

RESPONSE TO
"PERSPECTIVES ON ACCESS TO SUNLIGHT"

SUBMITTED TO THE ONTARIO MINISTRY OF ENERGY

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by

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The purpose of this report is to outline CELA's position in response to Perspectives on Access to Sunlight released by the Ontario Ministry of Energy, May 1978.

In this regard, the following material has been reviewed:

- 1) Perspectives on Access to Sunlight, Ministry of Energy, Government of Ontario, May, 1978.
- 2) Comment: Two Perspectives on "Perspectives on Access to Sunlight", Pat Reed, Bob Argue, The New Conserver Society Notes, Vol 1, No. 3, Fall, 1978.
- 3) The Right to Light in Ontario: A Common Law Remedy for the Overshadowed Neighbour?, Michael E. James, Canadian Environmental Law News, Vol. 4,
- 4) Some Comments on "Perspectives on Access to Sunlight" in Light of Pugliese, Pat Reed, third draft of CELA internal working paper, Spring 1978.
- 5) Memorandum in response to 4 above, by Michael James, dated October 23, 1978.
- 6) Memorandum in response to 4 above, by John Willms, dated July 17, 1978.
- 7) A Legal Right to Sunlight for the User of Solar Energy, A Proposal from the Canadian Environmental Law Research Foundation, M. Hallman.

This paper will outline the Canadian Environmental Law Association's initial response to Perspectives on Access to Sunlight - a working paper released on May 3, 1978 by the Ministry of Energy. This report discusses the problem of creating legal protection for solar energy units. In order to provide some organizational structure, we will attempt to respond to each specific section of the report.

Introduction

There is no consensus of opinion regarding the potential significance of renewable energy resources within the next 30 to 40 years. It has been variously estimated that by the end of this time period renewable energy resources could account for anywhere from 1% to 50% of our total energy consumption. This wide variation in forecasting may be illustrated by reference to the following:

The April 1977 report on "Ontario's Energy Future" concluded that the effect of all combined renewable energy options by the year 2000 (excluding Hydro) "will probably be equivalent to only 1 or 2% of the province's current total energy demand"....Recent forecasts by the Ontario Ministry of Energy have increased the estimated potential contribution of renewable energy sources to 2% of the demand by the year 2000. The federal Department of Energy, Mines and Resources predicts 3.4% of our energy supply could come from solar heating alone by the year 1990, while the United States is working on a timetable to have more than 10% of its energy supplied by renewables by 2000, and 25% by 2020. Even these figures fall far short of predictions by proponents of the "soft energy path", such as Amery Lovins, who feels that given today's technology and economics we could be half way to renewable based society by the turn of the century.¹

Government forecasts tend to cluster at the lower end of the scale and this appears to be largely a reflection of their continued commitment to large-scale central supply facilities which are powered by fossil fuels or nuclear energy. While we applaud the government for its increased

interest in renewable energy as evidenced by increased provincial and federal spending², we seriously question its continued devotion to energy sources which are increasingly scarce, expensive and potentially destructive. There are undeniable technical and economic obstacles to be overcome in the pursuit of widespread renewable energy consumption. However, we question whether these obstacles are any more imposing than the economic, technical and environmental problems associated with the continued importation of off-shore oil; the costly development of tarsands, Arctic oil and gas; and the proliferation of atomic energy facilities. From an environmental and security of source point of view, renewable energy resources offer a far better solution than the nonrenewable resources to which we are currently committed. There is nothing new in this thesis and we do not expect the government to suddenly abandon its efforts to secure access to new conventional resources. However, when the Ontario Ministry of Energy is spending a mere .89% of its total budget on renewable energy³, it cannot be argued that there is a real commitment to the alternatives which hold the greatest promise for the creation of an efficient and environmentally sound energy system. There is a need for a reordering of government priorities.

CELA maintains there should be a substantial shift in government policy, programs, and funding to support the development of a renewable energy industry. The important issues raised in Perspectives on Access to Sunlight are but part of the larger question of a viable energy program and the need for a stronger and clearer government commitment.

One of the most attractive renewable energy resources is solar energy. However, it is clear that one of the greatest barriers to the development of solar energy is the lack of secure solar access. We agree with Perspectives

on Access to Sunlight when it concludes that our present legal system does not provide the solar user with an effective means of establishing access to sunlight which passes over the property of other landowners. The widespread installation of solar energy units cannot go forward until this deficiency in our legal system has been rectified. CELA supports the Ministry of Energy's attempts to promote discussion which is designed to identify the most appropriate legal mechanisms for securing solar access. As an initial step, "Perspectives" represents a commendable beginning. Nevertheless, more specific and comprehensive research, on both a legal and a technical level, is needed before a well-founded legal framework can be created. In this regard, a note of caution may be appropriate. It has been reported⁴ that four months after the release of "Perspectives", the Ministry had received only 8 responses and that by the spring of 1979, the Ministry had received a total of approximately 30 responses. Furthermore, it has been reported⁵ that the Ministry has interpreted this small number of responses as indicative of a lack of public interest in solar energy. We submit that if such an interpretation has been made, it is ill-founded. Such an interpretation is not in accord with "Perspectives" assertion that there is widespread public support for solar energy⁶. It is argued that the small number of responses is not in fact indicative of a lack of public interest. Rather it is indicative of the legal complexities involved in securing solar access. Once again, more comprehensive research is needed before the law can be modified to provide the necessary legal infrastructure to support a solar energy system. We would be asking a great deal of the general public if we expect them to provide a legal synthesis of the issues raised in "Perspectives".

Principles for the Selection of a Potential Legal Mechanism⁷

In selecting one or more legal mechanisms for protecting access to sunlight, "Perspectives" asserts that 14 factors should be taken into account. These are:

- 1) Timeliness - A potential solar user should be able to obtain protection before he/she has actually acquired solar equipment.
- 2) Cost - The legal mechanism should not involve costly legal procedures.
- 3) Delay - The potential legal mechanism should not discourage solar use by involving excessive delays.
- 4) Simplicity - The mechanism for obtaining solar access should be simple and straightforward.
- 5) Certainty - The nature and extent of the solar right should be clear and comprehensible to the solar user and to his neighbours.
- 6) Amount - The solar right protected should provide adequate, but not excessive, sunlight for the efficient operation of a solar collector.
- 7) Fairness - The needs of the solar user must be fairly reconciled with the legitimate interests of his neighbour.
- 8) Impact - The legal mechanism should encourage the solar user to select collectors which involve the least impact for other land owners.
- 9) Termination - There should be some procedure for terminating the protection extended to solar access so that land use patterns are not frozen.
- 10) Notice - Landowners adversely affected by a solar right should have notice and an opportunity to lodge objections.
- 11) Municipal planning - The protection of solar access should be integrated with other municipal planning concerns.
- 12) Flexibility - Since the technical requirements of solar energy maybe quite site-specific and evolving, the mechanism should be sufficiently flexible to accomodate local circumstances and technological change.
- 13) New and retrofit - Separate mechanisms will need to be considered for new and existing areas of development.
- 14) Enforcement - There must be an adequate means of enforcing solar rights.

CELA supports these well reasoned objectives. To these enunciated principles, we would add the following:

- 15) Universality - Protection should be equally available to all citizens of the province and the existence of this protection should not be dependent upon

positive action by local governments.

Although individually laudable, it is clear that a number of these principles will be in conflict. For example, the more we strive to attain a simple, fast inexpensive and certain mechanism to further the interests of the solar user, the more likely we are to impinge upon the interests of his neighbour. Consequently, the design of an appropriate legal mechanism will be based largely upon policy decisions and tradeoffs which attempt to reconcile the objectives of various interest groups.

Existing Law of Light in Ontario⁸

In its examination of the existing law in Ontario, "Perspectives" briefly comments on the concepts of nuisance, easements, covenants, transfer of air space and trespass. Although the report later turns to some discussion of the potential use of easements and covenants, the report generally concludes that, "the law of light in Ontario is inadequate to protect solar access"⁹. We are in essential agreement with this section of the report and its conclusions with one caveat.

The common law remedy of nuisance has been quickly dismissed on the basis that "...interference with light has never been judicially characterised as unreasonable (i.e. as an actionable nuisance), where the obstructing structure serves any purpose"¹⁰. This appears to be too broad a generalization in light of recent cases such as:

- a) Critelli Limited v. Lincoln Trust and Savings Company (1978), 2R.P.R. 290; where the Supreme Court of Ontario held that the defendant was liable for the cost of strengthening his neighbour's roof when the defendant constructed a new building which deflected increased amounts of snow onto his neighbour's roof. The defendant was held to be liable even though the building complied with municipal zoning and there was no negligence in its construction.
- b) Pugliese v. National Capital Commission (1978), 17 O.R. 129 (C.A.) (appealed to S.C.C.); the court held that the plaintiffs had a cause of action in nuisance against the defendants who argued no action would lie for the loss of ground-

water since a landowner may make unlimited use of groundwater under his property regardless of the effect on his neighbours.

- c) Penno v. Government of Manitoba (1975), 64 D.L.R. (2d) 256 (C.A.); (cited in Pugliese, supra) where the court held that an action was available in negligence and nuisance for damages to the crop-making potential of farmland caused by a lowering of the water table.

Although these cases do not deal directly with questions of solar access and the potential remedy of nuisance, they illustrate that in questions of nuisance the court considers not only whether the defendant's use of his property was useful and reasonable, but also whether the plaintiff's property suffered substantial foreseeable harm to value, use or enjoyment¹¹. Consequently, although a court might quickly dismiss the assertion that shadowing a window constitutes nuisance, it might be much more sympathetic where the claim involves shadowing of a solar energy unit. This would be particularly true where the unit was in place and providing the building with its primary source of heat.

We do not assert that an action in nuisance is clearly available to the solar user or that it would necessarily generate an appropriate remedy. However, we do not accept "Perspectives" assertion that an action in nuisance is clearly unavailable. In fact, given the present state of the law, it appears that by necessity any case dealing with the shadowing of a solar collector would be based upon the concepts of nuisance. Consequently, we should recognize and be prepared for this eventually.

Having asserted that an action in nuisance may be presently available to a solar user, we should make it clear that we do not feel that it is a currently adequate legal mechanism. Without some legislative recognition of a right to solar access, such an action would be argued on the basis of the prior law of sunlight and the general concepts of nuisance. Such an approach would be far too complex, costly and uncertain. Therefore, we need to clearly establish a legal mechanism whereby solar access may be publicly and/or privately

created.

Potential Mechanisms¹²

After examining the existing law of light in Ontario, "Perspectives" goes on to discuss 9 potential mechanisms for protecting solar access. In the following section, we will attempt to comment on each of these alternatives.

Solar Zoning¹³

As envisaged in "Perspectives", solar zoning could be established with the following major characteristics¹⁴:

- 1) Solar zones could be established to encourage solar energy units.
- 2) Solar zoning could be superimposed on existing zoning categories.
- 3) Different degrees of protection and encouragement could be provided in different types of solar zones.
- 4) Within a solar zone, solar users could receive partial or total exemption from existing restrictions which impede the effective use of collectors (i.e. height, setback, lot coverage, aesthetic and use requirements). These exemptions could be denied to collectors which are ineffective, spiteful or "unfair" to neighbouring lots.
- 5) All new construction in solar zones could be governed by strict general height and spacing requirements to minimize shadowing of neighbouring properties.
- 6) Although existing buildings would continue as legal non-conforming uses, new building permits could also be refused to all proposed structures which would shade actual collectors.
- 7) Variences could be granted in specific situations of hardship or where the shaded area was clearly inappropriate for solar use.

If we are to establish solar zoning, "Perspectives" foresees the following possible changes in planning legislation¹⁵:

- 1) Section 35 of the Planning Act authorizes municipalities to enact bylaws "for regulating the...height, bulk, location,...spacing, external design, character and use of buildings or structures erected within... any defined area,...and the minimum frontage and depth of the parcel of land and the proportion of the area thereof that any building or structure may occupy¹⁶". (s 35 (1) (4))

"Perspectives" argues that, "bylaws authorized by this section could impose uniform height and spacing limits within solar zones and could authorize solar use in all zones of the municipality...However, special exemptions for solar users for the height, setback and other requirements would be of dubious validity unless specially authorized legislation, as restrictions must generally be uniform within a zone."¹⁷

- 2) In addition, specific legislation would be required to authorize a municipality to refuse a building permit on the basis of a building's shadow-casting characteristics.
- 3) The traditional rule against alteration or changes of use of "non-conforming" buildings could be amended to permit the retrofitting of solar or energy conserving equipment.
- 4) In the case of larger developments, section 35a of the Planning Act currently authorizes municipalities to enact development control bylaws which can be used to regulate matters beyond the scope of section 35.

35a, (2) "Where there is an official plan in effect in a municipality, the council of the municipality in a bylaw passed under s.35 may, as a condition of development or re-development of land or buildings in any defined area, prohibit or require the provision, maintenance and use of the following facilities and matters of 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 water courses, ditches, land drainage works and sanitary sewage facilities in the land.

8. Floodlighting of the land or of any buildings or structures thereon.

9. Walls, fences, hedges, trees, shrubs or other suitable ground cover to provide adequate landscaping of the land or protection to adjoining lands and,

11. Plans showing the location of all buildings and structures to be erected on the land and the location of the other facilities required by the bylaw.

(4) A bylaw that includes provisions authorized by s.2 may

(a) provide that facilities and matters required by the bylaw should be provided and maintained by the owner of the land at his sole risk and expense and to the satisfaction of the municipality, and

(b) require that the owner of the land enter into one or more agreements with the municipality dealing with the facilities and matters referred to in s.s.2.....

- (5) Any agreement entered into as referred to in clause (b) of s.s.4 may be registered against the land to which it applies and a municipality is entitled to enforce the provisions thereof against the owner and, subject to the provisions of The Registry Act and The Land Titles Act, any and all subsequent owners of the land."

"Perspectives"; suggests that section 35a could be amended to: (a) authorize the regulation of vegetation under clause 9 for the specific purpose of protecting access to sunlight.

(b) grant general authority for the regulation of solar access by adding to clause 8 a reference to "natural lighting or shadowing of buildings or structures".

(c) require that site plans show the shadows that would be cast by proposed developments (clause 11).

- 5) As a foundation for solar zoning, "Perspectives" also suggests that section 2(7) of the Planning Act could be amended to expressly authorize municipalities to include energy policy statements in their official plans.

Although many aspects of solar zoning appear to be authorized by section 35 as it now stands, authorizing legislation and subsequent bylaws tend to be strictly interpreted. Consequently, if solar zoning is to be enacted, it may be advisable to provide some specific authority in section 35, whereby a municipality is empowered to pass bylaws to regulate height, bulk etc. for the specific purpose of preserving solar access for private individuals.

As outlined in "Perspectives", solar zoning is an attractive mechanism since it based upon municipal concepts and procedures which are generally well understood. Furthermore, it provides perhaps the best opportunity for the integration of solar energy concerns with other planning objectives. As an initial approach to the establishment of solar zoning, "Perspectives" provides a reasonable legislative framework. Nevertheless, it is clear that careful consideration needs to be given to the administrative and technical difficulties of denying building permits on the basis of shadow-casting characteristics;

granting variances to solar users; and granting variances to buildings which shade solar users. Moreover, zoning bylaws are of general application and to be valid they must be sufficiently certain. On the other hand, the technical requirements of solar units may be so site-specific as to mitigate against the application of generalized and rigid regulations. Therefore, we must carefully consider whether solar zoning would merely generate a large number of individual variance applications. If this proved to be the case, we would be establishing, inadvertently rather than directly, a site certification procedure.

Solar zoning is clearly most applicable to areas of new development or large-scale redevelopment. It is probable that municipal councils would be extremely reluctant to impose solar zoning on established areas where existing structures may already preclude solar technology or where established residents might well object to the creation of generalized limitations which did not exist at the time they acquired title. This problem in developed areas of a potential conflict between solar users and adjacent property owners will arise regardless of the legal mechanism that is established to protect solar access. In fact, it is the most difficult barrier to the establishment of solar access and an effective process of conflict resolution must be formulated.

In order to implement solar zoning or the other publicly administered mechanisms; such as, shade control and site certification, extensive provincial assistance will be required. In regard to zoning, it would be particularly beneficial for the provincial government to develop local "model" solar bylaws on behalf of the local municipalities.

Shade Control¹⁸

In essence, shade control involves designating trees, accessory structures and signs as public nuisances where they interfere with actual solar collectors. It has been suggested that shade control laws could be enacted either in specific areas zoned for solar use or as general legislation to protect all collectors in the province or in a particular municipality. The first alternative appears to be most applicable as a complement to a system of solar zoning. The second alternative appears to be most applicable to a more universalized system based upon the concept of a "natural right" to solar access. Consequently, the choice between shade control laws based on zones, municipalities or on a province-wide basis, appears to be dictated by a more fundamental decision - whether to pursue solar zoning, site certification or a universalized "natural right" to light. We concur with the suggestion that regardless of the size of the area affected by shade-control laws, there should be a system whereby exemptions may be granted to specific objections; such as, particularly important trees which moderate local climates. Since section 35 zoning bylaws would not presently control vegetation, shade control laws would have to be based upon specific authorizing legislation. Before any legislative action is taken, we must first determine the degree of technical necessity - how tolerant is a solar collector to periodic shading? If a technical necessity exists, shade control laws should be a component in any legislative package which is designed to protect solar access.

Certification¹⁹

Site certification is offered as an alternative to solar zoning. Unlike zoning which would limit shadowing in large areas, certification would protect specific sites on an individual basis. As envisaged, the certification process would have the following major characteristics:

- 1) An individual could apply for a certificate whether or not he had planned to immediately install a collector.
- 2) All affected landowners would be notified and given an opportunity to voice their objections.
- 3) At the certification hearing, the applicant could also request any appropriate variances in designing restrictions which might hinder the effective operation of his proposed collector.
- 4) At the hearing, consideration would be given to the interests of the applicant, objecting neighbours and to municipal planning objectives. In cases of hardship, the applicant could be instructed to pay compensation to his neighbour.
- 5) If a certificate were granted, it would be registered against the title of the affected properties. The certificate could be for a specific period of time and subject to renewal. The solar user would then be entitled to unobstructed solar access, subject only to existing structures and to any conditions specified in the certificate.
- 6) Interference with access could be made both a public and private nuisance and therefore subject to individual or municipal enforcement.

Shade control in relation to vegetation could be effectively incorporated into the specific certificate.

We agree that the greatest disadvantage with site certification is the inherent cost and delays which would follow from individual applications and hearings. It may however prove to be a necessary complement to a system of solar zoning.

The choice between zoning or certification may depend largely upon the following issue - are the technical requirements of solar energy sufficiently flexible to be accommodated under zoning bylaws of general application or are they so site specific as to necessitate certification on a site by site basis? The answer to this question will often vary with the degree of development in a specific area. Zoning is more readily applicable to areas of new development or large scale redevelopment. In highly developed areas it may be necessary to pursue certification programmes which offer greater opportunities for flexibility and the resolution of competing interests. Certification

would be particularly attractive as an interim measure for the solar pioneer who has developed in an existing area.

Municipal Acquisition²⁰

This mechanism involves the municipal expropriation or purchase of solar rights for private use. The compensation paid could be recovered on a local improvement basis. Such a scheme is not initially attractive because of the expense to the municipality and eventually to the solar user. In addition, expropriation processes are often complex, time-consuming and not well received by the public. It appears that zoning procedures could ultimately achieve the desired objectives without the need for outright municipal acquisition.

In conclusion, of the publicly created mechanisms presented, solar zoning (with the complementary shade control law) is initially most attractive. It appears to offer the best opportunity for integrating solar concepts with overall planning objectives. It does not depend upon any radically new administrative techniques and it is widely understood and accepted. This is however, an initial assessment and we are not prepared to summarily dismiss further consideration of the other techniques presented. We are aware of the difficulties which are associated with solar zoning. In particular:

- 1) Its applicability to existing areas must be determined in accordance with the constraints of solar technology.
- 2) Although cumbersome, certification may offer a more individualized means of dealing with objections in a quasi-judicial manner.
- 3) As with all publicly created mechanisms, solar zoning does not give the solar user a basic right to solar energy. His right to light remains dependent upon the positive actions of his municipal government.

In addition to zoning, shade control laws, certification and municipal acquisition, "Perspectives" outlines 6 additional mechanisms, namely²¹:

- 1) Solar rights acquired by private agreement.
- 2) Solar rights by prescription (Doctrine of Ancient Lights).
- 3) Acquisition by "prior appropriation".
- 4) Restrictive covenants.
- 5) "Easements of necessity".
- 6) A statutory right of solar access.

Although the report offers little information in regard to some of these mechanisms, we will briefly comment on the appropriateness of each device.

Private agreements and restrictive covenants²²

There appears to be some confusion in these sections of the report. It is difficult to determine whether there is any real difference between restrictive covenants and the proposed legislative recognition of a "solar right" as a registerable and enforceable interest in land. Even in the absence of a vendor-purchaser relationship, adjacent property owners are free to create negative covenants which are capable of running with their titles. Although creation of an interest in land for a period of 21 years or longer requires a consent under section 29 of the Planning Act²³, this is a relatively simple procedure and if necessary an exemption could be created for restrictive covenants which safeguard solar access.

As "Perspectives" indicates, restrictive covenants could be most easily applied to new subdivisions. In this regard, consideration should be given to the following scheme:

- 1) The province could prohibit the marketing of any subdivision as "solar housing" (or industrial park) without governmental certification. This would provide consumer protection against unscrupulous advertising. It would also provide a mechanism for government involvement in solar design and the provision of legal safeguards.

- 2) Certificates would not be granted unless the design were based upon efficient solar technology.
- 3) The municipality could be requested to rezone the area on the periphery of the subdivision to secure ongoing solar access.
- 4) The municipality could be requested to rezone the subdivision to permit the most efficient solar design that would be in keeping with other planning objectives.
- 5) As a condition of certification, the developer would be required to include restrictive covenants in each deed so that each purchaser would acquire secure solar access.
- 6) This provision of restrictive covenants could also be included in subdivision agreement so that the municipality could itself enforce the covenants²⁴.
- 7) The province could further the establishment of "solar subdivisions" by actively participating in a model project and by establishing financial incentive to assist developers and/or individual purchasers.

Since the subdivision approval process is already in place and restrictive covenants are widely understood, it appears that such a scheme offers distinct advantages.

In existing areas, restrictive covenants could be secured on an individual basis. However, it is unlikely that such a scheme will be widely accepted because of the potential cost to the solar user and because the non-solar user may be generally reluctant to encumber his title²⁵.

Prior Appropriation²⁶

This is an American concept which asserts that, "whoever first begins to use (appropriate) a source of water is entitled to continue such use at the same rate"²⁷. By analogy, this concept may be useful for allocating solar access. Under the existing American scheme, there must be objective evidence of an appropriation. The appropriation must be for a beneficial use and it must be confirmed by a permit application or by a court action. Notice of the appropriation must be given to other interested parties. One of the most

interesting aspects of this concept is that, "a 'watermaster' may...establish priorities. In some states where an application is received for a use with high priority, existing appropriations for lower priority uses may be invalidated upon full compensation".²⁸ It is not clear whether compensation is always paid to appropriations which are judged to be of lower priority. If the permit application is considered on the basis of possible competing uses and if allocation is made to one or more of the competing parties, with or without compensation, there may be little real difference between the results of this process and the certification scheme outlined above. If this scheme is essentially equivalent to a certification process, then there may be little advantage in importing the American jurisprudence. However, the implications of this concept have not been adequately enunciated in the report and it need not be dismissed simply because Ontario deals with water resources on the basis of "riparian" rights rather than on the basis of "prior appropriation".²⁹ If the latter concept proves to be an appropriate mechanism for allocating solar resources, it could be applied without disturbing the existing doctrines which have been applied to water resources. Consequently, this doctrine should not be dismissed without a fuller consideration of its inherent advantages and disadvantages.

Easement of Light by Prescription³⁰

It appears that even if the Doctrine of Ancient Lights were revived so that an individual could acquire a prescriptive easement, it would not provide the individual with a sufficient quantity of light to operate a solar collector.³¹ Therefore, the revival of an historic common law doctrine which is quite technically complex, would not in itself provide appropriate or sufficient protection for the solar user.

Easements of Necessity and A Statutory Right to Solar Access³²

Although "Perspectives" mentions the possibility of an "easement of necessity", there is little discussion of this alternative.³³ Similarly, the possibility of creating "natural" solar rights is quickly dismissed with the conclusion that, "natural solar rights are unlikely to become a reasonable alternative at least until solar use has become far more widespread..."³⁴ On the other hand, one could equally assert that solar use is unlikely to become widespread until recognition is given to natural solar rights.

On the basis of the working paper, a combination of restrictive covenants, solar zoning and site certification appears to offer the greatest potential for reasonable solar protection. However, without the additional recognition of an individual right to solar access, the solar user may be denied any real protection. These mechanisms will be of little benefit to a solar user who is situated in a municipality which neglects to adopt solar zoning. They will be of little use to the individual if one of his neighbours refuses to provide a restrictive covenant. The neighbour may or may not have a perfectly valid reason for his refusal and the municipality may or may not be guided by legitimate planning considerations. If the individual is to be denied solar access, this denial should come from a third party acting in a judicial capacity. It should not come from an individual neighbour with vested interests or from a municipality which may be defending its own policies. If solar protection is to be provided only on the basis of private agreement and municipally initiated action, there will be no fundamental right to reasonable solar access.

To some extent these mechanisms of zoning etc. are based upon the assumption that the individual must justify his right to solar energy. They do not place the onus on others to justify the denial of solar access. After careful consideration

this may prove to be a necessary assumption. But it is not an attractive assumption with which to begin discussions. Would it not be more beneficial to start with the contrary assumption; namely, that the solar user has a natural right to solar energy until it has been clearly established that this right should be denied in favour of other development priorities? We do not advocate the establishment of an inflexible right which would take precedence over all other planning considerations. But we are not prepared to quickly dismiss the concept of establishing a basic right to solar energy. Such a right should be subject to existing structures and it should not negate other legitimate private and public concerns. It should not be impossible to designate an equitable form wherein this right could be removed in favour of legitimate conflicting interests, with or without compensation. Consequently, instead of a quick dismissal, we urge the Ministry to give careful consideration to the concept of recognizing a natural right to solar access.

From the information provided in the working paper, restrictive covenants appear to be the most attractive device for the private creation of solar access. In addition, solar zoning and/or site certification appear to be the most appropriate mechanism whereby solar energy concerns may be integrated with municipal planning processes. However, before any of the proposed mechanisms are finally endorsed or rejected, there is a need for greater research concerning the costs and benefits of each alternative. This is particularly true with regard to the issue of providing a statutory natural right to solar access.

Like the authors of "Perspectives", we are not prepared to present a definitive synthesis on this complex question. We do hope that our comments will contribute to the dialogue and that the Ministry will be encouraged to support further research toward the establishment of concrete legal mechanisms. The Ministry and the authors are to be commended for providing the first serious government working paper on the legal aspects of solar energy. We believe that the relatively small number of replies is due to the complexity of the subject and not to any lack of public concern.

Above all else, it should be emphasized that the Canadian Environmental

Law Association supports the renewable energy programme and the specific efforts to extend legal protection to solar users. The foundation for cleaner and safer environment will be built upon renewable energy resources. We hope that by reordering its priorities, the Ministry will make an even greater contribution to the establishment of this foundation.

FOOTNOTES

1. Comment: Two Perspectives on "Perspectives on Access to Sunlight", Bob Argue, The New Conserver Society Notes, Volume 1, Number 3, Fall, 1978, p. 29.
 2. ibid p. 29
 3. \$2.45 million out of a total budget of \$273 million for the fiscal year 1978-79.
 4. op cit, Argue, p. 30
 5. ibid, p. 30
 6. Perspectives on Access to Sunlight, Ministry of Energy, Government of Ontario, May 1978, p. 30 and 81.
- Note: All further references are to Perspectives unless otherwise indicated.
7. p. (iii), and 10-13
 8. p. 3-7.
 9. p. 7.
 10. p. 3.
 11. The Law of Torts, Flemming, J., The Law Book Company Limited, 4th ed., Sydney 1971, at 344045 and 354.
 12. p. 8-9.
 13. p. 31-43.
 14. p. 31-33.
 15. p. 34-38.
 16. R.S.O. 1970, C349.
 17. p. 34-35.
 18. p. 43-45.
 19. p. 47-53.
 20. p. 54-56.
 21. p. 8-9.
 22. p. 14-18 and p. 25-30.
 23. R.S.O. 1970, C349 s29(2) and s29(4) as amended by S.O. 1976 c38 s2(1).
 24. p. 29.

25. p. 17.
26. p. 22-24.
27. p. 22.
28. p. 23.
29. p. 24.
30. p. 19-21.
31. p. 30, item 3.
32. p. 9, 43, 57.
33. p. 9 and 43.

