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For the first time, the Federal Court has dealt with the issue of whether a party is permitted to appoint co-solicitors of record. The Court held that a party may not appoint co-solicitors as of right, but it provided guidance on the circumstances in which co-solicitors may be permitted. It remains to be seen how "special" such circumstances must be, especially since such arrangements are not uncommon in modern practice.

Summary of the Decision

In *Farmobile, LLC v Farmers Edge Inc. (2021 FC 1200),* the Plaintiff was initially represented by a team of four lawyers at Gowling WLG. When two of the lawyers left the firm to found Seastone IP, the Plaintiff sought to keep Gowling WLG on the record while adding Seastone IP. The Defendant opposed the Notice of Change of Solicitor on the basis that a party is only entitled to name a single firm as solicitor of record.

The Court found that, based on its interpretation of the *Federal Courts Rules* and consideration of case law from other jurisdictions, the plaintiff was not permitted as of right to appoint two firms as solicitor of record.

However, the Court held that "special circumstances" existed that justified granting leave to appoint co-solicitors in this case, namely:

- trial had already been adjourned five times so it was important to preserve the existing legal teams to reduce the likelihood of a further adjournment;
- the transferring lawyers were not authorized to access confidential information under the terms of a protective agreement which restricted such disclosure to counsel of record; and
- there was no prejudice to the defendant because:
    - an electronic service agreement was already in place;
    - the Court added a condition to the Order that the defendant only needed to obtain consent from either firm (not both) regarding steps in the proceeding; and
    - there was no evidence of any actual problems such as co-solicitors taking inconsistent positions, and if any such problems arose, then they could be addressed through the case management process.

The Court drew upon the principle of the Superior Court decision, *Housley v Barrie (Police Services Board,* namely that the plaintiff must tender a reasonable explanation when requesting representation by more than one law firm, which it found was satisfied in this case.

Commentary

Starting from first principles, it seems reasonable to permit a party to appoint co-solicitors in appropriate circumstances. Courts have often recognized that a litigant should not be deprived of her choice of counsel without good cause. Where the arrangement is a result of a transferring lawyer, it is also notable that courts have recognized the desirability of permitting reasonable mobility in the legal profession. See e.g., *MacDonald Estate v. Martin* for the recognition of both principles.

Further, many of the historical concerns with co-solicitors are not an issue in modern practice. For example, electronic service and electronic materials have now become commonplace, effectively eliminating any concerns about the onerousness of service and duplication of materials. Courts can also place conditions on the arrangement, such as in this case, where the Court ordered that either co-solicitor had full authority to bind the party, thereby relieving the Defendant from having to seek consent from multiple counsel. Hypothetical concerns can also be addressed if and when they actually arise, such as in this case, where the Court noted that it would be “inconceivable” that a party would knowingly provide inconsistent instructions to two counsel, and if any such mischief were to arise, then case management permits parties to bring the issue before the Court quickly.

Nonetheless, the extent to which the Federal Court will permit co-solicitor arrangements under different fact circumstances remains to be seen. For example, how important were the previous adjournments and the confidentiality dispute in this case? As a hypothetical, would the Court grant such an Order merely on the basis that there is no prejudice to the responding party and the proceeding is case managed?

As a practical matter, it may also seem somewhat surprising that co-solicitor arrangements remain a contentious issue. Representation by co-counsel has become a relatively routine aspect of modern practice, particularly in practice areas that deal with complex cases. In our personal experience, we have witnessed co-counsel of record arrangements in the Federal Court and the Ontario courts, in cases relating to IP, commercial litigation, judicial reviews, class action proceedings, and medical malpractice. This potential discord between law and practice

raises the question of whether courts (including the Federal Court) should consider amending their rules to permit co-solicitors of record as of right, or perhaps placing the onus on a respondent to demonstrate why such an arrangement is not appropriate in the circumstances.