

**Case Study for FOCA: Small Claims Court Experience**  
(Updated at 2014)

This summary was written by a FOCA-member Association in 2012, and was updated in 2014. The Association took the Small Claims court route, to resolve non-payment of road dues.

Important note: this is one group's experience, and is not intended as legal advice.

**Background:**

Our cottage association, which is incorporated, having filed Letters Patent, comprised of approximately 20 cottages, is responsible for keeping up a non-maintained municipal road for approximately 8 kilometres. Several of the cottagers use this road to access their cottage but refuse to participate in meetings or to contribute to a general fund established by our cottagers' association. Thus, non-participating cottagers are "unjustly enriched" by the efforts of others in the association. Numerous attempts had been made to bring them into our association, but they refused. Use of a collection agency had not worked due to the fact that they would not accept our registered letters or they had used an excuse that they do contribute to maintaining the road through work with other contractors. Non-payers also believed that contributing to road maintenance was voluntary and they could make the decision to use the road without any contribution.

Finally our association decided to take the issue to small claims court and contact was made with FOCA to determine if a database of information existed about other associations that pursued this route. We were referred to one case: Point Abino Association v. Lee (<http://www.foca.on.ca/case-law>). This case was very similar to our situation and used the concept of "unjust enrichment" to win their court case. This article will be a more detailed outline of the process of using the small claims court in order to assist other associations in their efforts to collect fees.

Our association wanted more information on "unjust enrichment" and we found references in the Ontario Court of Justice, Ontario Court of Appeals and the Supreme Court of Canada for this area. References are included at the end of this article.

The process of small claims court and all the forms required are available through the internet (<http://www.attorneygeneral.ius.gov.on.ca>). Going into the Small Claims section will give you all the information that you will need to continue your case. But, as of July 2014, new forms have been designed but there is a brief period allowing 'old forms' to be used.

A person unfamiliar with small claims court might find it extremely beneficial to attend court to see the procedure. Judges are not pleased when a person attends with poor preparation and no knowledge of the laws. For example, if you try to process small claims beyond two years, the judge may say, "You should know this. Case dismissed. Next case." But the judges also understand that individuals may need some assistance in the process. The judges seem to be harder on lawyers.

The first form required is the Plaintiffs Claim, Form 7A. You will need the name and address of the defendant (non-payer). But you have to be very careful. The name that you are claiming to be the defendant may not be the same person on the municipal role as paying the taxes. In two of our cases we got surprises when we found one property was actually an estate and the other property was not listed under the person we were requesting payment for our association. After checking the municipal role, you will find the address of the defendant. You might also go to the Land Registry Office and use a credit card to operate their computerized system for PIN (property identification number). You can check personal names and property lot numbers. This led to another surprise for us: the property that was an estate was still listed under the name of a person who had died over 10 years ago. It seems that this property ownership is still an active court issue. You might also check the Book of Wills; in the past this was an actual book, but now it is in the computer system. If property is owned in your jurisdiction and the person dies, this book will record when the deed is changed over to new owners. Several years ago you could check to see if there are any writs against the property or owners, but this is not presently possible. The staff at our Land Registry Office was very supportive in giving directions for finding information. We visited their office so many times that we thought we should attend their Christmas party.

In the Plaintiff's Claim you need to give the Reasons for Claim and Details. Basically we mentioned: 1) length of road maintained by our association, 2) number of cottagers along road, 3) lack of municipal maintenance, 4) number of culverts, washouts and beaver dams, 5) past accidents and insurance coverage and court summons, 6) efforts of volunteers for clearing of trees, dragging the road, 7) total amount of fees owed to our association by the defendant.

We numbered and indexed all our submissions. Give a statement of all the outstanding invoices and Balance Owing by the defendant. **BUT, remember: you can only go back TWO years!** This is critical, and should be mentioned again, if you miss this deadline for submitting your claim you will be quickly ushered away from the judge. No sympathy for late filing.

Our submission package included ALL past invoices incurred by the association, correspondence, Insurance liability payments, annual meeting agenda and minutes, bank statements, etc. Put everything about your association that you have on file. It may not be read by the judge, but it shows the organizational skills of your association and a nice historical record.

We also included submissions pertaining to "unjust enrichment": Point Abino Association V Lee (Ontario Court of Justice) 1996. In this Port Abino case, reference was made to several

other cases involving the concept of "unjust enrichment": Rathwell v. Rathwell [1978] 2 S.C.R. 436, and Pettkus v. Becker, [1978] O.R. 105 Ontario Court of Appeal (<http://canlii.org/en/on/onca/doc/1978/1978canlii50/1978canlii50.html>). Also mentioned is the Supreme Court of Canada Murdoch v. Murdoch, [1975] 1 S.C.R. 423 (<http://www.canlii.org/en/ca/scc/doc/1973/1973canlii193/1973canlii193.html>). Although we included these articles in our Plaintiffs Claim, it is not really necessary, actually it is 'overkill', but actually interesting reading.

One copy of your claim will be embossed and saved at the office for a judge. The clerk at the small claims office will stamp the Plaintiff's Claim form with a red seal and this is to be served to the defendant. You also require another copy that will be mailed to the defendant. The Plaintiff's Claim must be presented to the defendant, or an adult at the location and you require an affidavit of proof that this occurred. Since our non-compliant cottagers refused to accept registered mail from our association, or simply dismissed them, a process server was engaged to serve the paperwork. A website was found for the address area of a process server nearest the cottager's permanent residence. There is an upfront credit card fee and the company will refund any unused amount. For this we used Canadian Process Servers, <http://www.canadianprocesserving.com>. You can download a checklist. You need to send them two copies of your submission. One copy can be presented directly to the defendant, or if not able to contact the defendant, it can be left with an adult at the residence and the second copy should be mailed the next day. The process server will phone you with results and send you an affidavit for use at future court cases. Judges like to see process servers involved since it is specified that the defendant was served; they do not want to hear "well I told the defendant about it". But don't expect the process service agency to give you advice on your litigation.

You need to fill out one more form at the clerk's office if the defendant lives outside of the jurisdiction of the issue that you seek compensation. Only one Affidavit of Jurisdiction has to be completed and it is kept by the clerk and accompanies the plaintiff's claim. Ask for a photocopy for your files.

After 20 days, you can check with the small claims office to see if the defendant is contesting the claim; you have lots of time to check this out. The office will also contact you and send you a copy of the defendant's defense if the plaintiff's claim is disputed. This will come in a Notice of Settlement Conference, a given date and location and a blank proposed list of witnesses form that both plaintiffs and defendants must file to each other and the court in adequate time before the case is heard.

The settlement conference is held before a judge and the entire court room is cleared except for witnesses and the opposing parties. The judge asks both parties to state their case and each party can question each other. If it is clear that the parties cannot agree on a settlement, the judge will ask the parties about how many witness they might call for a trial. The judge will guess at the length in hours of a trial and suggest a date. BUT, the judge really wants this to be settled and suggested a meeting room in the court house for the parties to settle. In our case, our association proposed complete payment but we would exclude expenses incurred

as part of the filing fees. The defendant agreed to this concession. This was immediately reported and an Endorsement Record/Order of the Court was signed by the judge.

If the defendant does not contest the plaintiff's claim after 20 days, you must go to the clerk of small claims, show them proof that the defendant was served with the Plaintiff's Claim. This is made easy with a process server's Affidavit of Service. The defendant is now in default. You must fill out a Request to Clerk (form 9B) and ask for an Assessment Hearing before a Judge.

The clerk will assign a date to appear before a judge. The defendant is NOT notified since this person is now in default. You must state your case in summary form under oath before a judge. The judge will check the 2 year limit and your invoice of fees requested and if the judge agrees with your argument, the judge will write up an Endorsement Record/Order of the Court for the amount the defendant must pay including expenses and interest. This is a court order. The judge asked for an outline of our expenses and wanted to know if we wanted interest. The case took very little time, since "unjust enrichment" seems to be well established.

Once with a court order for the defendant to pay, the association had to have the document served on the defendant with an affidavit showing the person was served. We sent a regular post letter to the defendants with a copy of the judge's decision and waited a length of time before considering using a process server. It is always best to let the defendant have time to make a decision and perhaps pay the required amount rather than continuing the process. This resulted in two defendants paying the full amount and avoiding further litigation. For two other defendants there was no response.

Now comes a difficult issue. All the proceedings described above occurred in the jurisdiction of the cottage property and association. But, if the defendant still avoids paying, the next step is to take the defendant to an Examination Hearing. But, you must contact a small claims court in the defendant's permanent residence location. This might be several hundred kilometers away. The reason for leaving the cottage property's jurisdiction is if the defendant does not show up for an Examination Hearing after being notified by a process server, the defendant will be in contempt of court and can be picked up by local police, thus not forcing police to travel out of their area. In addition, the government form states that a person in contempt of court can be jailed up to 40 days.

Since the defendant's residence is outside the territorial jurisdiction of the cottage location, it was required that a Certificate of Judgement, and Affidavit for Jurisdiction (Form 11A), Affidavit for Enforcement Request (form 20P) be forwarded to the new small claims court. Basically, the new court wants documents showing you worked through the process in your area and want to continue in a new jurisdictional area. You can submit these to the court in the mail and they will forward an Examination Date. Obtaining the phone number of the new small claims court can also assist you in finding filing costs and checking to see if your forms have been received.

Once you have a date for an Examination Hearing, the defendant must be served directly. But as you might guess, the defendant may be hard to find and serve. Although the municipality can give you an address for the defendant, the person may never answer the door to a process server. This was a problem for us. The process server could not make contact with the defendant in our case.

The next step is to fill out a form for Substituted Service and ask for a date before a judge. If you explain about your problem contacting the defendant, the judge can sign off on a mailing to the address that you have. This will be suitable notification by the court. If the defendant still refuses to comply after receiving the judge's form, the person is in contempt of court and can be picked up by the police and taken before a judge if the defendant does not show up at the Hearing. Court orders are serious business.

For the Examination Hearing, the defendant must fill out an onerous financial information sheet and present it to the plaintiff before the judge. This includes bank information, employer information, rent, other assets, etc. The judge will make a decision on how outstanding funds are obtained.

Wanting to end this process before we hired another process server, our association sent a regular post letter to the defendant stating that our next step would be a Substituted Service hearing before a judge and the defendant would be compelled to attend and present a detailed financial disclosure form at an Examination Hearing. We gave the defendant one more chance to pay. Showing that we were serious, we received payment from the defendant. Case closed.

Before starting the small claims process, you must weigh the costs in time and filing fees. "Unjust enrichment" is well established in law and your association will certainly come out on the winning side if you have the courage to push the issue to the end. The process is well laid out in the small claims regulations. You may find that the judges also own cottages and are familiar with people who try to avoid paying cottage associations fees. Sending regular post letters to inform the defendant of your next step and asking them for payment to terminate the process is certainly easier than pushing process servers on them.

There are set fees that the judge can assign to cover the association's expenses, but it certainly will not cover all the costs. If you persist, you will win with every cottage owner contributing to the association and have more money to maintain the cottage road.

You do not have to be a lawyer to work through the small claims process, although with the limit at \$25,000, there will certainly be lawyers in court. Our association found that the amount of time and forms to be completed show that lawyers earn their fees. Lawyers are usually first on the docket since their time is valuable. This is a benefit since you can observe other cases.

For sure, try to attend small claims court to see the process. We were surprised to see a person brought into the court in handcuffs because this person was in contempt of court and was accompanied by three police officers. Another case was dismissed quickly for missing the two year deadline. Another person showed up for an Examination Hearing without having the financial information sheet filled out and the judge sent the person and his representative into the back room. In another case the plaintiff could not present an affidavit showing a defendant had been notified, and the defendant was not in court. Judges expect you to be prepared.

It took us two years to get payment from four cottagers. Hopefully we will not repeat this two years from now.

### **Submissions pertaining to "unjust enrichment"**

1. Point Abino Assn. v. Lee. (Ontario Court of Justice) The application by the association against the non-compliant cottager was held. "The Association was granted a declaration that it was entitled to collect yearly fees from Lee. The Association was entitled to recover fees on the basis of unjust enrichment. Lee benefitted substantially from the services provided by the Association."
2. Pettkus v. Becker, 1978. (Ontario Court of Appeals) This case quoted in Point Abino Assn. v. Lee. This case discusses the concept of "the application of the equitable doctrine of unjust enrichment."
3. Murdoch v. Murdoch, 1975. (Supreme Court of Canada) Although a different issue from our claim, it explains the concept of "unjust enrichment" on page 17 which says that labour and revenue of another should not "enrich" a person who makes no contribution.
4. Rathwell v. Rathwell, 1978. (Supreme Court of Canada) Long discussion of resultant and constructive trust. On Page 11 our case is stated: "As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another."