

THE RIGHT TO SOLAR RADIATION -- A CANADIAN SURVEY

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J.A. Potworowski

Renewable Energy Resources Branch

Department of Energy, Mines and Resources,

580 Booth Street, Ottawa, KIA OE4

SUMMARY

Legal right of access to solar radiation is a prerequisite to the development of the use of solar energy on a large scale. It is generally agreed that in Canada this matter falls within provincial jurisdiction. Although there is no existing legislation that provides a right to solar radiation for the production of energy, there appear to be historical and legal foundations on which such legislation could be built.

The growing interest of the federal government in renewable energy resources is demonstrated by the doubling of its spending on appropriate research and development in the past year, the creation of a Renewable Energy Resources Branch within the Department of Energy, Mines and Resources, and the establishment by the National Research Council of a program to demonstrate solar heating of houses. In addition, a joint program has been started with Prince Edward Island for the implementation of renewable sources of energy. The purpose of these programs is to evaluate the economic viability, operational reliability, and potential contribution of renewable sources of energy in the Canadian climate. However, economic competitiveness and technological feasibility alone will

not guarantee the widespread application of new technology. Various social and institutional barriers can impede their adoption. The lack of a well-defined legal right to light is one such barrier to the use of solar radiation. No one will invest thousands of dollars in a solar heating system if access to the sun might in the future be blocked by a neighbour.

What protection does the law offer to home owners wishing to install solar heating? What are the respective property rights of adjacent owners? How do these rights differ from province to province? The ten provincial ministers responsible for energy policy were asked these questions by the Hon. A.W. Gillespie, Minister of Energy, Mines and Resources, in the spring of 1977. This report summarizes the answers received.

In brief, no province currently has legislation that protects an individual or a corporation wishing to install a solar heating device. In the opinion of one federal expert,

"...it appears that any right to sunlight would involve the respective property rights of the adjacent owners and must be seen basically as a matter of 'property and civil rights' within provincial control. The closest analogy to such a right would be the common law 'right-to-light'. That concept is limited because it requires long established use (while solar energy installations would be generally new) and does not assure protection for an extraordinary use of light beyond what is normal and reasonable. Some difficulties can therefore be foreseen under existing laws of many provinces, but it would be for the provinces to decide how much they are prepared to interfere with the normal rights of those who are adjacent to an owner with a solar energy unit."

There would seem to be two narrow cases in which federal intervention could be possible. The first case would be one in which a solar energy unit is located on federal property and the second case would be where the solar energy unit is part of a commercial plant producing energy which would be distributed interprovincially or internationally. Since both cases are hypothetical, it is difficult to determine at present whether certain sections of the British North America Act could be applicable in practice.

General Considerations to the Legal Access to Light

At the provincial level, there appear to be several means by which access to light may be legally controlled. Historically, the most important appears to be "easement by prescription". According to an Albertan legal authority,

"The English courts, through the use of common law, permitted the acquisition of a negative easement of access to light by prescription, that is, the use of one parcel of land for the benefit of another parcel which, continued from time immemorial, created an easement by prescription. The American legal system rejected this concept. It is important to realize that the English courts distinguished between a property right in the light itself and a property right in the access to light. It was the enjoyment of light that was protected."

An official in the Department of the Attorney General of Nova Scotia offered this additional explanation:

"Prescription can be defined as the vesting of a right by reason of lapse of time (Osborne Law Dictionary, p. 250). Under the common law rules of prescription, a right by prescription could be achieved by a continuous use back to 1189, (the date of legal memory). The use back to 1189 was a conclusive presumption to be found upon a grant of the alleged easement prior to that time. The common law doctrine of prescription is not applicable in Canada. (Cases and Notes on Land Law, Laskin, p. 576; 61 S.C.R. 345).

Because of the difficulty in proving a use back to 1189, the (Canadian) Courts evoked the doctrine of the modern "lost grant". The lost grant doctrine has been accepted in the common law provinces as part of the applicable common law. (Cases and Notes on Land Law, p. 577). Under the lost grant doctrine a period of no less than 20 years of unexplained continuous use would suffice to justify a finding that a grant, now lost, had been made."

It was recognized quite early that the negative easement by prescription concept could seriously impair technological and industrial advancement. As a result in most provinces this concept has been legislatively abolished with the exception of some of the Maritime provinces. In any case, it should be noted that the amount of light to which an owner is entitled under an easement by prescription is:

"...enough light according to the ordinary notions of mankind for the comfortable use of the premises as a dwelling, or, in the case of business premises, for the beneficial use of the premises for ordinary shop or other business purposes." (Colls v Home and Colonial Stores Ltd. (1904) AC 179 at 205); Clerk and Lindsell on Torts, p. 840; Canadian Law of Real Property, p. 1002)

Thus, any right acquired is a right to light for ordinary living purposes, not a right to sunlight for the generation of energy.

It is also possible to acquire a right to light by an express grant of such right. That is, by clear, explicit words a grant of the right to light will be upheld. According to the Department of the Attorney General of Nova Scotia,

"A right-to-light may be created by express grant. In the case of an express grant, the grant itself should define the right (24 Law Quarterly Review, page 121). The grant may be in the form of a covenant, or may be affected by the use of general words whereby accommodations which were formerly merely quasi-easements are converted into valid easements (Halsbury, page 588). Presumably, any easement to light created by express grant would be subject to the Conveyancing Act and capable of registration under the Registry Act. The right may also be created by implication of law."

Given the economic importance of the correct location of a solar collecting system, this type of express grant may become more and more common.

Another method of controlling access to light under common law is the nuisance action. According to the same legal authority,

"The right to light can also be defined as the right to be protected from a particular form of nuisance, and unless the interference with the light coming to the dominant tenement amounts in law to an actionable nuisance, the owner of the dominant tenement has no right against the person who interferes with the light (Halsbury, p. 583). However, since the right-to-light is only a right to an amount of light sufficient according to the ordinary notions of mankind, an interference with light is actionable only if there is not so much light left, as is enough for comfortable use, according to ordinary requirements. (Clerk and Lindsell on Torts, p. 585)."

Again, the limiting factor appears to be the definition of "right to light". Finally, another method through which access to light can

be guaranteed is the use of zoning legislation. This may be done through building setbacks, height restrictions, and minimum floor ratios, or it may require specific solar zoning legislation. At present, no such zoning legislation specifically geared to protecting the rights of solar unit owners appears to exist in Canada.

Provincial Statutes and Solar Rights

In British Columbia, the opportunity to acquire a right to ancient lights, meaning natural sunlight, in the form of a prescriptive easement was abolished in the year 1900. Nevertheless, according to the Office of the provincial Attorney General,

"it is our view that the common law of nuisance would, in some circumstances, afford a property holder recourse against a neighbour where that neighbour's use of land interfered with the use and enjoyment of land, including the enjoyment or use of sunshine on that land."

Other statutory provisions in B.C. which could conceivably affect the operation of solar energy facilities are: the provisions of the Air Space Titles Act which would allow a landowner to alienate air space above his land, including the right to light, while retaining his fee simple interest in the land itself; the Weather Modification Activity Act which would allow the province to control activities which might jeopardize the availability of sunlight.

One solicitor in Newfoundland noted that

"...an easement to light can be acquired by prescription at common law in Canada only in Newfoundland and in Prince Edward Island - the other provinces have statutes abolishing the light of acquisition of such an easement by prescription. The easement is acquired at common law not under the Limitation of Actions (Realty) Act which deals with corporeal hereditaments not incorporeal hereditaments such as easements are generally reckoned to be."

In Nova Scotia, the legislature passed in 1860 an Act Respecting Ancient Lights in the City of Halifax, (Stats. N.S. 1860 C.44). The statute provided as follows:

- "1. Within the boundaries of the city of Halifax, no person or corporate body shall be restricted or prevented from building to any height he or they may judge necessary, by any right acquired by any adjacent properties by reason of any lights, windows or openings for air or light in premises near to or bordering on such intended building.
2. No right of ancient lights attached to windows, which have been in existence for 20 years prior to the passage of this Act shall be designated thereby."

This Act was made perpetual in 1863, and as far as can be determined, this legislation is still in existence. However, this local legislation has been superseded to a certain extent by a more general public legislation, the Limitations of Action Act passed in 1931. The situation is summarized as follows:

"In Nova Scotia there is a right-to-light. The right can be obtained by express grant, by interpretation or by prescription based on the Limitations of Action Act. In cities and incorporated towns, however, the right cannot be acquired after 1931 by prescription. Even in cities and unincorporated towns, however, the right can be obtained by express grant and by implication of law."

In Quebec, it appears that the only existing provisions under which solar rights could be guaranteed would fall under municipal jurisdiction:

"Le Code municipal et la loi des cités et villes accordent aux administrations locales le pouvoir de régler les dimensions, l'architecture et la destination des constructions dans les zones fixées de même que l'espace qui doit être laissé libre entre les constructions et les lignes des lots.

However, there is nothing to insure that all municipalities would adopt a uniform ruling on solar rights, or that they would ever adopt one in the first place.

In conclusion, there appears to be some historical and legal foundation upon which right to light legislation could be developed. Legal research is already underway in the province of Ontario under the auspices of the Ontario Crown Law Office. It would appear, for example, that model bylaws drafted in the United States could be applied to Ontario municipalities if appropriate amendments were made to the Ontario Municipal Act.

Finally, it might be useful to remember that other renewable technologies, such as wind energy and geothermal resources, might also require legislation in matters of property rights.