR REMOVAL OF COUNSEL

[52] Having addressed the evidentiary issues, I will now turn to the merits of the motion.

[53] As noted earlier in this decision, NufiCanada's retainer agreement with Ms. Sklar is signed by Mr. Wassom and Ms. Djadeu. When Ms. Djadeu was asked, during her cross-examination, who signed the agreement for NufiCanada, she initially testified that Mr. Wassom signed. She later stated that the Board signed ("la coordination l'a signée"), implying that Mr. Wassom, Ms. Djomboue and Mr. Siani all signed the agreement, which is false. She was reluctant to admit that she signed the agreement, but she eventually did so. Her lack of candour on this point undermines her credibility.

[54] The retainer agreement clearly states that Ms. Sklar is hired to represent NufiCanada, the corporate entity, in the within proceeding. She is not retained to represent Mr. Wassom or Ms. Djadeu personally. However, the agreement stipulates that only Mr. Wassom and Ms. Djadeu are authorized to give instructions to her on NufiCanada's behalf. It specifies that Ms. Sklar will not accept instructions from anyone other than Mr. Wassom or Ms. Djadeu, unless she is provided with written confirmation from the corporation that it has authorized another person to instruct counsel. The agreement further stipulates that Ms. Sklar will not accept instructions from any such

authorized individual if the person has a conflict of interest due to their implication in this file.<sup>2</sup>

[55] Ms. Djadeu denied personally giving instructions to Ms. Sklar. She was evasive when she was asked who was communicating instructions in connection with this litigation. With persistence, Mr. Gilmour eventually succeeded in obtaining an unqualified answer to that question. Ms. Djadeu testified that NufiCanada's directors are instructing Ms. Sklar. She stated that her name was added to the retainer agreement simply as a fallback person, in case Ms. Sklar was unable to reach one of the three directors when she needed instructions. She then stated that the Board decides collectively what instructions to give the lawyer and she is tasked with delivering the message to Ms. Sklar.

[56] I reject this testimony as not credible. It is internally inconsistent and is contradicted by the plain language of the retainer agreement. I conclude that Ms. Djadeu is trying to distance herself from her role as an instructing client because she knows she has a conflict vis-à-vis NufiCanada's interests in this proceeding.

[57] Ms. Djadeu was slow to acknowledge her conflict during her cross-examination. She initially feigned not understanding what it meant to have personal interests that diverge from the interests of the corporation. She tried to avoid answering questions about her conflict of interest and Mr. Wassom's conflict of interest. Mr. Gilmour pressed her, and she eventually acknowledged the existence of these conflicts. Her reluctance to admit these obvious facts undermines her credibility.

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<sup>2</sup> « J'accepterai des instructions pour le présent mandat provenant uniquement des personnes autorisées à agir au nom de Nuficanada. Les personnes autorisées à me donner des instructions au nom de Nuficanada sont les suivantes : Guy M. Wassom Ngangue et Marie-Claire Djadeu. Je ne prendrai pas d'instruction d'aucune autre personne dans ce dossier. Vous pouvez néanmoins autoriser une autre personne à me donner des instructions dès lors que cette autorisation m'a préalablement été communiquée par écrit, signée et datée. Veuillez noter que si cette autre personne se trouve ou peut se trouver en situation de conflit d'intérêt par son implication dans ce mandat, je n'accepterai pas d'instruction de sa part à l'endroit de Nuficanada. »

[58] NufiCanada submits, based on Ms. Djiaudeau's testimony, that the Board is responsible for instructing Ms. Sklar on NufiCanada's behalf. There is no credible evidence to support that submission, and I reject it. I conclude that Mr. Wassom and Ms. Djiaudeau are instructing Ms. Sklar, pursuant to the terms of the retainer agreement.

### Positions of the Parties

[59] Mr. Fojo argues that Ms. Sklar should be disqualified from acting for NufiCanada for several reasons. First, he submits that she has a conflict of interest because she is being instructed by individuals who have a conflict of interest with respect to NufiCanada in this proceeding. Second, he submits that these individuals were not authorized by the membership, in accordance with the corporation's bylaws, to retain and instruct counsel on NufiCanada's behalf. Finally, he argues that the membership authorized a different person to retain and instruct counsel for NufiCanada at an Extraordinary Meeting of the membership that he convened on April 27, 2019.

[60] NufiCanada argues that Ms. Sklar has no conflict of interest because she represents only the corporation, not the two individuals who signed the retainer agreement. NufiCanada further submits that the individuals who retained Ms. Sklar were authorized to do so by the Order of Justice Fowler Byrne dated November 13, 2018. In the alternative, NufiCanada argues that the directors have the inherent authority to retain counsel for NufiCanada in their capacity as members of the Board, or they have statutory authority to do so pursuant to s. 21 of the *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15. In the further alternative, NufiCanada argues that the membership approved Ms. Sklar's retainer by a majority vote conducted at the General Assembly held on January 26, 2019, where the voting members in attendance constituted a sufficient quorum.

### The Effect of the Order of Justice Fowler Byrne

[61] I will first address NufiCanada's argument that the four individuals who appeared in Court on November 13, 2018 were authorized by Justice Fowler Byrne's Order to retain and instruct counsel on NufiCanada's behalf.

[62] NufiCanada submits that Mr. Wassom, Ms. Djomboue, Mr. Siani and Ms. Djadeu were given a mandate by the Court on November 13, 2018 to select and retain NufiCanada's counsel. In its factum, NufiCanada goes so far as to submit that Justice Fowler Byrne's Order *required* the individuals who were present on November 13, 2018 to retain a lawyer to represent NufiCanada. That is not a reasonable interpretation of the Order.

[63] Justice Fowler Byrne simply ordered that NufiCanada had a specified amount of time in which to either retain a lawyer or to bring a motion for leave to have a non-lawyer represent the corporation in the proceeding. She neither considered nor ruled on the issue of whether the four individuals who appeared before her were authorized to retain and instruct counsel for NufiCanada.

[64] NufiCanada submits that Mr. Fodjo is precluded from challenging Mr. Wassom's and Ms. Djadeu's authority to retain and instruct NufiCanada's counsel because he did not object to their authority during the initial hearing before Justice Fowler Byrne. Mr. Fodjo's failure to object at that time is explained by the fact that neither Ms. Djadeu nor Mr. Wassom had, at that point, purported to take any steps to retain and instruct counsel for NufiCanada. Mr. Fodjo promptly raised his objection at the next court appearance, when a motion was filed seeking access to funds in NufiCanada's frozen bank account to enable Ms. Djadeu and Mr. Wassom to retain counsel for the corporation.

[65] For the reasons articulated above, I reject NufiCanada's primary submission that Justice Fowler-Byrne's Order granted authority to certain individuals (including Mr. Wassom and Ms. Djadeu) to retain and instruct counsel on NufiCanada's behalf.

#### Board's Authority

[66] I agree with NufiCanada's alternative submission that the corporation's directors have the power to retain and instruct counsel pursuant to s. 20 of the *Not-for-Profit Corporations Act*, 2010, S.O. 2010, c. 15, which entrusts them with the duty to "manage or supervise the management of the activities and affairs of the corporation." However,

as I have concluded above, the Board is not instructing NufiCanada's counsel in this proceeding.

[67] Only one director, Mr. Wassom, is acting as an instructing client. The other instructing client, Ms. Djadeu, is not a director. There is no evidence of a Board resolution passed to authorize these two individuals to instruct counsel on NufiCanada's behalf. Furthermore, at the January 26, 2019 General Assembly meeting, the membership approved retaining a lawyer, but did not vote on who would be authorized to retain and instruct counsel on the corporation's behalf. The source of Mr. Wassom's and Ms. Djadeu's authority to instruct Ms. Sklar is therefore unclear.

[68] I am not required to decide whether this lack of clarity is sufficient to disqualify Ms. Sklar from acting for NufiCanada in this proceeding, because I have concluded that Mr. Wassom's and Ms. Djadeu's conflicts of interest are grounds for disqualification. I arrive at this conclusion for the reasons set out below.

### Conflict of Interest

[69] NufiCanada argues that the right to retain counsel of one's choice is a fundamental principle of justice. That is true, but the Court is sometimes called upon to determine whether a lawyer should be precluded from representing a client in a proceeding based on principles of conflict of interest. As the Supreme Court of Canada explained in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 SCR 649, at para. 23:

The law of conflicts is mainly concerned with two types of prejudice: prejudice as a result of the lawyer's misuse of confidential information obtained from a client; and prejudice arising where the lawyer "soft peddles" his representation of a client in order to serve his own interests, those of another client, or those of a third person. As regards these concerns, the law distinguishes between former clients and current clients. The lawyer's main duty to a former client is to refrain from misusing confidential information. With respect to a current client, for whom representation is ongoing, the lawyer must neither misuse confidential information, nor place himself in a situation that jeopardizes effective representation.

[70] In *McKercher*, the Supreme Court held (at para. 61) that the 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.

[71] Most motions to remove an opposing party's solicitor of record for conflict of interest arise in the first circumstance, where the lawyer in question previously acted for the moving party and thereby acquired information that could prejudice the moving party. In such a case, the moving party must demonstrate that the targeted lawyer is in possession of confidential information that could be used in a tangible manner to undermine its position in the litigation: *McKercher*, at para. 54.

[72] Those are not the facts of this case. I therefore reject NufiCanada's submission that Mr. Fodjo has the onus of proving that he would suffer prejudice in the litigation if Ms. Sklar is permitted to continue to represent the corporation.

[73] Mr. Fodjo's motion falls into the second and third circumstances noted above. As explained below, a substantial risk of impaired representation arises on the facts of this case, and the removal of Ms. Sklar as counsel for NufiCanada is necessary to protect the integrity and repute of the administration of justice.

[74] Lawyers owe a duty of loyalty to their clients. Effective representation of a client's interests may be jeopardized in situations where the lawyer is tempted to prefer other interests over those of their client: the lawyer's own interests, those of a current client, of a former client, or of a third person: *R. v. Neil*, 2002 SCC 70 (CanLII), [2002] 3 SCR 631, at para. 31; *McKercher*, at para. 26.

[75] A risk of impaired representation arises most frequently 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. In these circumstances, 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: *Neil*, at para. 19; *McKercher*, at para. 43.

[76] In this case, Ms. Sklar is not acting for Mr. Wassom or Ms. Djadeu personally. They are not her clients. However, she is taking instructions from them exclusively, notwithstanding that it was their suspected conversion of corporate assets that prompted Mr. Fodjo to bring an Application to have the financial affairs of NufiCanada investigated. Given that their alleged misconduct is what triggered Mr. Fodjo's Application, they have glaring conflicts of interest relative to NufiCanada, the corporate client to whom Ms. Sklar owes a duty of loyalty. With them providing instructions to Ms. Sklar, there is a substantial risk that she may be misled or manipulated to prefer their interests (i.e., the interests of third parties) over the interests of her client.

[77] Ms. Sklar's own retainer agreement recognizes this risk. As noted earlier in this decision, the agreement stipulates that she will not accept instructions from individuals who have a conflict of interest due to their implication in this file, even if such individuals are authorized by the Board to provide her with instructions on NufiCanada's behalf. This contractual provision is consistent with Ms. Sklar's duty of loyalty to her client, and with her obligations pursuant to the Law Society of Ontario's *Rules of Professional Conduct*. Rule 3.2-3 states the following:

Notwithstanding that the instructions may be received from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising the lawyer's duties and in providing professional services, the lawyer shall act for the organization.

[78] The Commentary on Rule 3.2-3 states:

A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organization or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further, given that an organization depends upon persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

[79] I am not tasked with assessing Ms. Sklar’s compliance with her professional obligations. Indeed, Mr. Fodjo does not allege that she has engaged in any professional misconduct. However, her professional obligations are relevant to my analysis in this case. As the Supreme Court of Canada noted in *McKercher*, at para. 16:

Both the courts and law societies are involved in resolving issues relating to conflicts of interest — the courts from the perspective of the proper administration of justice, the law societies from the perspective of good governance of the profession: see *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331. In exercising their respective powers, each may properly have regard for the other’s views. Yet each must discharge its unique role. Law societies are not prevented from adopting stricter rules than those applied by the courts in their supervisory role. Nor are courts in their supervisory role bound by the letter of law society rules, although “an expression of a professional standard in a code of ethics . . . should be considered an important statement of public policy”: [*MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), [1990] 3 S.C.R. 1235, at p. 1246] (emphasis added).

[80] By taking instructions from Ms. Djiaudeau and Mr. Wassom, both of whom have glaring conflicts of interest relative to NufiCanada, Ms. Sklar is placed in a position that compromises her ability to “ensure that it is the interests of the organization that are to be served and protected”, as required by the Law Society’s *Rules*.

[81] It is worth noting that Mr. Fodjo is not seeking any personal remedies in this Application. He is simply seeking the appointment of an inspector to investigate a non-profit corporation’s financial affairs because he and other members of NufiCanada suspect financial misconduct by Mr. Wassom and Ms. Djiaudeau. Mr. Fodjo brings this motion, not as a litigation tactic to weaken the Respondent’s defence to an action in which he has something personal to gain. Rather, he brings the motion out of concern for the potential of impaired representation of NufiCanada’s interests because persons with conflicting interests are instructing NufiCanada’s lawyer.

[82] After the first appearance on this file before Justice Fowler Byrne, had NufiCanada brought a motion for leave to have Mr. Wassom and Ms. Djiaudeau represent the corporation (instead of a lawyer), I would have dismissed such a motion based on their

conflicts of interest. The Court can therefore hardly condone a retainer arrangement wherein the same two individuals are instructing NufiCanada's lawyer in this proceeding. The public's confidence in the integrity and administration of justice would be compromised if the Court permitted Ms. Sklar to continue to represent NufiCanada in these circumstances.

[83] For all the above reasons, I order that Ms. Sklar be removed as counsel of record for the Respondent in this proceeding. It would not be sufficient simply to order that different directors or members of the corporation assume responsibility for instructing Ms. Sklar. She has had a longstanding professional relationship (almost 7 years) with Mr. Wassom and Ms. Djiadeu as instructing clients. She is therefore tainted by their conflicts of interest.

[84] Mr. Fodjo asks me to declare that his wife, Gaelle Fodjo, is authorized to retain and instruct counsel on NufiCanada's behalf, based on a resolution passed by the membership of NufiCanada at an Extraordinary meeting convened by him on April 27, 2019. It is not necessary for me to decide whether the meeting was properly convened in accordance with the corporation's bylaws, or whether the vote was valid, because the appointment of Mr. Fodjo's wife as the instructing client for NufiCanada would give rise to similar concerns about conflict of interest, potentially impaired representation, and disrepute to the administration of justice.

[85] If NufiCanada wants to be represented by counsel in this Application, it must retain a new lawyer and authorize individuals who have no conflict of interest to provide that lawyer with instructions on the corporation's behalf. In the alternative, NufiCanada may bring a motion to be represented by someone other than a lawyer, pursuant to Rule 15.01(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. NufiCanada shall either appoint new counsel (and file a Notice of Change in Representation) or file the requisite motion by January 16, 2026.

[86] The next steps in the Application need to be timetabled without further delay. The parties should contact my judicial assistant (at [SCJ.JudicialAssistant.Guelph@ontario.ca](mailto:SCJ.JudicialAssistant.Guelph@ontario.ca))

to schedule a case management conference for that purpose within 5 days of the appointment of NufiCanada's new counsel or representative, and no later than January 23, 2026.

[87] Costs of this motion (including prior steps in the proceeding) are reserved to the judge who hears the Application.

Dated this 13<sup>th</sup> day of November, 2025,

Petersen, J.