The Boundary Point
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Case Commentaries on Property Title and Boundary Law

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

The law of water – and especially the taking of water – is usually left for the Provinces to determine and regulate. However, last month saw the release of a decision in the matter of inter-provincial water taking that had become the subject of a court proceeding in Ontario. One of the defendants was the City of Winnipeg and the plaintiff was a First Nation seeking damages for failure on the part of Crown Ontario to adequately protect its interests. In *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*,[1] Ontario sought to dismiss an action started by the plaintiff on grounds that it did not have a likely prospect of success. In this issue we consider the kind of damages claim that can be made on the basis of the Crown's failure to protect the interests of Indigenous people when allowing an aqueduct to be built over 100 years ago for the supply of drinking water to the City of Winnipeg.

Water-taking and the Fiduciary Duty of the Crown to a First Nation

Key Words: *Honour of the Crown, fiduciary duty, water, expropriation, Aboriginal title*

The ruling in *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)* was not a final determination of the issues in the dispute. Instead, Ontario brought a motion to the court for an order to dismiss the claim against it because the claim did not allege sufficient facts to establish the elements of a breach of fiduciary duty. In other words, Ontario submitted that it was plain and obvious that the plaintiff's allegations disclosed no reasonable cause of action for breach of a *sui generis* or an *ad hoc* fiduciary duty.

The location of Shoal Lake in Ontario and Manitoba giving rise to this dispute can be seen in the map at Figure 1 below.

[1] *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*, 2021 ONSC 1209 (CanLII), https://canlii.ca/t/jd8vr

Figure 1: The aqueduct from Shoal Lake delivers
225 million litres of water to Winnipeg every day…[2]

In dismissing Ontario's request, the court explained the test to be met on a motion of this type in these terms:

> Ontario's motion is brought pursuant to rule 21.01 (1)(b) of the *Rules of Civil Procedure*, which states:
>
> > WHERE AVAILABLE
> >
> > *To* any *Party on Question of Law*
> >
> > 21.01 (1) A party may move before a judge,
> >
> > > (a) […]
> > >
> > > (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.
> >
> > (2) No evidence is admissible on a motion, …
> >
> > > (b) under clause (1)(b).
>
> Where pursuant to rule 21.01 (1)(b), a defendant submits that the plaintiff's pleading does not disclose a reasonable cause of action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim. Matters of law that are not fully settled should not be disposed of on a motion to strike, and the court's power to strike a claim is exercised only in the clearest cases.
>
> In *R. v. Imperial Tobacco Canada Ltd*., the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with

[2] From: Darren Bernhardt, *A century of water: As Winnipeg aqueduct turns 100, Shoal Lake finds freedom,* CBC News, Posted: Jun 02, 2019 at: https://www.cbc.ca/news/canada/manitoba/winnipeg-aqueduct-shoal-lake-100-years-1.5152678 All rights reserved.

considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success. Chief Justice McLachlin stated:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *McAlister (Donoghue) v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] A.C. 562 (U.K. H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd*., [1963] 2 All E.R. 575 (U.K. H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

In *Atlantic Lottery Corp. Inc. v. Babstock*, the Supreme Court of Canada stated that the test applicable on a motion to strike is a high standard that calls on courts to read the claim as generously as possible because cases should, if possible, be disposed of on their merits based on the concrete evidence presented before judges at trial.

On a motion under rule 21.01 (1)(b), the court accepts the pleaded allegations of fact in the statement of claim as proven, unless they are patently ridiculous or incapable of proof.[3]

The court explained the context, history and circumstances giving rise to the plaintiffs' claim under the section heading, "*Anthropological, Geographical, Historical, and Statutory Background*":

> In this section, I will summarize the critical material facts of anthropology, geography, history, and statutory instruments that underlie Iskatewizaagegan No. 39's breach of fiduciary duty claims.
>
> Shoal Lake is a part of the Shoal Lake watershed, which is comprised of Shoal Lake, Falcon Lake, and High Lake. Shoal Lake is the largest of the watershed's three lakes with a surface area of about 260 km. Over 95% of Shoal Lake's surface area is in Ontario, the balance is in Manitoba. Shoal Lake is part of the Nelson Basin which is regulated by the *Ontario Water Resources Act*. Shoal Lake is a navigable water and is subject to the *Beds of Navigable Waters Act,* which confirms that Ontario holds title to the lakebed.

[3] *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*, *supra*, footnote 1, at paras. 37 to 44 [footnotes omitted]

Shoal Lake is also part of the larger "Rainy River - Lake of the Woods - Winnipeg River" drainage basin ("the Rainy River Basin"). The International Joint Commission has regulatory authority with respect to the Rainy River Basin. The International Joint Commission is an international body comprised of representatives from both Canada and the United States. The Commission regulates waters that are subject to the *International Boundary Waters Treaty Act*. The Commission has regulatory authority over Shoal Lake because the lake is interconnected with the Lake of the Woods, which is subject to the *International Boundary Waters Treaty Act*.

The Commission's regulatory powers include granting permission to take water and setting water levels. The Lake of the Woods Control Board of the International Joint Commission exists under concurrent Canada, Manitoba, and Ontario legislation. It operates as a federal board with members from each province and from the federal government. The Commission is responsible for maintaining minimum and maximum water levels in Shoal Lake.

The people of Iskatewizaagegan No. 39 are Anishinaabe. Iskatewizaagegan No. 39 is a distinct Aboriginal society, a recognized Band under the *Indian Act*, and an Aboriginal people within the meaning of s. 35 of the *Constitution Act*, 1982.

Shoal Lake is a part of the cultural identity of Iskatewizaagegan No. 39 and its people. Since time immemorial, the Anishinaabe have used the waters of Shoal Lake and the surrounding land for survival. Iskatewizaagegan No. 39's culture is coextensive with Shoal Lake and the surrounding land. The transmission of Anishinaabe teachings, traditions, and values to future generations takes place and continues to take place at Shoal Lake.

Iskatewizaagegan No. 39 has a reserve bordering half of the north shore and part of the west shore of Shoal Lake. There are three other First Nations with reserves on Shoal Lake. Iskatewizaagegan No. 39's traditional territory encompasses Shoal Lake and the Shoal Lake watershed. The traditional territory of Iskatewizaagegan No. 39 encompasses the Shoal Lake watershed and lands surrounding the watershed up to Falcon Lake and High Lake.

Common law real property concepts do not apply to Aboriginal lands or to reserves. Aboriginal title and the Aboriginal interest in reserves are communal *sui generis* interests in land that are rights of use and occupation that are distinct from common law proprietary interests. An aboriginal interest in land will generally have an important cultural component that reflects the relationship between an Aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community. The Aboriginal interest in land is a *sui generis* (unique) independent beneficial legal ownership interest that burdens the Crown's underlying title, which is not a beneficial ownership interest and which may rather give rise to a fiduciary duty on the part of the Crown.

Iskatewizaagegan No. 39 is a beneficiary of the *Royal Proclamation of 1763,* the text of which is set out in Schedule "A" to these Reasons for Decision.

The *Royal Proclamation of 1763* was ratified by assembled Indigenous Nations by the *Treaty of Niagara 1764*. In the summer of 1764, representatives of the Crown and approximately 24 First Nations, met at Niagara. The lengthy discussions lead to the *Treaty of Niagara 1764*,

> which was recorded in wampum. The Crown does not recognize the *Treaty of Niagara 1764* as substantively altering the legal effects of the *Royal Proclamation of 1763*. In contrast, First Nations assert that the *Royal Proclamation of 1763* must be understood together with the *Treaty of Niagara 1764* and so understood the *Royal Proclamation of 1763* constitutes a recognition of Indigenous sovereignty.
>
> On October 3, 1873, Iskatewizaagegan No. 39 entered into Treaty No. 3 with the Crown. One subject of the treaty was 55,000 square miles of territory from west of Thunder Bay to north of Sioux Lookout in Ontario and extending the Manitoba border and the border with the United States. The text of Treaty No. 3. is set out in Schedule "B" to these Reasons for Decision. The reserve of Iskatewizaagegan No. 39 adjacent to Shoal Lake was established pursuant to Treaty No. 3.
>
> Treaty No. 3 is a pre-confederation treaty on behalf of the Dominion of Canada and Chiefs of the Ojibway. The Ojibway yielded ownership of their territory, except for certain lands reserved to them. In return, the Ojibway received annuity payments, goods, and the right to harvest the non-reserve lands surrendered by them until such time as they were taken up for settlement, mining, lumbering, or other purposes by the Government of the Dominion of Canada.
>
> Although Treaty No. 3 was negotiated with the Crown in right of Canada, the promises made in Treaty No. 3 are promises of the Crown. The federal Government and Ontario are responsible for fulfilling the promises of Treaty No. 3 when acting within the division of powers under the *Constitution Act, 1867*.
>
> In accordance with the division of powers under the *Constitution Act, 1867,* Ontario exclusively had the authority to take up lands pursuant to Treaty No. 3 and it is the owner of the lands and of the resources on or under the lands taken up. Under the *Constitution Act, 1867*, Ontario has the exclusive power to manage the lands and the exclusive power to make laws in relation to the natural resources, forestry resources, and electrical energy on the lands taken up. In exercising its jurisdiction over Treaty No. 3 lands, Ontario is bound by the duties attendant on the Crown and it must exercise its powers in conformity with the honour of the Crown and the fiduciary duties that lie on the Crown in dealing with Aboriginal interests.[4]

Most of the reported ruling is a replication of the pleadings in the Statement of Claim and these are quoted verbatim. On a Rule 21 motion, no evidence is permitted; it is simply determined on the sufficiency of the pleadings which, if proven, can support a claim for the relief sought. Two appendices are also attached to the ruling: the *Royal Proclamation of 1763* and the text of *Treaty No. 3*. These were explained as documents that were entered into between sovereign nations in the First Nation's statement of claim.

[4] *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*, *supra*, footnote 1, at paras 7 to 20 [footnotes omitted]

Figure 2: Chief engineer William Gregory Chace stands in one of the arches of the Winnipeg aqueduct under construction in August 1915.[5]

Readers may wonder how Crown Ontario was a named defendant when the entire aqueduct is located in Manitoba. History provides an answer, as well as the geography of Shoal Lake, most of which is located in Ontario. A number of authorities and agencies approved the construction of the aqueduct. The court explained:

> In 1909, under the *Boundary Waters Treaty*, the International Joint Commission was established, and Shoal Lake came within the authority of the International Joint Commission.
>
> In 1913, the Greater Winnipeg Water District was established for the City of Winnipeg. The Water District proposed a project to construct an aqueduct from Winnipeg to the shores of Shoal Lake across the provincial border. The purpose of the aqueduct was to take water from the lake for the citizens of Winnipeg. The Water District sought permission from Ontario, Canada, and the International Joint Commission to take water from Shoal Lake.
>
> On October 2, 1913, the Ontario Lieutenant Governor in Council approved an Order in Council granting permission to the Water District (which is now the City of Winnipeg) to enter upon and to divert and take water from Shoal Lake in the District of Kenora. The 1913 Order in Council stated:
>
> > To His Honour, The Lieutenant Governor in Council:
> >
> > The undersigned has the honour to report that the Greater Winnipeg Water District, comprising the following municipalities […] has represented that the only available source of water supply for domestic and municipal purposes, for use in the said District is Shoal Lake, in the District of Kenora in the Province of Ontario and the said

[5] From: Darren Bernhardt, *A century of water: As Winnipeg aqueduct turns 100, Shoal Lake finds freedom,* CBC News, *supra*, footnote 2, originally from City of Winnipeg Archives. All Rights Reserved.

district has applied for permission to take water from the said Lake for the purposes aforesaid.

The undersigned respectfully recommends that there be granted to the said Greater Winnipeg Water District the right to enter upon and to divert and take water from Shoal Lake in the District of Kenora in this Province subject to the following terms, conditions and stipulations:

1. That full compensation be made to the Province of Ontario and also to all private parties whose lands or properties may be taken, injuriously affected or in any way interfered with, but water taken within the terms thereof, and considered merely as water is not property to be paid for.
2. That the District shall abide by and conform to any and all rules, regulations or conditions regarding the ascertainment of the quantity of water being taken, and as to the inspection of works and premises, and the manner of carrying out the proposed works that the Government of Ontario may at any time see fit to make or enact in the premises.
3. That the water shall be used only for the purposes for which municipalities and residents therein ordinarily use water, and not for the generation of hydraulic or electric power and the quantity taken shall never, at any time, exceed one hundred million gallons per day.
4. That if it should hereafter appear that the taking of said water from Shoal Lake affects the level of the Lake of the Woods at the Town of Kenora, and thereby appreciably reduces the amount of power now developed and owned by the Town of Kenora or in any way injuriously affects the property of the said Town, the Greater Winnipeg Water Authority shall construct such remedial works as may be necessary to prevent or remove any such injurious affects and in the case of failure on the part of the said District to construct such works, then the said District shall pay to the Town of Kenora any damage the said Town shall sustain by reason of the taking of the water as aforesaid.
5. In the event of a dispute between the Town of Kenora and the Greater Winnipeg District with reference to any of the matters in the preceding paragraph mentioned, the same shall be finally settled and determined by arbitration under the Ontario *Arbitration Act*.

It should be noted that the 1913 Order in Council stipulated that the Water District (now Winnipeg) be liable "to the Province of Ontario and also to all private parties whose lands or properties may be taken, injuriously affected or in any way interfered with."

In understanding this stipulation, it shall be helpful to understand the nature of a claim for injurious affection. Injurious affection occurs when: (a) the statutory authority expropriates a part of the plaintiff's lands and the partial taking adversely affects the value of the plaintiff's remaining land; or (b) the statutory authority's activities on land interfere with the use or enjoyments of the plaintiff's lands. It is the second type of injurious affection that is relevant to the facts of the immediate case.

In understanding this stipulation in the 1913 Order in Council, it shall also be helpful to understand the nature of a public nuisance claim. A public nuisance is an activity that unreasonably interferes with the public's interest in questions of health, safety, morality, comfort, or convenience and a private person may bring a private action in public nuisance by proving special damage.

When the 1913 Order in Council was enacted, the Water District had not settled on the precise location of the terminus of the aqueduct from Winnipeg to Shoal Lake.

In January 1914, the International Joint Commission held a hearing about the Water District's project. The International Joint Commission approved the project subject to the same terms and conditions as set out in Ontario's 1913 Order in Council.

Under its Order of Approval, the Commission granted the Water Commission permission to take water from Shoal Lake for domestic and sanitary purposes up to a maximum of 100 million gallons per day.

In early 1914, the Water District decided that the aqueduct would be built totally within the Province of Manitoba.

In 1915, Ontario enacted legislation confirming that lands conveyed to fulfill Treaty No. 3's reserve requirement, including Iskatewizaagegan No. 39's reserve, excluded the lakebed of Shoal Lake. The legislation confirmed that the land covered by water was the property of Ontario.

In April of 1916, Ontario enacted *An Act to Confer Certain Rights and Powers upon the Greater Winnipeg Water District*. The statute confirmed the 1913 Order in Council and declared that its terms and conditions were legal, valid, and binding as if the Order in Council had been enacted as a statute.

As noted above, Shoal Lake is part of the Nelson Basin and pursuant to s. 34.3 (1) of the *Ontario Water Resources Act*, the taking of water from Shoal Lake pursuant to the 1913 Order in Council is exempted from the prohibition against water transfers. Section 34.3 (3) paragraph 6 states:

> *Water transfers: Great Lakes-St. Lawrence River, Nelson and Hudson Bay Basins*
>
> 34.3 (1) For the purposes of this Act, Ontario is divided into the following three water basins: […]
>
> *Prohibition*
>
> (2) A person shall not take water from a water basin described in subsection (1) if the person will cause or permit the water to be transferred out of the basin.
>
> *Exceptions*
>
> (3) Subsection (2) does not apply if the transfer of water out of the water basin is one of the following: […]
>
> 6. A transfer of water pursuant to the order of the Lieutenant Governor in Council dated October 2, 1913 respecting the Greater Winnipeg Water District.

> In a six-year construction project, the Winnipeg Water District built a 150 km aqueduct from Winnipeg to Shoal Lake. The aqueduct intake was located at the west end of Indian Bay, which is in Manitoba. The aqueduct began operating in 1919.
>
> The International Joint Commission's Order of Approval, which permits the withdrawal of 100 million of gallons per day, continues to apply to this day.[6]

The nature of a fiduciary duty is explored and discussed at length in this ruling in a very insightful analysis. In the context of how a claim to a fiduciary may exist, the ruling concluded:

> While there may be situations where the federal government, a provincial government, or a public authority may have a fiduciary relationship with an individual or group with attendant fiduciary obligations, those instances will be rare because:
>
> a. government's or public authority's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare;
>
> b. it will be rare that either by implication from the relationship between the parties or as deriving from a statute that a government will undertake to act with loyalty just for a particular individual or group;
>
> c. it will be difficult to establish the requirement that the government's action adversely affects a specific *private law* interest to which the person has a pre-existing distinct and complete legal entitlement, and in this regard, it is not enough that the government's or public authority's activities impact on the individual's or group's well-being, property or security; and
>
> d. the degree of control exerted by the government or public authority over the interest in question must go beyond the ordinary exercise of statutory powers and must be equivalent or analogous to direct administration of that interest before a fiduciary relationship can be said to arise.
>
> Although rare, examples of individuals or groups having interests where a government or a public authority might have a fiduciary relationship with them with attendant fiduciary obligations include property rights, interests akin to property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person or where a statute creates a complete legal entitlement.[7]

[6] *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*, *supra*, footnote 1, at paras 21 to 34 [footnotes omitted]

[7] *Iskatewizaagegan No. 39 Independent First Nation v. Winnipeg (City)*, *supra*, footnote 1, at paras 63 and 64 [footnotes omitted]

It was not plain, obvious, and beyond doubt that the plaintiff could not succeed in this claim and therefore Ontario's motion was dismissed.[8] Ontario's title to the bed of Shoal Lake, agreements with Manitoba, Winnipeg and Canada set the stage for characterization of the taking of water as an expropriation – complete legal entitlement – and with no compensation to the plaintiff First Nation for the past 100 years.

This ruling is a good example of the complex history of treaties, reserve creation, artificial water body controls and shifting jurisdictions in this part of northwestern Ontario. Any land surveyor or lawyer having reason to deal with boundaries in this part of the Province will find the entire ruling and appendices a helpful read.

Editor: Izaak de Rijcke

Cross-references to *Principles of Boundary Law in Canada*

Chapter 7: *Aboriginal Title and Boundaries*, in *Principles of Boundary Law in Canada* is a helpful adjunct to the nature of aboriginal title and the complex concepts arising from same. This ruling confirms again the very unique (sui generis) nature of aboriginal title, even when the subject area is public land owned by crown provincial.

FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD

[8] *Ibid.* At para 88, the ruling states,

> "In its factum, Iskatewizaagegan No. 39 argues:
>
> > Thus, just as the federal government owes a fiduciary duty to preserve a First Nation's interest to the extent possible once it has decided it is in the public interest to expropriate part of a First Nation reserve [see *Osoyoos Indian Band v. Oliver (Town),* 2001 SCC 85], so too does Ontario owe a fiduciary duty to the Nation to preserve its interests to the extent possible once it had decided it was in the public interest to permit the GWWD to infringe on the Nation's interests for the purposes of taking water from Shoal Lake. Additionally, by interposing itself between the GWWD and private landowners through creation of a compensation entitlement for lands or properties "taken, injuriously affected, or otherwise interfered with", Ontario owed a fiduciary duty to ensure the Nation could access such compensation. Indeed, ensuring compensation could be accessed would reasonably be expected to deter the taking, injurious affection, and interference with the Nation's interests.
>
> It is not plain and obvious that this argument from Iskatewizaagegan No. 39 is doomed to fail."

hours.[9] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

Seventh Annual Boundary Law Conference

This year's conference[10] theme is: *Complex Cadastral Problems: Searching for Solutions*. The perspective of "surveyor as expert witness" is used as an initial theme, but then delves into complex cadastral surveying scenarios using cases, legislation and legal principles in a changing environment. Like the last conference, this event will be held starting **April 7, 2021** as a series of eight weekly *lunch & learn* sessions via our interactive virtual meeting room. The agenda is available and registration is open.

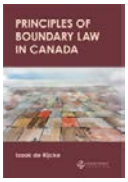
Land Registration Research Cybrary

AOLS members can now benefit from a searchable catalogue of material covering the underlying principles of research in the land registration system, what records are available, how they are organised and made accessible, and how the research can be completed in the context of history and a surveyor's quest to find the best evidence of a boundary. Access to the cybrary requires an enrolment code provided by completing the associated form in the External Training webpage.

Risk Management in Searching for Boundary Evidence

This CPD product is an outgrowth from the presentation "*Risk Management in Searching for Boundary Evidence in the Electronic Land Registration*" delivered by Anne Cole and Izaak de Rijcke at the AOLS AGM in February, 2020. The original presentation has been reconfigured as 3 webinars with accompanying resources.[11]

Principles of Boundary Law in Canada



In the context of (1) the complex and ever-evolving nature of boundary law, (2) the challenges of doing legal research in this area, and (3) the constant interplay between land surveying practice (as a regulated profession with norms codified in statutes) and common law principles, land surveyors would benefit from a current

[9] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

[10] This CPD product qualifies for 12 *Formal Activity* AOLS CPD hours.

[11] This CPD product qualifies for 3 *Formal Activity* AOLS CPD hours. Please note that access to this CPD opportunity is free for AOLS members with an enrolment code provided by completing the associated form in the external training webpage.

reference work that is principle-based and explains recent court decisions in a manner that is both relevant and understandable. See *Principles of Boundary Law in Canada* for a list of chapter headings, preface and endorsements. You can mail payment to: ***Four Point Learning*** (address in the footer of the first page of this issue of *The Boundary Point*) with your shipping address **or** purchase online. (*NB: A PayPal account is not needed to pay by credit card.*)

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