

Federal Court



Cour fédérale

Date: 20211109

Docket: T-449-17

Citation: 2021 FC 1200

Vancouver, British Columbia, November 9, 2021

PRESENT: Case Management Judge Kathleen Ring

BETWEEN:

FARMOBILE, LLC

**Plaintiff/
Defendant by Counterclaim**

and

FARMERS EDGE INC.

**Defendant/
Plaintiff by Counterclaim**

ORDER AND REASONS

[1] This is a motion brought by the Defendant/Plaintiff by Counterclaim, Farmers Edge Inc. ["Farmers Edge"] for an order that the Notice of Change and Appointment of Solicitor [the "Notice of Change of Solicitor"] filed by the Plaintiff, Farmobile, LLC ["Farmobile"] be struck, and for costs of this motion at a heightened scale in any event of the cause, in the event the motion is opposed.

[2] Since the outset of this patent infringement action in 2017, Farmobile has been represented by the law firm of Gowling Lafleur Henderson or its successor law firm, Gowling WLG (Canada) LLP [“Gowling WLG”]. The primary solicitors involved from Gowling WLG in this matter have been Scott Foster, Patrick Smith, Nelson Godfrey, and Nicholas James.

[3] In August 2021, Scott Foster and Patrick Smith left Gowling WLG to set up a new law firm named Seastone IP LLP [“Seastone”]. Nelson Godfrey and Nicholas James remain at Gowling WLG.

[4] On August 4, 2021, Farmobile served and filed the Notice of Change of Solicitor. It provides that “[t]he Plaintiff (Defendant by Counterclaim), Farmobile. LLC hereby appoints Seastone IP LLP as a solicitor of record in addition to its current solicitor of record Gowling WLG (Canada) LLP”.

[5] Farmers Edge submits that the Notice of Change of Solicitor must be struck because the law requires that Farmobile must elect a single solicitor of record. The “irregular” Notice is not contemplated by the *Federal Courts Rules* and does not comply with any Federal Court form. According to Farmers Edge, Farmobile has provided no special circumstances that justify having multiple solicitors of record and brought no motion to permit it to be represented by two solicitors of record. It contends that if Farmobile wishes to engage a second solicitor, it may only do so as agent, not as a solicitor of record.

[6] Farmobile's position is that more than one solicitor of record is permissible under the *Federal Courts Act* and *Federal Courts Rules* and the Notice of Change and Appointment is not irregular. If the Notice of Change is irregular, Farmobile submits that the Court should use its

discretion and affirm the Notice of Change of Solicitor, given the assurances made by Farmobile and the lack of prejudice to Farmers Edge.

[7] The two issues to be addressed on this motion are:

- (a) Do the *Rules* allow Farmobile to have two solicitors of record as of right?
- (b) If not, do special circumstances exist that justify Farmobile having two solicitors of record?

[8] While the issue of co-solicitors of record has been addressed by other Canadian courts, it appears from the submissions of the parties that there is no reported Federal Court case law on point.

[9] Having reviewed the motion records filed on behalf of the parties and considered the oral submissions of counsel for the parties, and for the reasons that follow, I conclude that Farmers Edge's motion is dismissed. Farmobile is granted leave to be represented by two solicitors of record, Gowling WLG (Canada) LLP and Seastone IP LLP, in this proceeding on the terms set out in this Order.

I. Do the *Rules* allow Farmobile to have two solicitors of record as of right?

[10] Farmers Edge argues that the *Rules* do not allow parties to appoint more than one solicitor of record absent special circumstances. It relies, in part, on the fact that Rules 123 to 125 specifically refer to “the” and “a” solicitor of record in the singular, whereas the *Rules* use plural forms in other instances. For example, Rule 123 provides that:

123 Where a party takes a step in a proceeding by filing or serving a document signed by **a solicitor, that solicitor is the solicitor** of record for the party.

[Emphasis added]

[11] Farmers Edge also submits that none of the forms referred to in Rule 124 (Forms 124A, 124B, or 124C), refer to solicitors in the plural form or to co-solicitors, nor permit a “notice of change and appointment of solicitors”. It contends that Farmobile has created a form that does not exist under the *Rules*.

[12] Conversely, Farmobile submits that the references in the *Rules* to “solicitor” in the singular include the plural. It argues that the *Federal Courts Rules* are a federal statutory instrument and, as such, they are subject to section 33(2) of the *Interpretation Act*, RSC 1985, c I-21. Section 33(2) provides that “[w]ords in the singular include the plural, and words in the plural include the singular”.

[13] Farmobile also contends that the reference to “solicitor” and “solicitor of record” in the *Rules* and the *Federal Courts Act* refer to individuals and not to law firms. It relies, in part, on the definition of “solicitor” as “a person referred to in subsection 11(3) of the *Act*”, and subsection 11(3) of the *Federal Courts Act* which speak in terms of individuals who are barristers and solicitors, rather than law firms. Accordingly, Farmobile says that the *Rules* authorize multiple individual legal counsel from different law firms to be solicitors of record for a party.

[14] I disagree with Farmobile’s argument. In my view, the *Federal Courts Rules* do not allow it to have multiple solicitors of record as of right. Subsection 33(2) of the *Interpretation Act* is subject to subsection 3(1) of that Act which states that “[e]very provision of this Act applies, unless

a contrary intention appears, to every enactment”. In my view, the *Rules*, when read as a whole, evince a contrary intention to the application of subsection 33(2) of the *Interpretation Act* to the phrase “solicitor of record”.

[15] By way of illustration, a party’s entitlement to have a plurality of solicitors of record, as of right, would be inconsistent with Rule 102 which provides that “[t]wo or more persons who are represented by the same solicitor may join in one proceeding as plaintiffs” [emphasis added]. Moreover, the *Rules* and the forms provide that court documents shall bear the signature of the “solicitor”, that the address for service of a represented party will be the address of the solicitor of record shown on the last document that indicates “an address”, and that the solicitor of record shall certify the affidavit of documents.

[16] My interpretation of the *Rules* - that “a solicitor” means just that - is consistent with the approach taken in *Housley v. Barrie (Police Services Board)*, 2002 CanLII 53247 (ON SC) [*Housley*]. In that case, the defendants brought motions to strike the plaintiff’s notice of change of solicitors as being improper on the grounds that it named both the original solicitor of record along with a second law firm as solicitors of record for the plaintiff. The plaintiff took the position (as does Farmobile) that sections of the *Interpretation Act*, R.S.O. 1990, c. I-11, s. 28(j) and (k) (which are analogous to subsection 33(2) of the federal *Interpretation Act*) dictated that the singular – “a solicitor” – must be interpreted as the plural. The Ontario Superior Court of Justice rejected the plaintiff’s argument based on its analysis of the broader context of the Ontario rules of civil procedure and the case law. The Court held at para 10:

... It is clear that the Rules do use the plural where, in the view of the drafters, it is appropriate to do so. The fact that it is used in some instances and not in others suggests that where it is not used,

there is no need to and no basis for inferring the plural. As a result, I read Rule 15 as limiting representation to one solicitor of record per party, subject to the exceptions referred to earlier.

[17] Additionally, the interpretation of the *Rules* advocated by Farmobile conflicts with well-established jurisprudence across Canada on the issue of co-solicitors of record. In *Texaco Canada Ltd. v. Bennett*, 1980 CanLII 2703 (NS SC) at para 13, the County Court of Halifax, after reviewing a large body of case law, articulated the general rule as follows:

The authorities cited support the principle that, normally the plaintiff or plaintiffs should be represented on the record by one solicitor, who is responsible for initiating the procedural steps and to whom the defendant and other parties may deliver notices and documents and deal with otherwise in the course of the proceeding, as the person authorized to act for the plaintiff therein. If, for good reason, there is to be a departure from the norm, it should be by special order.

[18] The difficulties that the general rule seeks to avoid are magnified in the case of co-plaintiffs. In that context, separate legal representation of co-plaintiffs can lead to “procedural deadlock, uncertainties and other obstacles to the orderly conduct of proceedings arising from inconsistent advice to co-plaintiffs”. For those reasons, the general rule excluding separate representation of co-plaintiffs has long been recognized in English law: *Siu Man Lau v. Bayview Landmark Inc.*, 2004 CanLII 859 (ON SC) at paras 16 to 19; see also: *Manitoba Métis Federation Inc. v. Canada (Attorney General)* 2003 MBQB 40, *McLeod Lake Indian Band v. British Columbia*, 1997 CanLII 570 (BC SC), [1997] B.C.J. No. 3087, 46 B.C.L.R. (3d) 129 (S.C.).

[19] If the *Federal Courts Rules* were interpreted to permit a plaintiff or plaintiffs to have co-solicitors of record as of right, as Farmobile suggests, the mischief sought to be avoided by these well-established legal principles would be allowed to occur in litigation in this Court.

[20] For these reasons, I conclude that Farmobile is not entitled, as of right, to have co-solicitors of record under the *Rules*. Leave is required to allow Farmobile to have Gowling WLG (Canada) LLP and Seastone IP LLP as its co-solicitors of record.

II. Do special circumstances exist that justify Farmobile having two solicitors of record?

[21] The irregular Notice of Change of Solicitor filed by Farmobile is a problem that is capable of being cured: *Housley* at para 20. In this Court, Rule 55 expressly permits the Court to vary or dispense with compliance with a rule “in special circumstances”. I agree with Farmers Edge that the onus is on Farmobile to establish that special circumstances exist to justify granting leave to Farmobile to have co-solicitors of record in this case.

[22] In this case, I am well aware from my role as Case Management Judge that the trial of this action has been adjourned five times already. The trial is currently scheduled for August 8, 2022 for twenty (20) days. Given the protracted history of this case, it is particularly important that the legal teams for both parties are able to continue to fully function, as they have done in the past, so that the trial date is not once again placed in jeopardy.

[23] One of the issues that has arisen as a result of Mr. Foster and Mr. Smith leaving Gowling WLG and setting up Seastone is that Farmobile has requested an amendment to the Amended Protective Agreement to add Seastone so that Mr. Foster and Mr. Smith have access to confidential information and “counsels’ eyes only” [“CEO”] information under the terms of the Agreement. Farmobile sent a copy of the Amended Protective Agreement to Farmers Edge for signing on September 28, 2021. While Farmers Edge has advised Farmobile that it will agree to this

amendment, the information before the Court is that the Amended Protective Agreement has not yet been signed.

[24] Farmers Edge says that the Amended Protective Agreement remains unsigned because another clause in the Agreement is in dispute between the parties. Regardless of what may be the true cause of the delay, the fact remains that Seastone has not yet been added to the Amended Protective Agreement. As a result, counsel for Farmers Edge could once again take the position, as they did in the email dated September 1, 2021, that the lawyers at Seastone are not authorized under the terms of the Agreement to access CEO information.

[25] The concern regarding access by Seastone to confidential information in the litigation will be avoided if the Court grants leave to Farmobile to be represented by Gowling WLG (Canada) LLP and Seastone as solicitors of record. If Seastone is allowed to act as a co-solicitor of record in this proceeding, it will have access to confidential material in that capacity.

[26] Farmers Edge argues that would be prejudiced by Farmobile having a second solicitor of record. This argument lacks merit. The parties have had an electronic service agreement in place in 2019. The lawyers acting for Farmobile have not changed as a result of the Notice of Change of Solicitor being filed. In order to serve Seastone in addition to Gowling WLG, Farmers Edge would only need to change the email addresses of Mr. Foster and Mr. Smith.

[27] With respect to Farmers Edge's concern that it would be obligated to obtain consent from both solicitors of record, the Court can impose conditions, as part of this Order, to ensure that Farmers Edge would only be obligated to obtain consent from either Gowling WLG or Seastone, and not from both.

[28] As regards Farmers Edge's other concerns, there is no evidence of inconsistent positions, duplication of efforts or otherwise any evidence of Farmobile's counsel's inability to co-operate. In my view, it is inconceivable to think that the instructing authority at Farmobile would knowingly provide one set of instructions to Gowling WLG and an inconsistent set of instructions to Seastone. Moreover, if problems were to arise in the future, they could be addressed through the case management process.

[29] In conclusion, having carefully considered the submissions of the parties and the material before the Court, along with my personal knowledge of this proceeding as Case Management Judge, I am satisfied that special circumstances exist in this case to justify granting leave to Farmobile to be represented by two solicitors of record.

III. Conclusion

[30] For the foregoing reasons, Farmers Edge's motion to strike out the Notice of Change and Appointment of Solicitor is dismissed. Farmobile is granted leave to be represented by two solicitors of record, Gowling WLG (Canada) LLP and Seastone IP LLP, in this proceeding. Farmers Edge will only be required to obtain consent from either Gowling WLG or Seastone, and not from both, regarding steps in the proceeding, as necessary.

[31] As the motion raised a novel issue, there shall be no order as to costs of the motion.

ORDER in T-449-17

THIS COURT ORDERS that:

1. The motion by Farmers Edge to strike out the Notice of Change and Appointment of Solicitor is dismissed.
2. Farmobile is granted leave to be represented by two solicitors of record, Gowling WLG (Canada) LLP and Seastone IP LLP, in this proceeding.
3. Farmers Edge is only required to obtain consent from either Gowling WLG or Seastone, and not from both, regarding steps in the proceeding, as necessary.
4. There shall be no order as to costs of the motion.

“Kathleen Ring”

Case Management Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-449-17

STYLE OF CAUSE: FARMOBILE, LLC v. FARMERS EDGE
INC.

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

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ORDER AND REASONS: CASE MANAGEMENT JUDGE
KATHLEEN RING

DATED: NOVEMBER 9, 2021

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