SOME COMMENTS ON "PERSPECTIVES ON ACCESS TO SUNLIGHT"[1] IN THE LIGHT OF PUGLIESE[2]

Introduction

In Canada, a small but rapidly growing body of literature indicates a lively interest in the potentialities of solar radiation as a source of heating. "Perspectives on access to sunlight" ("Perspectives"), a working paper of the Ontario Ministry of Energy, is a recent addition. The paper considers the usefulness of an assortment of legal devices which might be available to create legal entitlement to receive sunlight in Ontario.

The early chapters present a review of the law of light[3] in Ontario and set out thoughtful, balanced principles[4] by which to measure the effectiveness and fairness of any legal scheme adopted. This is followed by a separate, well-researched chapter for each of a number of discrete legal concepts. The result is a tidy view of law as consisting of a series of discrete, clearly defined categories, among which readers are asked to express a preference.

Without quarrelling with the author's views or denying the usefulness of some of the devices examined, the present writer will argue that the Ministry's paper neglected a very important attribute of the law. It changes. Grindingly, perhaps, and grudgingly, it nevertheless changes. The recent Ontario Court of Appeal decision in Pugliese v. National Capital Commission[5] (Pugliese) will be discussed as an illustration.[6]

"Perspectives"

The devices discussed in the paper fall naturally into three groups. Chapters three through six deal with concepts found in contract and real property law: private agreements, prescriptive easements, restrictive covenants, doctrines used for allocating water rights. Chapters seven through ten introduce concepts inspired by municipal and land-use-planning law: solar zoning, shade control by-laws, site certification, municipal acquisition. A statutorily conferred "natural right" to sunlight is briefly suggested in chapter eleven.

The paper sets out advantages and disadvantages of each of these devices. In most cases, the disadvantages seem the more impressive. The conclusion, stated at the beginning,[57] is that the present law of Ontario does not protect solar access for most urban landowners, "...since there is no automatic right to the light which crosses the property of others."

As the purpose of the paper[58] is to inspire discussion rather than to advocate solutions, it would be unfair to complain of their lack. However, it is submitted that where an actual use of solar energy or an immediate and ascertainable intention to use solar energy is completely blocked, a right of action is available and a remedy probably.

Several underlying assumptions seem to have limited the view of the law expressed in "Perspectives." The first of these is the assumption that there must, in every instance, be found or created a specific kind of "right" to use solar energy and that it must be lodged in the individual landowner. The emphasis on rights tends to direct attention toward once-for-all solutions and away from consideration of the kinds of transactions

which would be required if technological advance should demonstrate that an original assignment of rights had been an ecological error.

Although the author of "Perspectives" is aware of the need for flexibility, especially in zoning and planning, no mechanism for altering rights which have become attached to property is suggested. Rezoning alone would not ensure that a better land-use could equitably replace (shade out) an established dependency on solar energy. This failure to deal with the process of change may be the result of excessive concentration on possible rights and inadequate consideration of probably remedies available to validate them.

A second underlying assumption is that the courts will necessarily deal with interference to use of solar energy in the way they have dealt with right-to-light claims. Even if the law continues to put each different subject matter into a differently labeled, sealed box ("easement for light," "natural right of riparian owner," etc.), there is no particular reason why "access to solar energy" should go into the same box as "right to light." A contrast of the law of riparian rights with that which has governed the exploitation of ground water[9] ~~(discussed infra at)~~ demonstrates that there are an infinite number of possible boxes.

The third assumption is a tacit acceptance of a situation lamented by Professor Maitland around 1909, that the forms of action "still rule us from their graves."[10] This in the face of considerable evidence that legal concepts shift and categories once thought closed open up to include new fact situations.[11] In particular, the possibility of an action in nuisance for interference with use of solar energy should not have so cursorily ruled out.[12] This will be further discussed in connection with the _Pug Llass_ case,[13] ~~infra at~~ .

The Traditional Legal Devices

While recognizing that it could be an expensive solution, "Perspectives" suggests[14] that solar users be given the right to protect their access to sunlight by an agreement between neighbours which would be a registrable property interest, binding upon subsequent owners of the land. By this means a right similar to an express negative easement or a restrictive covenant[15] could be created by a combination of statute and contract law.

With respect, there is confusion here, brought about, in part, by relying on English authority as to what property interests are registrable,[16] and, in part, by a failure to realize that both the benefit and the burden of a negative covenant are capable of running with the land, even when the covenant is made by adjoining land owners who have no vendor-purchaser relationship.[16½] As the author indicates at another place,[17] restrictive covenants are among the most commonly conveyed interests in land.

Although creation of any interest in land for a period of 21 years or longer requires a consent under section 29 of The Planning Act,[18] the procedure is relatively simple where no plan of subdivision is required.[19] This was the case with the restrictive covenant given to the Church of the Holy Trinity by Eaton Centre Limited and The Fairview Corporation, protecting sunlight on Holy Trinity Square.

As "Perspectives" indicates,[20] restrictive covenants for entire neighbourhoods are most readily created by developers of new subdivisions or condominiums. In these situations, the cost in time and money of getting the agreement of all parties and of registration is minimized.

Although a number of jurisdictions in the United States are passing legislation to permit easements for the receipt of sunlight,[21] it is submitted that restrictive covenant is better suited to private land-use-planning in Ontario. It is presently available, flexible, well understood by lawyers, real estate people and many members of the general public, readily registrable and readily conveyable. In general, the categories of easements are old, restricted as to subject matter[22] and governed by complex accretions of rules.[23] With the exception of the easement for a right of way and the easement for utilities, they are not generally understood. This is particularly true of the negative easement, which cannot be enforced by requiring some positive action, such as tree trimming, on the part of the owner of the servient tenement. The restrictive covenant, on the other hand, requires only that the subject matter touch and concern the land and, in appropriate cases, can be specifically enforced by way of mandatory injunction.

However, those who create restrictive covenants for a development should be required to bind any adjacent land in which they have or may acquire an interest. Official Plans and zoning by-laws have not always protected subdivisions from incompatible uses, such as high rise apartments, put up just next door by the original developer. A restrictive covenant, properly drafted, could do that.

Remedies under Traditional Legal Devices

Regardless of how the legal right suggested by "Perspectives" is characterized, it would be enforceable by the courts. In theory, the remedy would depend on whether the action was for breach of contract, enforcement of an easement or breach of a restrictive covenant. In practice, the results would not always differ.

The usual remedy in contract is an award of direct, foreseeable monitary damages, not specific performance of the contract or a negative injunction.

Traditional remedies for obstruction to an easement include self-help by removal of the obstruction or an action for abatement and/or damages for nuisance. However, self-help is not much favoured by the law,[24] except in minor matters which have little or no permanent effect on other persons or on the public in general.

In practice, an injunction will be given only when the court considers that it would be just in all the circumstances and that damages would be an insufficient remedy. The availability of injunction would probably vary according to the economic or social importance of the competing land uses. Injunction might be more readily available to prevent the planting of a blue spruce than to control the height of a condominium.

Restrictive covenant developed in equity. In theory, only equitable remedies should be available. Since the value of a covenant protecting land is of a "real" character and lies in the continued observance of the covenant, damages in lieu of injunction would not normally be an adequate remedy.[25] However, there are exceptions. Restrictive covenants do not bind a public authority acting under statutory powers. The remedy in such a case would be damages for injurious affection.[26] Further, a restrictive covenant can be discharged,[27] upon payment of appropriate compensation, if the court considers it to be obsolete or against public policy.[28] If, for instance, a more efficient user of solar energy wished to build, the first user might be awarded damages or compensated in equivalent energy from the new facility.

It seems, therefore, that whether a right to sunlight were to rest on contract, easement or covenant, the remedy for interference with it might be a monetary award. This being the case, the parties might settle the matter where most actions are settled, outside the court. It is submitted that this would be the desirable outcome, providing that society's interest in the efficient use of energy could be protected. If the area in question were zoned for solar use,[28] and if the Official Plan stated use of solar energy to be a municipal goal,[29] the parties, as well as the court, would be encouraged to consider this aspect of the case very seriously.

However, ~~in many cases~~ there might be none of these legal devices in place to protect a solar-oriented neighbourhood or an isolated single user from highrise development. "Perspectives" envisages zoning as a solution[30] but does not suggest what should happen if the offending highrise were to use solar energy and use it more efficiently. Would the embattled group of neighbours have sufficient bargaining power to require the developer to pay just compensation or, failing that, sufficient political clout to block a socially desirable re-zoning? It is submitted that an equitable outcome could be expected only if solar users were to have a right of action apart from the legal devices previously discussed, and that such a right of action, in nuisance or in negligence, exists.

Nuisance - Analogies to Water Law

"Perspectives" touches on points[31] which, examined in the light of recent jurisprudence,[32] suggest an omitted right, the right to have a nuisance enjoined or abated or to have damages in lieu of abatement. Nuisance is dismissed quickly, with the conclusion that, since "...interference with

light has never been judicially characterized as unreasonable (i.e. as an actionable nuisance), where the obstructing structure serves any useful purpose.....," nuisance would not lie for interference with the use of solar energy.[33] This conclusion does not necessarily follow. Casting a shadow on a solar collector might be considered to be a nuisance where casting a shadow on a window would not. The amount of harm done is one relevant consideration in nuisance.[34]

"Perspectives" reasonably compares sunlight, as a natural resource coming onto the land, with water flowing past the land[35] and discusses one of the methods developed in arid parts of the United States for allocating water use.[36] The conclusion reached is that a doctrine of prior appropriation for allocating solar rights would not be readily understood in Ontario, where water rights are governed by the riparian rule. Possible analogies to water rights are much more complicated than this and can be carried much further.

In Canada, rights to take water, as between private persons, are governed by common law. Rights to fresh water fall into two principal categories, (1) the rights of riparian owners (owners of the banks) to use water from a stream or lake and (2) the right of any landowner to exploit water on or under his land which does not flow in a known natural channel.

A riparian owner is entitled to have the water flow down to his land as it has been accustomed to flow, substantially undiminished in quantity and quality, subject to the right of upper riparian owners to use the water.[37] This is not an easement but a "natural right,"[38] inseparably annexed to

the land. Anyone who diverts the water can be restrained from doing so without proof of damage.[39] However, this does not constitute ownership of the water.[40] The right must be balanced against that of the upper riparian owner to use the water for any ordinary purpose on his land and to use it for any other reasonable purpose so long as the flow is substantially undiminished.[41]

The cases demonstrate that the balancing function carried out by the courts can be a very nice one indeed. For instance, compare two New Brunswick cases in which the upper riparian owner interrupted the flow of water at certain periods in order to supply his own needs. In Keith v. Corry,[42] it was held reasonable for the defendant to shut the gates of his mill at certain seasons in order to build up a head of water. In Brown v. Bathurst Electric and Water Power Co.,[43] it was held unreasonable for the defendant to close the gate of its dam during the day so that it could generate electric power at night.

If, as suggested in "Perspectives,"[44] the right to make use of solar energy were by statute deemed to be a "natural right," the analogy to riparian rights could provide a model for the courts to protect a right to the flow of sunlight from interruption by those who would make no "ordinary" or "reasonable" use of it. This would be a more flexible tool than that provided by a strict doctrine of prior appropriation and would be at least as flexible as that given by the modified doctrine actually in use in western parts of the United States. The difference would be that, without further legislation, decision-making would be a judicial rather than an administrative process, and there would be no remedy where interference with solar

was for a purpose which the court found to ~~xxxxxxx~~ be an ordinary use on the land or a reasonable use.

In the case of surface water and water percolating through the soil in no defined channel, there is equally no ownership of the water,[45] but at common law a landowner could draw off and use all of it with no regard to reasonableness or to the claims of neighbouring users, and no-one had a right of action for its loss[46] or for loss of its support to the land.[47] It was said to be a case of damnum absque injuria, loss without (legal) injury.

¶ This curious dichotomy in the law dates from an English decision made in 1843,[48] and may never have become law in Ontario.[49] However, it was always assumed to be law[50] until the recent Court of Appeal decision in Pugliese.[51] Although confirming that there is no property right in the water and no absolute right to its support to the land, the Court (Arnup, Houlden and Howland JJ.A.) decided that there is a right of action where interference with ground water occurs negligently or results in nuisance.[52,53]

Pugliese & Other Cases

Pugliese was an action in nuisance and negligence brought by 175 plaintiffs who were owners of residential properties in the Regional Municipality of Ottawa-Carleton. They claimed that the water table beneath their lands had been substantially lowered by the construction of the Lynwood Collector Sewer (LCS) on land owned by the National Capital Commission (NCC) nearby, and that their homes and lands were seriously damaged by the resulting subsicence.

An application was made pursuant to Rule 124 to determine whether the plaintiffs had a cause of action against any of the defendants (assuming that the allegations of fact in the statements of claim were true). Without deciding

the question, Galligan J. referred it to the Court of Appeal pursuant to subsection 35 (1) of The Judicature Act.[54]

> s.35(1) If a judge considers a decision previously given to be wrong and of sufficient importance to be considered in a higher court, he may refer the case before him to the Court of Appeal.

The Court of Appeal agreed to determine the following question of law:

> Does an owner of land have a right to the support of water beneath his land, not flowing in a defined channel, and does such an owner have a right of action in negligence or nuisance or under The Ontario Water Resources Act (from the pumping of water in excess of the amounts as set out in permits granted under that Act), for any damage resulting from the abstraction of such water?[55]

The major issue was whether there was a right of action for "damage resulting from the abstraction of such water." That no action would lie for the loss of ground water had been laid down as the English rule in Acton v. Blundell,[56] approved by the House of Lords in Chasemore v. Richards[57] in 1859. The problem of resulting subsidence first came before the English courts in Popplewell v. Hodkinson,[58] 1869, and was approved by the Judicial Committee of the Privy Council in Gill v. Westlake[59,60] in 1910. The Chasemore case was recently followed in another English subsidence case, Langbrook Properties, Ltd. v. Surrey,[61] where Plowman J. held there was no right of action either in nuisance or in negligence.[62]

Standing against this authority was the decision of the Manitoba Court of Appeal in Penno v. Government of Manitoba,[64] where a majority of that Court held that an action was available, both in negligence and in nuisance, for damages to the crop-making potential of farm land through lowering of the water table. The Ontario Court also considered cases from Australia[65] and the United States[66] which had reached a similar result, and the Restatement of the Law of Torts, Second.

Mr Justice Howland, giving judgment for the Court, distinguished two previous Ontario decisions, Storms v. Henniger[68] and Rade v. K. & E. Sand & Gravel,[69] where the English rule had been followed, on the grounds that (1) those actions had not been based on negligence and (2) the courts in those cases had found that the alleged nuisances resulted from a "natural user" of the land, the removal of sand and gravel.

The concept of "natural user" originally belonged in the framework of the Rylands v. Fletcher[70] type case and provided an exception[71] to the rule that one who accumulates anything likely to do mischief on his land was strictly liable for resulting damage if it should escape. It seems now to have been subsumed to nuisance law and to equate with reasonable use.

According to Fleming,[72] this distinction between natural and non-natural user has primarily served to provide a desirable degree of flexibility to the law, enabling the courts to infuse into it prevailing notions of social and economic needs. "Natural user" should, therefore, be defined, somewhat circularly, as an ordinary use of land which the courts do not see fit to forbid or penalize as a nuisance. Therefore, "non-natural user" would be a use that the courts would hold to be unreasonable as causing an increased risk of harm to others.

The question the Pugliese court asked itself was whether the English rule was to be applied absolutely, regardless of the harshness and injustice which might result.[73] The answer was that recognition should also be given to "the equally well-settled doctrines in the law of torts which impose liability for property damage caused by negligence and nuisance."[74] It

is submitted that this would be the reaction of the Court, regardless of what old English maxim or rule might be before it.

Mr Justice Howland then set out the meanings and relationship of negligence and nuisance as presently developed. What he stressed in both sorts of action was the reasonable foreseeability of damage, given the fact that there was a neighbour.

For negligence to be actionable, there must be a duty of care to the person who is injured. This duty extends to neighbours and others whom the injurer ought reasonably to have in contemplation. He applied the test set out by Lord Wilberforce in Anns v. Merton London Bourough Council.[75]

> Through the trilogy of cases in this House – Donoghue v. Stevenson....Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd....and Dorset Yacht Co. Ltd. v. Home Office...the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrondoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter....Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise....[76]

If a reasonable person would conclude that the damage could have been avoided or minimized, Howland J. said, failure to do so would be negligence.[77]

Of nuisance, Mr Justice Howland said,

> Nuisance is a separate field of tortious liability and not merely an offshoot of the law of negligence. A nuisance may be caused by an intentional or by a negligent act. Negligence is not a prerequisite to an action for nuisance. A negligent act may, however, be a constituent element of a nuisance, or may itself constitute a nuisance.
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> ...
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> In determining whether a nuisance exists, it is not sufficient to ask whether an occupier has made a reasonable use of his own property. One must ask whether his conduct is reasonable considering the fact that he has a neighbour.[78]

This is consistent with the development of nuisance theory since The Wagon Mound (No. 2).[79] Liability in nuisance is based on foreseeable substantial harm to the value, use or enjoyment of a neighbour's property.[80]

That an action in nuisance, and sometimes in negligence as well, would lie for interference with use of solar energy seems unquestionable. That it would not in every case lead to a satisfactory solution is suggested by the only similar-fact case thus far[81] to rely on Pugliese. In Knox Christian School v. Regional Municipality of Durham,[82] the trial judge found as fact that construction of a road by the defendant municipality caused the school's well to go dry. However, he felt himself bound by the English rule and held that the defendant was not liable. Damages were fixed at $3,669. This represented sums paid out to have water trucked to the school, to have the well deepened and to purchase a new pump. Pugliese having been decided in the interim, it was argued on appeal.[83] The Ontario Court of Appeal (Howland C.J.O., Zuber and Wilson, JJ.A.), in a decision written by Mr Justice Zuber, followed Pugliese in dealing with the case as an action in negligence or nuisance but held that the evidence at trial had disclosed neither. There

was no discussion of the evidence, so it is not possible to be certain wherein it failed to support the allegations. Rather than automatically apply the de minimus rule, however, it is worth noting that the trial transcript seems to indicate that it was only when the excavation for the road reached its deepest point that large quantities of water poured from one bank, and it was only then that serious damage was done to the plaintiff's water supply. Perhaps the Court felt the defendant was not in a position to foresee the harm and this is what caused the Court to "negative....the scope of the duty or the class of person to whom it is owed...." and to find that the defendant municipality behaved reasonably toward its neighbour.

One last recent case on point is Critelli Ltd. v. Lincoln Trust and Savings Co.,[85] where the defendant relied on another old Latin tag, cujus est solum, ejus est usque ad coelum et ad inferos, freely, he who owns the soil owns it from the centre of the earth to the sky.

The facts are very simple. The plaintiff owned a two story building which was built to the edge of the lot to the west. Its roof met the snow load requirement in the National Building Code. Lincoln Trust put up a nine story building next door, with its east wall flush with the lot line and with the west wall of the plaintiff. The lee created by the higher building deflected snow and caused increased amounts to accumulate on the roof of the plaintiff. This made it necessary to strengthen plaintiff's roof, at a cost of $14,433.

The defendant's building was legal in every respect, and Grange J. found that there had been no negligence in its construction. Citing Pugliese,[86] he held the defendant liable in nuisance, then went on to quote Lord Wright

in Sedleigh-Denfield v. O'Callaghan[57] on the rights of an occupier to do what he likes with his property.

> A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society. (Emphasis added.)

Lord Wright conceded that minor nuisances arising out of a normal and reasonable user are not actionable and went on to say,

> Beyond this point it is necessary to ask if the conduct of an occupier of land has been reasonable vis-a-vis his neighbour. The taking of all reasonable care is not a defence to an action for nuisance. If an operation cannot by the exercise of reasonable care and skill be prevented from causing a nuisance, then it cannot lawfully be undertaken unless there is either a statutory authorization or the consent of those injured. (Emphasis added.)

It is submitted that in a society with a public policy of energy conservation and utilization of solar energy, interferring with a solar device, whether intentionally or negligently, would be an actionable nuisance.

Measure of Damage

The remedy for negligence is damages. The remedies for nuisance[88] are abatement, in certain circumstances, and/or injunction and/or damages. The usual measure of damage is the difference in the value of the land before and after the coming of the nuisance, but there is no categorical rule, and there are cases where a plaintiff can insist on being restored to a specially favoured situation.[88] Otherwise, an award of damages could amount to the forced sale of an easement. In the case of interference with solar access, this could conceivably include provision of equivalent energy from the intercepting facility.

Municipal Planning Law

Introduction

~~In contrast to the~~ somewhat esoteric aspects of the common law ~~discussed above,~~ planning law affects ~~every~~ property owner in southern Ontario, ~~and~~ most owners are very much aware of ~~it~~. Since it is available, visible, ~~and fairly well understood~~ and generally avoids use of the courts, it seems ~~both~~ reasonable ~~and desirable~~ that planning law be the ~~most used~~ means of sorting out rights of access to solar energy.

A preliminary consideration is the ~~degree of protection to be afforded,~~ ~~in those cases where a choice can be made.~~ "Perspectives" ~~opts[89] for~~ protecting roof-top collectors ~~only~~. This is ~~the~~ minimum and ~~is~~ not necessarily the best way to encourage solar use. A passive collector, created by designing or altering[90] the south wall of a building to absorb and retain more of the warming rays of the sun, costs less and requires no components for storing and circulating the heat.

~~Even~~ More extensive use of solar energy would be possible if the southerly portion of lots could be protected, making possible the use of various kinds of light reflectors, such as snow or light coloured paving, to increase the amount of light reaching the south wall or the active roof-top collector. Such lot protection would also make possible the use of detached solar collectors where it is not possible to orient the building itself to the south. ~~Such~~ A collector ~~can~~ be incorporated into a greenhouse, swimming pool or other detached building.

These and other technical considerations, such as orientation of roads in new subdivisions and ~~optimal~~ siting of buildings on their lots, should

be considered by planners when deciding what degree of protection from shading is possible and desirable for a given area. In particular, when drafting by-laws, every effort should be made to offer protection to existing solar uses.

~~"Perspectives" seems to envisage~~ four basic fact situations: (1) where a municipality wishes to encourage use of solar energy in a new development; (2) where a municipality is concerned to protect existing or planned solar installations; (3) where it is desired to protect as yet unclaimed solar possibilities; and (4) where an application is made to construct a solar collector which would not conform to zoning requirements in some important respect.

Although there is much technical data to be collected and evaluated before any general solar zoning can be done, the basic framework for dealing with the first three situations mentioned above, and for minor variances, is in place at the municipal level. However, the law to be applied needs to be strengthened and made more flexible in several respects. In particular, certain ~~additions~~ to The Planning Act[91] ~~will be recommended~~.

Whether to give municipalities power to deal with the fourth situation, to permit a ~~major~~ variance from zoning requirements for construction of a ~~ekar~~ solar collector, is a policy decision which will probably have to be faced sooner or later. It is not just a question of having some monstrous, ~~anomalous~~ looking structure in a residential neighbourhood. It is also a question of permitting placement of a house at some unusual angle on its lot in an area which normally requires uniform set-backs. Authority to permit the first of these is probably premature. Authority to permit the second, with suitable safeguards, ~~is very much needed~~.

The Planning Act

~~It is recommended that~~ Subsection 35 (1) of The Planning Act could be amended to give municipalities authority to make by-laws providing for: (1) solar zoning; (2) an approval process for solar installations which would result in a certificates of approval registrable on ~~against~~ title; (3) the variation of other zoning requirements where ~~this~~ is necessary to (a) protect an approved solar installation or (b) ~~where it is~~ desirable to encourage the use of solar energy; and (4) control of vegetation on private property in certain limited situations.

Solar Zoning

Municipalities rely on paragraph 35 (1) 4. of The Planning Act for authority to pass by-laws to protect access to light and air.

> s.35(1) By laws may be passed by the councils of municipalities:
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> 4. For regulating the cost or type of construction and the height, bulk, location, size, floor area, spacing, external design, character and use of buildings or structures to be erected within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway, and the minimum frontage and depth of the parcel of land and the proportion of the area thereof that any building or structure may occupy.

A by-law intended to protect access to sunlight written under this section would surely be valid, particularly if supported by an energy statement in the Official Plan.(d) There would be instances where such a by-law would be perfectly functional from a technical point of view as well. This would be true for instance, of a major downtown development, where the placement of structures is negotiated with the builder, and of some subdivisions.

(d) In Ontario, the Official Plan is generally regarded as the planning document in a municipality which outlines broad planning policies. These policies are implemented by passage of restricted-area by-laws, in conformity with such policies.

(c) Comparable to title issued under EPA

However, in already built areas solar zoning will not change or replace existing zoning but will of necessity be superimposed upon it. Of necessity, because sunlight, unlike light and air, is directional. At Ontario latitudes, it comes only from the south, southeast and southwest. The protection required for solar access has no necessary relationship with existing street layout or lot lines. It concerns a wedge of three dimensional space immediately to the south of any given building, sloping skyward away from the building. The width of the wedge varies according to the number of hours of sunlight protected. Its slope is governed by whether the protection is to a roof collector, the south wall of the building or an area at ground level.

This means that restrictions on land-use imposed for the protection of solar access will frequently be in addition to any existing building restrictions and could in certain instances effectively sterilize ownership rights unless authority to give exemptions from existing zoning requirements is broadened. To provide a authority for this, specific provision must be made in The Planning Act. It is recommended that paragraph s. 35 (1) 7. be added, allowing municipalities to pass by-laws providing for one or more levels of solar protection within any area or areas of the municipality or upon land abutting on any defined highway or part of a highway.

Approvals

Innovations in the law should mesh readily with the legal framework that is already in place. Since a building permit would be required to instal a solar facility,* a reasonable approach to the approvals system would be to make it a part of the building permit system.** As expertise is developed,

it may become possible to codify situations where a permit and certificate of approval would issue on the authority of the building department, pursuant to the requirements of a general by-law. If such a system develops, the general by-law should provide for notice and a hearing for those affected.

Registration of a certificate of approval against the title of affected land would have a result similar to registration of an easement for utilities. The owner could not build on his land in a way which would interfere with the transmission of the protected sunlight, and there would be limitations on the planting and growing of trees. Furthermore, these limitations will not necessarily effect only a readily measured strip of land at the periphery of the property. They could impinge on it in any one of a variety of ways. Until considerable experience has been gained with the system and the equities involved, it is, therefore, desirable, as well as necessary that approvals issue one or a few at a time, under special by-laws, time consuming though this may be.

Since it would be inequitable to permit an owner to take an approval on spec, it should be valid only if the certificate is registered and the collector installed within a limited period of time. In order to ensure planning flexibility, approvals should not last forever but should be limited according to the expected life of the solar facility, the building or the neighbourhood generally. They should be renewable, and, where the neighbourhood has remained stable, there should be a presumption in favour of renewal.

Recommendation 2

It is recommended that The Planning Act be amended by adding section 35d, providing for a system of approvals and for registration of certificates of approval and the enforcement of their provisions against all subsequent owners of the land.

Variation of Zoning Requirements

One way of providing for the planning flexibility needed to make optimal use of solar energy would be to permit municipalities to pass by-laws varying the relevant items in paragraph 4. of s. 35 of The Planning Act, or some of them, where it is "deemed necessary" to protect an approved solar energy installation, or where it "is desirable" to permit a proposed building to utilize solar energy. Use of the by-law making process for these zoning variations is intended to ensure more thorough consideration and more public discussion than is usually achieved when a Committee of Adjustment deals with a minor variation. Use of the phraseology "deemed necessary" in the first instance would be intended to give a municipality the authority necessary to protect an installation that is in existence and that it has approved. Use of the term "is desirable" in the second instance would place a greater onus on the proponent of such a by-law, and on the planners, to show that the zoning variation is indeed desirable.

Recommendation 3

It is recommended that s. 35 (1) permitting municipalities to pass by-laws providing for variation of zoning requirements where this is deemed necessary to protect an approved solar facility or is desirable to enable a proposed building to utilize solar energy.

Shade Control

Recommendation 4 (rearrange)

A further amendment to section 35 (1) could give municipalities some control over the height, location and density of trees on private property in areas zoned for solar use. This is likely to be a very controversial measure and should, until considerable experience has been accumulated, be a limited power. Established plantings should not be affected, and, since

it is not intended to make solar use mandatory, owners could still plant in order to shade their own buildings. However, the planting of trees in the critical sector to the south of an approved collector would be controlled as to location and species from the date when actual notice of the application of approval is given, together with a copy of a plan showing the protected sector, to all owners and occupants of affected property.

It is suggested that the quality of the notice given is especially important in the case of control of vegetation. Such control on private property, except where an easement for utilities has been previously reserved, is novel and may not be widely understood at first. Future purchasers would receive actual notice as a result of the registration of the certificate and a copy of the plan.

Large Developments – section 35a

The suggested amendments to section 35, outlined above, would also enlarge the scope of section 35a (2), which affects larger developments and comes into play when a municipality has an Official Plan and passes a development control by-law under section 35a:

> s.35a(2) Where there is an official plan in effect in a municipality, the council of the municipality in a by-law passed under section 35 may, as a condition of development of redevelopment of land or buildings in the municipality or in any defined area or areas thereof, prohibit or require the provision, maintenance and use of the following facilities and matters or any of them and may regulate the maintenance and use of such facilities and matters:
>
> 7. Conveyance to the municipality, without cost, of easements required for the construction, maintenance or improvement of any existing or newly required watercourses, ditches, land drainage works and sanitary sewerage facilities on the land.

"Perspectives" suggests [94] that easements required for unobstructed access to sunlight be added to paragraph 7. as one of the things which could be conveyed to the municipality without cost. This would be an alternative to the use of restrictive covenants to achieve the same end. It brings in an element of public enforcement which might be worth considering in the light of the remedies presently available for private enforcement of both public and private rights.

Remedies

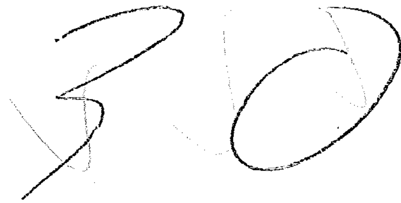
"Perspectives" suggests [94] a statutory remedy for interference with protected sunlight which would make such interference both a public and a private nuisance, enforcable by either the site owner or the municipality. It is suggested that legislation as outlined above would have an equivalent effect. The remedy for interference with an easement is an action in nuisance. Further, a ratepayer presently has power under section 240 of *The Municipal Act* to restrain the contravention of a by-law.

> s.470 Where any by-law of a municipality or of a local board thereof, passed under the authority of this or any other general or special Act, is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such contravention may be restrained by action at the instance of a ratepayer or the corporation or local board.

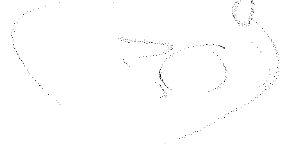
The rule that the Attorney General normally has sole authority to prosecute public nuisances is very old in Anglo-Canadian law. The fact that, for reasons which are not relevant here, the results are less satisfactory in Canada than in Great Britain would not necessarily motivate the province to pass this power over to municipalities. An action by the Attorney-General probably could not be expected unless several solar collectors were affected. In that event, the case would sound in public nuisance with or without the suggested legislation.

A simpler and more expedicious statutory remedy would be to provide what

is lacking in <u>The Municipal Act</u>, the right to claim a mandatory injunction, compelling the removal of any building or other structure or any vegetation which contravenes the by-law.



CONCLUSION: Unfortunately, many of these concepts are unavailable in presently developed areas due to impingement of sunlight by adjacent buildings. Where new development or large-scale redevelopment is planned, solar zoning may be feasible. But, this will necessarily cause much consideration to be given to adjoining property owners' rights and how such development may or may not prevent one's access to sunlight. Further consideration would also have to be given to any thought of controls that would encumber an adjacent property owner's title, when he or she previously took it without such limitations as to use. Until these problems are sorted out, it is unlikely that any municipality would try to impose access to sunlight controls.(2)



(2) see: Brief of the Solicitor for the City of Toronto which rejected any access to ~~zoning~~ sunlight zoning controls; , 1978.

FOOTNOTES

1. Ontario Ministry of Energy working paper on solar access (hereinafter "Perspectives").

2. *Pugliese v. National Capital Commission* (1978), 17 O.R. 129 (C.A.) (appealed to S.C.C.) (hereinafter Pugliese).

3. "Perspectives," *supra* note 1, at 3-7.

4. *Id.* at 8-9.

5. *Pugliese v. National Capital Commission*, *supra* note 2.

6. See text, *infra*, at .

7. "Perspectives," *supra* note 1, at ii.

8. *Id.* at i.

9. See text, *infra*, at .

10. Maitland, Frederick W., *Equity and the Forms of Action at Common Law* (Cambridge, 1910) at 296: "The forms of action we have buried. Yet, though we have buried them, they still rule us from their graves."

11. See Levi, Edward H., *An Introduction to Legal Reasoning* (The University of Chicago Press, 1949) at 8-27.

12. "Perspectives," *supra* note 1, at 3-4.

13. See text, *infra*, at .

14. "Perspectives," *supra* note 1, at 14-18.

15. A restrictive covenant is always negative in nature. See Megarry & Wade, *The Law of Real Property* (4th ed. London: Stevens & Sons, 1975) at 743 and at 751.

16. "Perspectives," *supra* note 1, at 14 and at 76 ~~at 82~~ n. 32.

*(insert 16 ½)

17. *Id.* at 25-30.

18. R.S.O. 1970, c. 349, s. 29 (2) and s. 29 (4), as amen. by S.O. 1976, c. 38, s. 2 (1).

19. *Id.*, s. 42 (3).

20. "Perspectives," *supra* note 1, at 28.

21. Passed: Colorado, Illinois, Kansas, Maryland (also permits covenants, restrictions or conditions), North Dakota; proposed: Florida, Missouri, Ohio, Utah.

FOOTNOTES CONTINUED

16½ Megarry & Wade, supra note 15, at 722-23.

22. Megarry & Wade, supra note 15, at 805-6.

23. Id. at 827-81.

24. Id. at 865.

25. Id. at 751.

26. Id. at 775.

27. For instance, in an application under The Vendors and Purchasers Act R.S.O. 1970, c. , s. or under Rule 611.

28. See text, infra, at .

29. See text, infra, at .

30. "Perspectives," supra note 1, at 32.

31. Id. at 22-24.

32. Penno v. Government of Manitoba (1975), 64 D.L.R. (2d) 256 (C.A.); Pugliese v. National Capital Commission, supra note 2. See text, infra, at .

33. "Perspectives," supra note 1, at 3-4.

34. Fleming, John G., The Law of Torts (4th ed. Sydney: The Law Book Company Limited, 1971) at 348-50.

35. "Perspectives," supra note 1, at 22-24.

36. A much larger number of states apply either the Reasonable Use doctrine or the Correlative Rights doctrine. See 93 C.J.S. ~~770-73~~ 771-73

37. In England, these rights have been substantially curtailed by statute. See Megarry & Wade, supra note 15, at 72-73.

38. Id. at 815.

39. ~~Idxxatx22x~~ LaForest, G.V., Water Law in Canada (Ottawa: Regional Economic Expansion, 1973) at 207.

~~40x~~

40. Mason v. Hill (1833), 5 B & Ad. 1 at 24.

41. See LaForest, supra note 39, at 206-17.

42. Keith v. Corry (1877), 17 N.B.R. 400.

FOOTNOTES CONTINUED

43. Brown v. Bathurst Electric and Water Power Co. (1907), 3 N.B.Eq. 543.

44. "Perspectives," supra note 1, at 57.

45. See Acton v. Blundell (1843), 12 M. & W. 324.~~a&x2S&x~~

46. Id. at 354.

47. Chasemore v. Richards (1859), 7 H.L.C. 349, 11 E.R. 140.

48. Acton v. Blundell, supra note 45.

49. The laws of England relative to property and civil rights were introduced into the province as at October 15, 1792, by 32 G. 3, c. 1, and the English rule was not part of the laws so introduced. For a discussion of the affect of the later adoption of the rule by the House of Lords, see Laskin, Bora, The British Tradition in Canadian Law (London: Stevens & Sons, 1969) at 60-67. And see Pugliese, supra note 2, at 146.

50. See, e.g., Storms v. Henninger, 1953 O.R. 717 (C.A.); ~~a claim to an easement to take water~~; Rade v. K. & E. Sand & Gravel (Sarnia) Ltd., 1970 2 O.R. 188; and the dicta of Dubin, J.A. in Jackson v. Drury Construction Co. (1975), 4 O.R. (2d) 735 at 736-7, 49 D.L.R. (3d) 183 at 184-5.

51. Pugliese v. National Capital Commission, supra note 2.

52. Id. at 152-155.

53. This result has been reached in a number of other jurisdictions, including Manitoba, see supra note 32; Australia, by the High Court in Mayor, Councillors and Citizens of Perth v. Halle (1911), 13 C.L.R. 393; and by a number of the states of the United States, notably New York: People v. New York Carbonic Acid Gas Co. (1909), 196 N.Y. 421, 90 N.E. 441, Michigan: Bissell v. Ford, 176 Mich. 64, 141 N.W. 860, Massachusetts: Gamer v. Town of Milton (1964), 196 N.E. (2d) 65, Wisconsin: State v. Michels Pipeline Construction, Inc. (1974), 217 N.W. (2d) 339, Texas: Smith-Southwest Industries v. Friendswood Development Co. (1977), 546 S.W. (2d) 890.

54. R.S.O. 1970, c. 228.

55. Pugliese, supra note 2, at 132.

56. Acton v. Blundell, supra note 45.

~~57xxxPopplewellxxxHodkinsonx(1869)xxLxRxx4xExxx248x~~

57. Chasemore v. Richards, supra note 47.

58. Popplewell v. Hodkinson (1869), L.R. 4 Ex. 248.

FOOTNOTES CONTINUED

57. Chasemore v. Richards, supra note 47

58. Popplewell v. Hodkinson, supra note 58.

59. Gill v. Westlake, 1910 A.C. 197.

60. For a discussion of the effect on Canadian law of a Privy Council decision in a case from another jurisdiction, both before and after the establishment of the Supreme Court of Canada, see Laskin, supra note 49.

61. Langbrook Properties, Ltd. v. Surrey, 1970 1 W.L.R. 161 (Ch.Div.)

62. Like Pugliese, this was a trial on the preliminary issue. Plowman J. was, of course, bound by the decisions above. The case was not taken to appeal, according to one of the solicitors involved, because the equities were not that great, the plaintiff being thought to be less than completely candid. Private communication.

63x

64. Penno v. Government of Manitoba, supra note 32.

65. Mayor, Councillors and Citizens of Perth v. Halle, supra note 53, and Metropolitan Water Supply & Sewerage Board v. Jackson Ltd., 1924 St.R.Qd. 82.

66. Gamer v. Town of Milton, State v. Michels Pipeline Construction, Inc. and Smith-Southwest Industries v. Friendswood Development Co., supra note 53.

67x

68. Storms v. Henniger Ltd., supra note 50

69. Rade v. K & E Sand & Gravel (Sarnia) Ltd., supra note 50.

70. Rylands v. Fletcher (1866), L.R. 1 Ex. 265, aff'd (1868), L.R. 3 H.L. 330.

71. See Fleming, supra note 34, at 282-84.

72. Id. at 284.

73. Pugliese, supra note 2, at 151.

74. Id.

75. Anns v. Merton London Borough Council, 1977 2 W.L.R. 1024 at 1032.

76x

FOOTNOTES CONTINUED

77. Pugliese, supra note 2, at 153.

78. Id.

79. The "Wagon Mound" (No. 2), 1963 1 Ll.Rep. 402, 1963 S.R. (N.S.W.) 948.

80. See Fleming, supra note 34, at 344-45 and at 354.

81. 15 August, 1978.

82. Knox Christian School v. Regional Municipality of Durham, unreported, judgment 31 May, 1977, Currelly, J.Cty.Ct

83. Knox Christian School v. Regional Municipality of Durham, unreported, appeal heard 9 May, 1978.

84. Critelli Ltd. v. Lincoln Trust and Savings Co. (1978), 2 R.P.R. 290.

85. But see Nor-Video Services Ltd. v. Ontario Hydro (1978), 19 O.R. (2d) 107, where Robins J. held Ontario Hydro liable in nuisance for building an electrical installation so close to a cable television operation that it interferred with plaintiff's reception of one signal.

86. Critelli Ltd. v. Lincoln Trust and Savings Co., supra note 84, at 293.

87. Sedleigh-Denfield v. O'Callaghan, 1940 A.C. 880, 1940 3 All E.R. 349.

88. Fleming, supra note 34, at 370 and the cases cited there.

91. The Planning Act, supra note 18.

94 "Perspectives", supra note 1 at 37.

95. Id. at 47.