

Unpaid road dues are an unjust enrichment

By Don Payne, Chair, FOCA Roads Advisory Group

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With spring approaching, it won't be long before cottage and road associations will begin spending money to upgrade and maintain their private roads. The money, of course, comes from those who use those roads to gain land vehicle access to their properties. But what of those road users who don't pay their road dues?

Of all the road problems that come to FOCA, the one that occurs the most often concerns the inability of associations to get everybody to pay their annual road dues. Often when properties change hands, the new owners will not pay their road dues. Their excuses are that "they were never informed" or that "it is not in my deed" or "we don't belong to your association and never will." Others have had a disagreement with another cottager or a member of the association and feel that they can "get back" at them by not paying dues. Yet others may not agree on the amount levied and only pay what "they" think is fair, especially after they have personally moved a little gravel off the shoulder to fill in a pot hole on the road behind their cottage. Some quit an association altogether because widening the road on a dangerous hill caused a large tree to be removed, and some have been known to stop paying dues for fear that if there is an accident they will be included in the list of people who will be sued. Some associations cannot collect an adequate amount of money for proper road maintenance because sometime in the past one property owner dissented from paying for whatever reason, and then others dissented to show support or would not pay because someone else was not paying road dues. The list of different excuses/reasons for not paying is quite long.

No one likes to go to court over unpaid road dues. If the unpaid dues are \$10,000 or less you can go to Small Claims Court where you may be required to be represented by a lawyer if your association is incorporated.

Where to start! Courts make judgements based on the facts presented; therefore, it is important to get your facts straight before applying. It would be a good idea to have a clause in your association bylaws allowing the executive to initiate court proceedings to collect dues and other monies owing. Barring such a clause, it would be useful to have a resolution passed to direct the executive to use the courts. There should be historical records; minutes of annual meetings showing dues levied as well as records of who has paid, when and how much. The minutes should show any resolutions that affect the collection and use of funds. They should show that "collection" letters have been sent to the "dissenters" by registered mail, and that the letters included all the resolutions passed and the authority to make a collection. All correspondence between the dissenter and the association should be on file. The treasurer should have all the bills that have been paid and reasons for the division of the costs to all road users. There should be copies of everything for the court and for the dissenter/defendant. Added to these documents would be copies of any previous court judgements from other jurisdictions that support your case of "unjust enrichment" on the part of the defendant.

One previous court judgement that could be of use is Point Abino Association, plaintiff, and Stewart Lee, defendant. It was heard May 16, 1997 and an oral judgement was given August 5, 1997. The hearing was in Ontario Court of Justice (General Division) Welland, Ontario. In this particular case, the court found that the road that is owned by the Point Abino Association was being used by Lee to reach his otherwise landlocked property on Lake Erie, and that Lee had refused to pay his fair share of the costs of maintenance, snow-plowing, municipal taxes and liability insurance. The court held that there was no requirement on the part of the association to give notice that owners of the properties accessed by its road had to pay fees in order to use it. It held that unless Lee paid his equitable share of the annual costs incurred, he would be "unjustly enriching" himself at the expense of the other payees, whether they were association members or not. In addition it asserted that it was not up to the defendant to be the arbiter of how much should be paid, but that he had every right to join the association and make his feelings known at its annual meeting.

This is just a synopsis of the judgement. Any association could use its content in a final collection letter before actually going to court in the hope that the person who has not paid their road dues would see that the association was determined to collect, and that there was already a court judgement as precedent for being able to do so. The complete text of the judgement can be found in the Roads section of FOCA's website ([Point Abino Assoc](#)).

FOCA does not believe that people who do not agree should have to go to court to settle their differences. However, a judgement once made serves as a warning to others to not seek to unjustly enrich themselves at the expense of others. If the judgement does not cause the defendant to pay their dues, then, and only then, may a lien be placed on the defendant's property, thus prohibiting them from selling without paying what is owed.

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Indexed as:

Point Abino Assn. v. Lee

Between

Point Abino Association, plaintiff, and
Stewart Lee, defendant

[1997] O.J. No. 3262

DRS 98-00281

File No. 7376/96

Ontario Court of Justice (General Division)

Welland, Ontario

Fleury J.

Heard: May 16, 1997.

Oral judgment: August 5, 1997.

(6 pp.)

Real property — Title, registration of instruments — Caveats or cautions — What constitute — Restitution — Unjust enrichment — What constitutes.

This was an application by Point Abino Association for a declaration that Lee was required to pay levies to the Association for maintenance costs of certain lands. In 1925, the Association purchased land to provide access to many cottage owners along the shore of Lake Eric who would have otherwise been landlocked. Since that time, the Association had maintained the private roads for the benefit of all the owners. In 1983 Lee purchased his lot. The deed did not give him a right of way over Association lands to enable him to access his lot. Lee refused to join the Association and had refused to pay annual fees since 1996.

HELD: Application allowed. 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. Section 112 of the Registry Act did not apply. There was no obligation on the part of the Association to give notice that the

owners had to pay fees to the Association if they wanted access to their lands. The Association did not seek a claim against Lee's land but rather a remedy that he pay an equitable share of the costs incurred on behalf of all landowners.

Statutes, Regulations and Rules Cited:

Registry Act, R.S.O. 1990,, c. R-20, s. 112.

Counsel:

Thomas A. Bielby, for the plaintiff.
Lawrence A. Wolfman, for the defendant.

RESERVED DECISION

1 **FLEURY J.** (orally):— In this motion for judgment, the plaintiff seeks a declaration to the effect that the defendant is obligated to pay certain levies raised periodically by the Point Abino Association concerning the costs of maintaining certain lands. The defendant resists the application arguing the provisions of the Registry Act of Ontario.

2 The facts can be summarized as follows: In or about the year 1925 the plaintiff acquired certain lands from one Allan Isaac Holloway. These lands were purchased by the plaintiff in order to provide access to the many owners of cottages and summer residences along the shore of Lake Erie who would have otherwise been landlocked. Since that time, the Point Abino Association has been maintaining these private roads for the benefit of all owners. The plaintiff has incurred expenses in the nature of snow-ploughing, of general road maintenance, of providing security to the development and also by paying municipal taxes on such lands owned by the Association. The Association also secures an insurance policy to cover its liability to any persons using the lands owned by the Association.

3 In 1983, the defendant purchased lot #137, situated in the Point Abino development, from a previous owner who was not the plaintiff. What he got by way of deed was a standard deed, granting him the full fee in lot #137. However, he did not get a right of way over the Association lands to gain access to his lot. It should be noted that nowhere in the documents filed within the last forty years in the registry office is there any mention of the right of the Association to levy charges or impose any penalties on any of the members or non-members of the Association. In my opinion, this amounts to very poor conveyancing. However, I am not asked to pass comments on the conveyancing aspects of this affair but on the plaintiff's request for a declaration. The defendant has steadfastly refused to become a member of the Association and although he has contributed voluntarily in the past by paying a portion of the yearly fees requested by the Association, he

now takes the position that he is not obligated to pay any sums whatsoever to the Association.

4 The issue therefore as I see it is whether the Association has the right to charge certain fees for its work and expenses in maintaining the rights of way and the private roads and other properties owned by it for the benefit of the owners of cottages and summer residences. If it has that right, then under what cause of action can such levies or fees be collected?

5 According to the plaintiff, this situation raises a issue of unjust enrichment. It argues that by not paying his fair share of the common expenses, Mr. Lee is unjustly enriched to the detriment of the other property owners who are then forced to contribute a higher amount to cover all expenses. As I understand the defendant, he claims that he only receives limited benefits from the Association and he therefore wishes to be the arbiter of how much he should pay them if at all.

6 Let me deal firstly with the argument put forward by the defendant concerning the Registry Act, R.S.O. 1990, c. R-20. It seems clear to me that that argument cannot succeed. There is no obligation on the part of the Association to put some notice on the defendant's land that the owners must pay some fees to the Association if they want to have access to their lands. It has always been a feature of any search of title conducted by competent legal professionals to make sure that the lands are reachable either through publicly owned lands or enforceable rights of way. The Association is not seeking a claim against the defendant's lands in this action. They are simply seeking a remedy whereby he will be made to pay an equitable share of the costs incurred for the benefit of all landowners. Section 112 of the Registry Act has no application in the instant case. The Association would have every right to bar the defendant from using the Association lands if they so chose. Without using the Association lands, the defendant cannot reach his lot and therefore he cannot enjoy the amenities of his cottage.

7 The claim has been framed in terms of unjust enrichment. Although I was taken aback, initially, by counsel's approach, a careful review of the jurisprudence referred to me appears to validate the position taken by plaintiff's counsel. It seems clear to me that the defendant has benefitted substantially from the services provided by the Association. The plaintiffs have paid the taxes on the lands in question, have maintained the roads, thereby giving him access to his lands, they have ploughed the snow in the winter, they have provided insurance coverage for the common lands and they have provided the services of security personnel. How a land owner, occupying a piece of landlocked property can deny receiving a direct benefit from the Association's work on private roads used to gain access to these lands is beyond me. It is also self-evident that by failing to share in the costs of the maintenance, he has deprived the Association of funds which it should have been entitled to count on.

8 There is no doubt in my mind, that the plaintiff is correct in its request to this court and I will issue a declaration to the effect that the Association is entitled at law to collect from the defendant the amount of yearly fees it stipulates as appropriate according to its own by-laws. I am satisfied that these funds are owed to the plaintiff pursuant to the principles outlined by the Supreme Court in Deglman v. Guaranty Trust [1954] S.C.R. 725 and later expanded by the same court in a series of cases the most notable of which are Rathwell v. Rathwell [1978] 2 S.C.R. 436 ad Pettkus v. Becker [1980] 2 S.C.R. 834. To quote Mr. Justice Dickson at p. 455 in Rathwell (supra): "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."

9 I was not made aware of any claims for the years prior to 1996 and I will therefore limit my ruling to the years 1996, 1997 and ongoing years. If Mr. Lee takes exception with the way the Association runs its business, he has every right to join the Association and make his feelings known during their annual meeting. However, it is not up to him to be the final arbiter of how much he personally should pay as representing his fair share of the costs incurred by the Association for the benefit of all co-owners.

10 The issue of costs was not argued. I may be spoken to on this issue in case the parties cannot agree on a rational disposition.

FLEURY J.

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