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Setting Aside Residential Tenancy Dispute Resolution Service Orders for Problems with Service: It Can't Be Done

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Case Commented On: *Abougouche v Miller*, 2015 ABQB 724 (CanLII)

As the recently-appointed Master in Chambers, James R. Farrington, clearly and concisely sets out in *Abougouche v Miller*, there is no way for a tenant to have an order made by the Residential Tenancy Dispute Resolution Service (RTDRS) set aside if a tenant fails to appear at the hearing before a Tenancy Dispute Officer because the tenant did not receive actual notice of that hearing. The tenant cannot go back to the Tenancy Dispute Officer; that person only has the power to correct typographic, grammatical, arithmetic or other similar errors in their orders, clarify their orders, and deal with obvious errors or inadvertent omissions in their orders (*Residential Tenancy Dispute Resolution Service Regulation (RTDRS Reg)*, Alta Reg 98/2006, section 19(1)). The tenant cannot apply to the only body with the power to cancel or vary an RTDRS order — the Court of Queen's Bench (sections 23(1) and 25(1)(b) *RTDRS Reg*) — because new evidence is not permitted on appeals (section 25(1) *RTDRS Reg*) and evidence about service in technical compliance with the regulations but inappropriate nonetheless would be evidence that was not before the Tenancy Dispute Office, i.e., new evidence. So a tenant — even a tenant as apparently well-prepared with legal arguments as the self-represented tenant was in this case — has no opportunity to be heard on the merits. Worse, a tenant like Ms. Miller, who appears to have vacated the rented premises because of significant deficiencies, including internal flooding, seems to be set up by the *Residential Tenancies Act (RTA),* SA 2004, c R-17.1. That Act allows her landlord to serve notice of a RTDRS hearing on her by posting it on the rented premises that she vacated, even if the landlord knows the tenant has vacated those premises, even if she vacated for good reasons, and even if the landlord is still in regular communication with the tenant by email and text messages about the deficiencies in the rented premises (section 57(3) *RTA*).

Ms. Miller rented premises from Mr. Abougouche on or about March 1, 2015. Various concerns about the condition of the premises and the payment of rent arose during the short tenancy. When the premises were damaged by internal flooding on September 7, 2015, the tenant left. Master Farrington found that it was clear that rent was not paid for at least one month (at para 6), although he does not indicate if this was before or after the flooding.

The landlord applied to the RTDRS. He served the tenant with notice of the RTDRS hearing by posting the required documents on the rented premises on October 5, 2015. This is allowed by section 57 *RTA* if the tenant has vacated the premises:

> 57 (3) If a landlord is unable to effect service on a tenant by reason of the tenant's absence from the premises or by reason of the tenant's evading service, service may be effected
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> (a) on any adult person who apparently resides with the tenant, or

(b) by posting the notice, order or document in a conspicuous place on some part of the premises (emphasis added).

Because the tenant in this case had vacated the premises on which the documents were posted, she did not receive notice of the hearing scheduled for October 9, 2015. She was in frequent contact with the landlord by text message and e-mail about the premises and their flooding. As Master Farrington notes, given this "significant communication" (at para 12) between the landlord and tenant, "a courtesy 'heads up' with a text or an email message indicating that there would be a proceeding, or indicating where materials could be obtained likely would have avoided much of what has transpired since the hearing" (at para 13). Not only did the landlord stay silent about the documents posted on the vacated premises, but the landlord also applied for an order allowing substitutional service by email of the order granted by the Tenancy Dispute Officer after the hearing on October 9, 2015. The landlord's evidence in support of substitutional service by email referred to "using email as a way to communicate with the tenant over the previous 30 days" (at para 14). As Master Farrington concluded, "the landlord appears to have been much more concerned about providing effective notice of the RTDRS order after it was granted, rather than ensuring effective notice of the application itself" (at para 14). These facts illustrate that there is, as Master Farrington put it, "a difference between what is permissible, and what is appropriate in a given situation" (at para 10).

These facts also illustrate how people with lawyers can "game" the system to ensure their clients can benefit from technicalities. This may be why the Master was careful to note that the lawyer for the landlord who appeared before him was *not* the same lawyer who appeared before the Tenancy Dispute Officer or who asked for substitutional service by email (at paras 4 and 14).

The Order granted by the Tenancy Dispute Officer on October 9, 2015 terminated the tenancy effective that date and gave the landlord judgment for $725 for one month of unpaid rent, plus $75 in costs. It is not known what the landlord told the Tenancy Dispute Officer at the hearing or what the landlord told the Master who granted the order for substitutional service.

The tenant did not appear at that October 9th hearing because she had no actual notice of the hearing. Had she been notified, it is unlikely she would have opposed the termination of her tenancy; after all, she vacated the premises. However, given the evidence before Master Farrington, it is likely she would have had something to say to the Tenancy Dispute Officer about whether one month's rent was owed or whether her rent should be abated due to the condition of the premises.

Once the tenant received the Tenancy Dispute Officer's order and found out about the hearing held in her absence, what could she do to try to be heard on the merits? As already mentioned in the introductory paragraph, she could not go to the Tenancy Dispute Officer to set aside his or her order because that person does not have that kind of power (section 19(1) *RTDRS Reg*). And as already explained, she could not appeal to the Court of Queen's Bench to set aside or vary the RTDRS order (under sections 23(1) and 25(1)(b) *RTDRS Reg*) because new evidence is not permitted on appeals (section 25(1) *RTDRS Reg*). The tenant knew this; she even ensured that her "Emergency Application to Set Aside Order" explicitly stated "I am not appealing this order" (at para 8-9).

If not an appeal, what was the tenant's application? The tenant put forward two possible sources of jurisdiction for the Master to set aside the Tenancy Dispute Officer's Order. The first was Rule 9.15(1) of the Alberta Rules of Court, Alta Reg 124/2010), which provides:

> 9.15(1) On application, the Court may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made
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> (a) without notice to one or more affected persons, or
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> (b) following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing (emphasis added).

That seems to cover the tenant's situation, but the following rule, Rule 9.16, says otherwise:

> 9.16 An application under rule … 9.15 must be decided by the judge or master who granted the original judgment or order unless the Court otherwise orders. (emphasis added)

As Master Farrington notes:

> The wording of Rule 9.16 appears to contemplate that orders that are subject to a Rule 9.15 application are orders that were originally granted by a master or a judge. . . . Of course, the RTDRS order in question was not granted by a master or a judge. That is a significant problem for this application (at para 18, emphasis added).

So, Rule 9.16 is inapplicable. Instead, because Ms. Miller was asking the Master to revise a decision of another body, he concluded "that is a function in the nature of an appeal" (at para 24). A Master of the Court of Queen's Bench has no appellate jurisdiction (at para 24; section 9(1)(1) Court of Queen's Bench Act, RSA 2000, c C-31).

The second possible source of jurisdiction that the tenant put forward was section 21 *RTDRS Reg*:

> 21 An order of a tenancy dispute officer is binding on the parties to the dispute unless it is set aside or varied on appeal (emphasis added).

Master Farrington illustrated how those emphasized words can be read two ways (at para 26):

> "...unless it is (*set aside or varied*) on appeal"
> or
> "unless it is set aside (*or varied on appeal*)."

Master Farrington convincingly justifies the first interpretation as the correct one, offering a four complimentary reasons:

> An appeal court can clearly do both things. It can set aside or vary an order. The tenant's interpretation would only allow the appeal court to vary an order rather than set it aside. The interpretation treating setting aside and varying as both applying to the appeal court is a much more natural grammatical interpretation and it fits the overall structure of the appeal process better in any event. In addition, even if setting aside the order was to be treated separately under s. 21 of the Regulation, the set aside process would still need to be defined somewhere for me to have jurisdiction and I have concluded that it is not (at para 27).

In the end, therefore, Master Farrington held that there appeared to be a gap in the law but that "it is not something that I can address simply by assuming jurisdiction in an area where I do not otherwise have jurisdiction" (at para 30).

So is that it? There is a gap in the law and a tenant who did not actually receive notice of an RTDRS hearing cannot apply to set aside a Tenancy Dispute Officer's order due to problems with service of the notice of the hearing? Even if the landlord's minimal compliance with the service requirements left much to be desired in terms of appropriateness in the circumstances (at para 10)? It hardly seems fair.

Master Farrington does note that the tenant did not apply for an abatement of rent (at para 6). It is true that, with 20/20 hindsight and good legal advice or information, the best thing for the tenant to have done when the premises flooded was to apply to the RTDRS for an order terminating the tenancy and abating the rent because the premises were in poor condition or uninhabitable: see "The Abatement of Rent Remedy under Alberta's Residential Tenancies Act." It may have been the smart thing to do, but I am not sure how realistic it is to expect tenants in these types of situations to take these steps. Tenants in frequent communication with their landlord after moving out, as was the case here, probably expect to reach an agreement that results in the tenant moving out and rent payments stopping. Unfortunately, and perhaps counter-intuitively, that is not the law in Alberta. No matter how uninhabitable premises are, rent is an independent obligation (sections 1(1)(p), 21(a), 26(1) and 29(1) *RTA*); it is not conditional on inhabitable premises (section 28(1) *RTA*).

Nonetheless, Master Farrington hints at potential partial relief for this tenant even at this point in time (at para 28). If, despite the criticism of his actions in this decision, the landlord proceeds to make the Tenancy Dispute Officer's order a judgment of the Court of Queen's Bench and then ask a Master or Justice of that court to enforce it, the order could be stayed, i.e., its enforcement postponed. Master Farrington even points to a precedent the tenant could use: *Boardwalk General Partnership v Montour*, 2015 ABQB 242 (CanLII). A postponement is a little something that might be helpful.

Another possible remedy here for Ms. Miller would be to apply to the Court of Queen's Bench for judicial review of the Tenancy Dispute Officer's decision pursuant to Part 3 of the Alberta Rules of Court on the ground that it was unlawful to proceed without giving her adequate prior notice. There is authority in Alberta that holds judicial review is also available in the face of a statutory appeal process where the latter does not provide for an adequate remedy for unlawful procedure (See e.g. *Foster v Alberta (Transportation and Safety Board)*, 2006 ABCA 282 at paras 14, 15). But this potential remedy also seems beyond the reach of most tenants in these types of situations.

The better remedy would be a thorough legislative review of the *RTA* and its regulations. There is much that is wrong with this Act and the gap in the law illustrated by this case is just one of its many problems. It is failing in its purpose of protecting tenants and balancing the power between tenants and landlords.