Federal Court  Cour fédérale

Date: 20251015

Docket: T-740-25

Citation: 2025 FC 1696

Ottawa, Ontario, October 15, 2025

PRESENT: Madam Justice Sadrehashemi

Docket: T-740-25

BETWEEN:

SERGIO GRILLONE

Applicant

and

B. RILEY FARBER INC.

Respondent

JUDGMENT AND REASONS

I. Overview

[1] I am deciding a Rule 51 appeal of an Associate Judge's Order to remove the Office of the Superintendent of Bankruptcy ("the Superintendent") as a Respondent and instead name the Trustee, B. Riley Farber Inc. as the Respondent ("Rule 303 Order"). The key issue on appeal is the application of Rule 303(1) of the *Federal Courts Rules*, SOR/98-106 [the *Rules*], and whether the Trustee is "directly affected by the relief sought in the application."

[2] The Associate Judge made the Rule 303 Order in response to an uncontested motion in writing filed by the Attorney General of Canada. Due to a combination of factors which I explain below, and on the request of the Attorney General and the Trustee, I have considered the new issues raised by the Trustee that were not raised before the Associate Judge.

[3] I see no basis to interfere with the Associate Judge's Rule 303 Order. Having considered the new issues raised on a *de novo* basis, I am dismissing the appeal. Both the Trustee and the Attorney General sought costs. I am not ordering costs because while the Attorney General was successful on this appeal, they share some responsibility for the convoluted procedural history that led to this appeal.

II. Background and Procedural History

A. *The Parties*

[4] Mr. Grillone is the Applicant in the underlying judicial review. He was a practicing lawyer in Ontario but is now no longer licenced to practice law. He is an undischarged bankrupt and represents himself before this Court. As explained by Justice Grant in a related decision on the extension of time to file this appeal: "Mr. Grillone has engaged in a litigation strategy [in proceedings related to his bankruptcy] that has been described as 'concerning'", including that "various matters that he has brought before the Ontario courts have been found to be 'frivolous, vexatious and/or an abuse of process'" (see paragraph 6 Justice Grant's May 20, 2025 Order in T-740-25 for case references).

[5] The Respondent, and the moving party in the motion before me, is B. Riley Farber Inc., the trustee of Mr. Grillone's estate ("the Trustee").

[6] The Attorney General of Canada is also a party on this appeal. The Attorney General is arguing that the Associate Judge's Rule 303 Order granting their motion should be maintained.

B. *Procedural History*

[7] In July 2024, Mr. Grillone filed a complaint about the Trustee's conduct to the Superintendent. In a decision dated January 31, 2025, the Superintendent found there was no need to take further action in relation to Mr. Grillone's complaint. Mr. Grillone challenged the Superintendent's decision by filing an application for judicial review in this Court.

[8] Mr. Grillone seeks the following relief in his application for judicial review: an order quashing the Superintendent's January 2025 decision to not pursue his complaint against the Trustee, a declaration that the Superintendent acted unreasonably and breached his procedural fairness rights, an order for *mandamus* directing the Superintendent to investigate and take action on the Trustee's alleged improper conduct, and costs.

[9] Mr. Grillone named the Superintendent as the Respondent to the judicial review. The Attorney General, acting as the legal representative of the Superintendent, filed a motion in writing under Rule 369 of the *Rules*, asking that the Superintendent be removed as a Respondent and that in its stead, under Rule 303(1) of the *Rules*, the Trustee be named, as a party who is directly affected by the relief sought. Having not received any response to the Attorney

General's motion materials from the Trustee or Mr. Grillone, the Associate Judge granted the motion and ordered costs against Mr. Grillone.

[10] The parties filed new evidence in the appeal motion before me and on the extension of time motion before Justice Grant that sought to explain the events that took place between the parties before the Rule 303 Order and in its aftermath. The parties are generally in agreement as to what transpired.

[11] I will briefly summarize. Essentially, though the Attorney General filed a motion in writing, the parties proceeded as if the Court would be scheduling a hearing to decide the motion. Counsel for the Trustee filed a Notice of Appearance on behalf of the Trustee indicating that they intended to respond. In the background, counsel for the Attorney General advised both the Trustee and Mr. Grillone that they would write to the Court with the parties' availability for a hearing of the motion. Before counsel for the Attorney General sent this letter with the parties' mutual dates of availability for an oral hearing to the Court, the Associate Judge decided the motion in writing based on the uncontested motion of the Attorney General.

[12] Following this, counsel for the Attorney General suggested that they could file a motion to vary the Rule 303 Order under Rule 399 of the *Rules* so the Trustee could have an opportunity to respond to the motion. Later, counsel for the Attorney General decided to not proceed that way because in their view, the Rule 303 Order was appropriate and there was no basis to vary the decision. Counsel for the Attorney General offered to consent to an extension of time for the Trustee to file a motion if it was necessary.

[13] The Trustee filed a motion appealing the Associate Judge's Rule 303 Order and asked for an extension of time. Justice Grant heard the motion for an extension of time and granted it. Justice Grant reserved judgment on the issue of costs in relation to the extension of time motion, leaving it to be finally determined by the judge hearing the appeal.

[14] A further procedural issue came to light in the appeal record before me. Counsel for the Attorney General confirmed that she had inadvertently misstated the date on which the Trustee had been served with their Rule 303 motion. The date communicated in the solicitor's affidavit of service was March 28, 2025, but in fact a courier had delivered the motion record to the Trustee on March 31, 2025. Practically, this meant that when the Associate Judge made the Rule 303 Order, the time for responding submissions had not expired; there was one day remaining.

[15] I heard the appeal motion orally. The Trustee and the Attorney General asked that I considered the appeal on a *de novo* basis given the procedural issues.

III. Legislative Context of the Bankruptcy and Insolvency Act

[16] The underlying judicial review is a challenge to a decision of the Superintendent of Bankruptcy made under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA]. The Superintendent of Bankruptcy supervises the administration of all estates and matters to which the BIA applies, including trustee compliance and the licensing of trustees who amongst other duties, administer bankrupt estates in accordance with the BIA.

[17] The Superintendent has broad powers to oversee the conduct of trustees, including: receiving applications for and issuing licenses to trustees; monitoring the conditions that led to a trustee being licensed and taking appropriate action if those conditions no longer exist; making inquiries or investigations into the conduct of a trustee and; receiving and keeping record of all complaints from any creditor or person interested in any estate and in doing so, make investigations into the complaint as the Superintendent may determine (Section 5 of the BIA).

[18] Following an inquiry or investigation, where the trustee has had an opportunity to know the allegations and to respond, the Superintendent may cancel or suspend the trustee's license or place conditions on the trustee's license (Section 14.01 of the BIA). Section 14.02(5) provides explicit jurisdiction to the Federal Court to review and set aside disciplinary decisions made by the Superintendent following a hearing under section 14.01(4) of the BIA.

IV. Standard of Review and New Issues on Appeal

[19] Rule 51 appeals are generally not *de novo* appeals and are solely based on the record that was before the Associate Judge (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 64). Where a party seeks to raise a new issue on appeal, they have a burden to demonstrate that the Court should consider it without prejudice to an opposing party (*Guindon v Canada*, 2015 SCC 41 at paras 22-23; *RE/MAX, LLC v Save Max Real Estate Inc.*, 2022 FC 1268 at para 41).

[20] The Trustee argued that procedural complications resulted in their submissions not being before the Associate Judge. The Trustee puts these submissions before the Court on appeal and

asks that this Court decide the Rule 303 question of who should be named as the Respondent. The Attorney General also asks that this Court decide this appeal *de novo*, considering the arguments made by the Trustee on appeal that were not before the Associate Judge at the time of the Rule 303 Order. Mr. Grillone's first position is that the Rule 303 Order should be set aside because the Trustee's arguments on the merits were not before the Associate Judge and that if the Attorney General wants to bring a new motion, they can do so. I understand Mr. Grillone's alternative position to be that the Superintendent should still be named as one of the Respondents, and the Trustee can be included, in his words, as a "nominal Respondent" in the proceedings.

[21] I am satisfied in these unusual circumstances that I ought to address the new issues raised on this appeal in relation to the Rule 303 Order because of the combination of the following factors: i) both the Trustee and the Attorney General are asking that I consider the new issues on appeal; ii) both the Trustee and the Attorney General contributed to the procedural complications leading to the Rule 303 Order being made without the benefit of considering the submissions of the Trustee; iii) I see no prejudice to the parties, including Mr. Grillone, in addressing the new issues on appeal; iv) the new issues have been fully argued before me with sufficient notice of the issues to all parties; and v) in line with Rule 3 of the *Rules*, deciding the *de novo* issues at this stage will be "the just, most expeditious and least expensive outcome".

V. Analysis

[22] An applicant on a judicial review must name the respondent(s) when they file their application with the Court. Rule 303 of the *Rules* explains who must be named as a respondent in a judicial review application:

303 (1) Subject to subsection (2), an applicant shall name as a respondent every person	303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or	a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;
(b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.	b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.
(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.	(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.
(3) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent after having been named under subsection (2), the Court may substitute another person or body, including the tribunal in respect of which the application is made, as a respondent in the place of the Attorney General of Canada.	(3) La Cour peut, sur requête du procureur général du Canada, si elle est convaincue que celui-ci est incapable d'agir à titre de défendeur ou n'est pas disposé à le faire après avoir été ainsi désigné conformément au paragraphe (2), désigner en remplacement une autre personne ou entité, y compris l'office fédéral visé par la demande.

[23] The animating concern of Rule 303 is to ensure that the Court has before it the right parties – those who are not directly affected by the relief being sought by an applicant ought not to be named as respondents.

[24] The Federal Court of Appeal explained in *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2013 FCA 236 [*Forest Ethics*] that the language of "directly affected" in Rule 303 mirrored the language used in section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 which sets out who can bring a judicial review. The Federal Court of Appeal reasoned that the same guidance in interpreting the meaning of being "directly affected" that had developed in the jurisprudence on section 18.1 could be relied upon in defining "directly affected" under Rule 303. The relevant question to be determined on a Rule 303 motion is therefore "whether the relief sought in the application for judicial review will affect a party's legal rights, impose legal obligations upon it, or prejudicially affect it in some direct way" (*Forest Ethics* at para 21).

[25] The Trustee takes the position that they are not directly affected because the Court has no jurisdiction to hear Mr. Grillone's judicial review. The Trustee argues that sections 14.01 and 14.02 of the BIA only confer jurisdiction on the Federal Court to review the decision of the Superintendent once the Superintendent has made a finding on the Trustee's conduct after a hearing. The Attorney General argues that the Federal Court has overall jurisdiction to review the Superintendent's decisions regarding the conduct of the Trustee; in other words, deciding not to proceed further with an investigation after a complaint is still part of the same disciplinary or supervisory process that, if the Superintendent had decided to have a hearing, could have resulted in a finding against the Trustee.

[26] The Trustee also argues that the decision being challenged is not one that could be subject to judicial review because it is simply a determination to not proceed further with Mr. Grillone's complaint about the Trustee's alleged conduct and therefore, it is not a decision that can affect "legal rights, impose legal obligations upon it, or prejudicially affect it in some direct way."

[27] In my view, it is unnecessary on an appeal of a motion that was only concerned with naming the proper respondent, to finally determine the contested questions of jurisdiction and justiciability of the matter raised in the underlying judicial review.

[28] While the language of "directly affected" in section 18.1 of the *Federal Courts Act* is certainly relevant to the interpretation of defining who is "directly affected" under Rule 303– these remain distinct inquiries. The legislation is clear that the focus of a Rule 303 inquiry as to who is directly affected is not on the decision being challenged, like in section 18.1 of the *Federal Courts Act*, but rather on the relief being sought by an applicant.

[29] Recently, Justice Turley considered a similar issue in *Çolakoğlu Metalurji A.S. v. Altasteel Inc.*, 2023 FC 1102 [*Çolakoğlu Metalurji*]. In *Çolakoğlu Metalurji*, in arguing that they were the only appropriate respondent, the Attorney General focused on why the underlying matter (the re-investigation decision of Canada Border Services Agency) was not amenable to judicial review – relying on the jurisprudence under section 18.1 to argue that it was a decision that did not affect legal rights, impose legal obligations or cause prejudice.

[30] Justice Turley found that the Attorney General's submissions did not focus on the governing question in Rule 303 which is tied to the relief being sought by an applicant, not the decision being challenged:

> [34]… the AGC [Attorney General] conflates the test for determining the proper respondents to an application under Rule 303(1)(a) with the test for determining whether a matter is justiciable under 18.1 of the *Federal Courts Act*…. While both tests are concerned with direct impact or effect, the focus of each is different.
>
> [35] In considering whether a respondent is directly affected, the focus is on the relief sought in the application: *Forest Ethics*, at paras 21-23. On the other hand, in determining whether a matter is reviewable, the focus is on the impugned decision and whether it affects legal rights, imposes legal obligations or causes prejudicial effects: *Democracy Watch v Canada (Attorney General)*, 2021 FCA 133, at paras 23, 29-30, 40. These are two distinct issues.

[31] I see no basis to distinguish Justice Turley's reasoning in *Çolakoğlu Metalurji*. Like in that case, the Trustee is focused on arguing about the decision under review, asking the Court to find on a Rule 303 motion that the underlying matter is not amenable to judicial review because it is not justiciable and the Court lacks jurisdiction to hear the matter.

[32] The focus ought to be on the relief being sought by Mr. Grillone in the underlying judicial review. The relief sought is: i) to quash the Superintendent's decision to not proceed further with an investigation of the conduct of the Trustee and ask it to be redetermined; and ii) for an order directing that the Superintendent investigate the Trustee's actions.

[33] I am satisfied, looking at the relief sought by Mr. Grillone, that the Trustee is directly affected in that if the relief being sought by Mr. Grillone was granted, they would be

prejudicially affected in some direct way. For example, if the judicial review was granted, the decision to not further deal with Mr. Grillone's complaint about their conduct would be overturned and the Trustee would be subject to another inquiry on the same allegations.

[34] The immediate concern on a Rule 303 motion is ensuring that the Court has the right parties before it in order to make the relevant arguments on judicial review including, the justiciability of the matter and the Court's jurisdiction to hear the case. The arguments as to the Court's jurisdiction and the justiciability of the matter are still to be decided. A determination on either of those issues could lead to the termination of the judicial review in its entirety, not just the narrower issue of the proper parties to make these arguments before the Court. In my view, in these circumstances, it is not appropriate at the stage of a Rule 303 motion to finally determine these matters.

VI. Other Procedural Concerns raised by the Trustee

[35] The Trustee also raised as a concern that the Attorney General brought the Rule 303 motion even though in the underlying judicial review the Superintendent was named as the Respondent. I do not agree that this is a concern. I agree with the Attorney General that they have a statutory obligation to appear for the Superintendent in these proceedings, as the legal representative of the Superintendent, who had been named as the Respondent.

[36] The Trustee also raised the concern that because counsel for the Attorney General had inadvertently misstated the date of service of their motion record, the Rule 303 Order was rendered a day before the time had expired for the Trustee's submissions. Counsel for the

Attorney General argued that this was not a significant issue because the Trustee had not planned to file a written response given the Trustee's mistaken understanding that the Rule 303 motion would be heard orally.

[37] I agree with the Trustee that the misstatement of the service filing is a serious concern that ought to have been raised as soon as it was discovered. However, any procedural fairness breach has been resolved in that I have considered, on the request of the Trustee and the Attorney General, the issues on a *de novo* basis, in part because the submissions of the Trustee were not before the Associate Judge when he issued his Rule 303 Order. I also considered the misstatement of the service filing date in my decision to not award costs against the Trustee.

VII. Disposition

[38] I am dismissing the appeal.

[39] Both parties sought the costs of this appeal motion and the motion seeking an extension of time to file the appeal. Though the Trustee was not successful on appeal, I have exercised my discretion under Rule 400 to not award costs. In my view, the parties share responsibility for the procedural confusion that led to the failure to indicate to the Court prior to a decision on the Rule 303 motion that they were seeking an oral hearing.

[40] I agree with Justice Grant's comments on costs concerning the motion seeking an extension of time to file the appeal. He noted that while counsel for the Attorney General was confused about the procedures for written and oral submissions before the Federal Court, counsel

for the Trustee also bore some responsibility for not understanding the Rules pertaining to responding to written motions. Further, as explained by Justice Grant, the Trustee did not provide an explanation for why they were unable to file their appeal record in time. In my view, both parties share some of the responsibility for the confusion and therefore I see no basis to award costs in relation to the extension of time motion.

[41] I find the Attorney General's misstatement of the service date filing to be significant. If it had been raised earlier and as a basis to ask the Associate Judge to vary his order under Rule 399 to receive the submissions that ought to have been before him, this appeal may not have been necessary.

[42] Taking into account these procedural issues, and the Attorney General's success on appeal, I ultimately exercise my discretion to award no costs against the Trustee.

[43] I am also ordering that this matter be specially managed in the hopes of facilitating the subsequent steps in judicial review without further prolonged procedural confusion.

JUDGMENT in T-740-25

THIS COURT'S JUDGMENT is that:

1. The appeal of the Associate Judge's decision dated April 9, 2025 is dismissed;
2. No costs are awarded; and
3. The application for judicial review will continue as a specially managed proceeding under Rule 384 and will be referred to the Chief Justice for the appointment of a case management judge.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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