

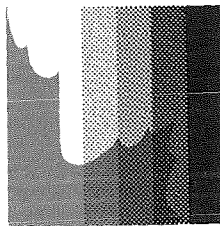
"THE RIGHT TO LIGHT"

a proposal

to

MINISTRY OF ENERGY

PROVINCE OF ONTARIO



by the

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
(CELA)

and the

CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION
(CELRF)

FEBRUARY, 1977

I TITLE

THE RIGHT TO LIGHT: A PREREQUISITE FOR SOLAR
ENERGY IN CANADA

II OBJECTIVES

1. Review pertinent Canadian and Ontario laws that apply to the right to light.
2. Review and evaluate the legislation in England and search the literature for the experience of other jurisdictions.
3. Draft a model statute with explanatory commentary to promote the orderly development of the use of solar energy in order to reduce landuse conflicts which would arise between users and non users of solar energy.

III BENEFITS TO THE OFFICE OF ENERGY CONSERVATION

In return for supporting this investigation the Office of Energy Conservation will receive a report on the current state of Federal and Ontario law relating to the right to easements to receive light and suggestions for reform where necessary together with a draft statute.

IV JUSTIFICATION

Such a study is fundamental to the development of effective urban planning incorporating any use of solar energy. Such energy cannot be successfully utilized if owners and occupants of adjoining lands have the right to cut off access to sunlight by erecting a tall structure.

It is likely that the availability of oil and natural gas for heating purposes will be very limited in the future. The United States, for example, has already become dependent on importing 40% of its oil, according to Lawrence R. Klein, an advisor to U.S. President-elect James Carter. At present, Canadian experts predict shortfalls in natural gas available for export by 1984 or 1985. High initial capital costs make solar energy financially a less attractive heating source than fossil fuels. The difference in overall capital costs between solar heat and fossil fuels narrows greatly when the rising cost of fuels is considered. Planning for solar energy for future medium & low temperature applications should be started at the earliest possible time.

Ontario abolished the common law right to acquire an easement to unobstructed light by statute in 1880. because the right interfered with urban and industrial development, and it no longer appeared to be needed.

However, the right was not completely abolished. There may still be some openings for the courts to declare in some cases that a plaintiff does have this right. If a court does open the door to such claims, using obscure and ancient doctrines, the right to light will have to be established on a case by case basis, thereafter. This would probably lead to a long period of confusion over the exact extent of the right. In addition, the basis for the right to light which a court might employ could not apply equally to all properties in a province. This could cause immense problems in urban areas for developers.

It would appear to be preferable to legislate whatever rights are deemed necessary to balance the interests of developers and existing landowners who wish to have the capacity to incorporate solar energy. All parties should be able to determine the state of existing rights.

The law has developed differently in England, where a committee studied the right to light and reported in 1950. Arguments were raised before this committee that the need for this right had faded, because its purpose was being served by planning legislation. However, the committee found that the right was still needed and its report resulted in the incorporation of the commonlaw right into a statutory framework. Thus a mechanism was provided which allowed an expedient method of determining the rights which might be annexed to a particular property.

The study would evaluate the success of the English model in balancing the competing interests. It would also examine the model's suitability for Canadian and provincial adaptation.

V EARLIER STUDIES

The study will be conducted by Michael James, B.A., LLB. Mr. James acted as a researcher on "Canadian Mining Law", recently published by Butterworths'. He also reviewed the right to light as it now exists in Ontario, published in the Canadian Environmental Law News.

In his analysis of the law relating to the right to light in Ontario, James observed that:

"It should be clear that no generalized right to light can be found in this province. The removal of prescription prevents any 'routine' attachment of the right to buildings existing for a period of time. Unless prevented by statute, or such of the common law as survives, a neighbour may build in such a way as to interfere with the established comfortable use of and existing property. Where the law persists it must be taken as uncertain until tested and, in some instances, fraught with arcane technicality.

English experience indicates that such rights can be adapted to meet the need to build a statutory framework. It may now be prudent to review the decisions of the last century, in the courts and the legislature, for we may no longer share the perceptions which fathered them nor wished to be governed by the rules which are their corollaries."

Supervisor: John Z. Swaigen, Counsel, Canadian Environmental Law Association.

Mr. Swaigen has published widely in the U.S. and Canada. Recent research topics include:

- Protection of Natural areas in private ownership in Ontario.
- Standing, An Idea whose Time has Come
- The Need to Reform the Ontario Provincial Parks Act.

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1. James, Michael E., The right to light in Ontario: A common law remedy for the overshadowed neighbour?
4 Canadian Environmental Law News 162 (1975)

VI METHODOLOGY

The study would be based on legal research to determine the current state of Ontario and federal law in relation to easements for light. A literature search will be undertaken to determine any relevant material available from other jurisdictions directly addressing the question; then an evaluation of the English experience under its statutory framework in recent years will be undertaken.

Six parts or phases will be incorporated into the study.

- Part I: an analysis of the historical development of the common law of easements for light in England.
- Part II: an analysis of all reported decisions in Canada relating to the right to light.
- Part III: a description of any federal legislation and Ontario legislation extending or limiting the common law right to light with reference to legislation in the other common law provinces.
- Part IV: a search of the literature in other jurisdictions and an analysis of the effectiveness of the British legislation.
- Part V: the development of recommendations for reform and
- Part VI: preparation of a draft model statute.

VII DURATION

To expedite the study and thus provide immediate benefits to the OEC, we plan to conduct our investigation and compose the final report within the time frame of March 1 to August 31, 1977. The timing is also subject to the availability of one of the two principal researchers, Mr. James, during this time period.

VIII BUDGET

60 days: per diem rate - \$100/day	\$6,000.00
Travel	250.00
Xerox	30.00
Typing	175.00
Printing cost, final report - 15 copies	<u>50.00</u>
	<u>\$6,505.00</u>