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Protecting Solar Access in Canada: The Common Law Approach

Fear No More, The Heat O' The Sun
Cymboline, IV, 11, 258

I. *Introduction*

The viability and adaptability of both active and passive solar collectors as alternative energy sources is not to be doubted; Canadian studies have determined that a solar heated home is feasible in locations south of 53°N[1] and although the radiation incident on each metre of land surface is relatively low in this country[2] the total amount of solar energy received in Canada is over 7,000 times the total energy consumed.[3] Government sources indicate that in spite of the relatively diffuse form of solar energy, most Canadian locales are suitable for solar water, pool and space heaters.[4] As the technology develops to maximize effective collection methods and costs for active systems decrease, the demand for solar energy equipment will increase.

Traditionally, the North American housing market has required 30 years or more to accept significant innovation.[5] Undoubtedly, government intervention, public interest, and uncertainties in conventional energy costs and supply will accelerate this normally long gestation period.[6] Indeed, present indications are that by the year 2000 renewable energy sources will meet up to ten per cent of total energy demands[7] in Canada.

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1. Department of Energy, Mines and Resources, *Office of Environmental Conservation Catalogue of Solar Heating products and Services in Canada Research Rep. No. 12.* (Ottawa) February, 1977, p. 5 (hereinafter referred to as No. 12).
2. Department of Energy, Mines and Resources, Renewable Energy Resource Board, *Implementing Solar Energy Technology in Canada,* (Ottawa) 1977 p. 2.
3. No. 12, *supra,* note 1, p. 4.
4. *Ibid.*
5. Department of Energy, Mines and Resources, Sewell, W.R. Derrick, *Accelerating the Acceptance of Solar Heating,* (Ottawa) 1979, p. IV (hereinafter referred to as Sewell).
6. *Ibid.*
7. *Ibid.*, p. 25.

The extent to which solar technology will be incorporated into practical use relates not only to technical feasibility but to other realities, including the law. To date the Canadian legal community has failed to address the relevant questions which surround solar energy. In so doing it is arguable that the acceptance and utilization of this alternate energy source has been retarded. As the situation now exists those who have invested in solar technology find themselves at a disadvantage in that the commonlaw right to ensure their "fuel" supply is veiled in uncertainty. As well, there is a marked hesitancy in initiating any legislative response to the problem. In practical terms, the problem is that the majority of the sun's rays strike the earth's surface at an angle. An obstruction on a neighbour's property may render the adjoining landowner's solar collector unusable.[8] Even in the absence of existing obstructions there is little incentive to install solar equipment if it may be rendered ineffective sometime in the future. Some form of legal protection must accrue to these consumers.

Traditional common law doctrines which address property rights are based on principles of land-based wealth and the right of the individual to use and enjoy his land as he sees fit. The Latin maxim *cusjus est solum ejus est usque ad coelum* aptly summarizes this prediliction. The uniqueness of an action to protect access to direct sunlight further aggravates the confusion of the common law. To date Canadian courts have steadfastly denied that the right to light (let alone sunlight) is a property right appurtenant to ownership of the fee; "no natural right exists to a single ray of light."[9] So too, Canadian tort law has yet to specify interference with sunlight as an actionable nuisance; the action having been confined to interference with easements to light only.[10]

Insofar as legislation is concerned, the general concensus among the provinces and larger municipalities is that the need for statutory protection of solar access has not yet been significantly demonstrated.[11] Thus the pioneers of solar energy utilization find

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8. Jesse L. Matuson, *A Legislative Approach to Solar Access: Transferable Development Rights* (1977/78), 13 New England Law Review 835 at 838.
9. Gale, *Gale on Easements*, 12th ed. p. 6.
10. *Ibid.*, see *infra* p. for possible new directions in this regard.
11. A conclusion based on data collected by the author from 23 Canadian municipal and legislative counsel. In all fairness the majority of sources canvassed have expressed a continuing interest in the possibility of solar related law in the future.

themselves presented with a "chicken and egg" dilemma; the demand for statutory protection must exist to precipitate legislation yet in order to preserve the viability of the technology access to supply must be secure. Which comes first, protection of solar access to facilitate and promote its use or extensive use of solar technology which will justify legal protection?

In spite of present shortcomings it is arguable that new directions in the recognition of solar access rights may be forthcoming. It is the purpose of this paper to examine and assess common law solutions to the problem of protecting solar access within the Canadian urban context with particular emphasis on the more viable approaches.

II. *The Doctrine of Ancient Lights*

Prior to the mass introduction of electricity in urban residences the necessity of access to natural light resulted in the common law doctrine of ancient lights. The doctrine did not stem from the recognition of any proprietary right to light as such, but was based on the acquisition of a negative prescriptive easement; originally, if a landowner (or occupier) could establish that windows overlooking his neighbours property had been in existence "for longer than could be remembered,"[12] it was within that landowner's right to prevent the erection of any structure on his neighbours land which would interfere with sufficient light entering the window.

The ancient lights doctrine was introduced to North America by our common law forefathers. However, the application of the doctrine has since been substantially limited if not eliminated from the common law.. Early Canadian cases such as *Carter* v. *Grasett,*[13] *Simpson* v. *Eaton*[14] and *Reutsch* v. *Spry*[15] which discuss the acquisition and extent of a negative easement to light are based on the premise that a right to acquire an easement by prescription exists. Unfortunately, in all provinces but Newfoundland and P.E.I., statutes now specifically set out that no right to the use of, or access

12. The prescriptive standard of "longer than could be remembered" was legislatively altered to a readily determinable number of years. For a complete discussion of the doctrine and ancient lights within the historical context see Pfeiffer, S.D., *Ancient Lights: Legal Protection of Access to Solar Energy* (1982), 68 American Bar Association Journal 288.
13. (1887), 14 O.A.R. 685.
14. (1907), 15 O.L.R. 161.
15. (1907), 14 O.L.R. 233.

to, light may be acquired by prescription.[16] For all intents and purploses then, barring statutory change the doctrine is obsolete in all but two Canadian jurisdictions. To change the legislation in order to revive the doctrine is not foreseeable (nor practicable) as a means of protecting solar access for two reasons: firstly, the ancient lights doctrine has traditionally dealt with a right to light which does noit necessarily imply a right to direct sunlight. The case of *Colls* v. *Home and Colonial Stores*[17] addresses the quantum of light which the dominant landholder may claim; in order to maintain an action for nuisance there must be

> a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done.[18]

Although it is arguable that the obstruction of direct sunlight (necessary for heat production when using a solar collector) would directly affect the habitability of a Canadian home, this presupposes the right to light extends not only to the benefits of natural illumination but to other properties of light including heat. This premise is questionable, although two recent English decisions may be of value in indicating possible directions.

Lord Denning's judgment in *Ough* v. *King*[19] reiterated the *Colls* standard that the diminuation of light must be of a degree wherein occupation of the home becomes uncomfortable according to the

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16. See ["British Columbia, Land Registry Act, R.S.B.C. 1970, c.s. 38A; Alberta, Limitation of Actions Act, R.S.A. 1955, c. 177, s. 49; Saskatchewan, Land Titles Act, R.S.S. 1953, c. 108, s. 69; Manitoba, Law of Property Act, R.S.M. 1970, c. 190, s. 28; Ontario, Limitations Act, R.S.O. 1970, c. 246, s. 33; New Brunswick, Easements Act, R.S.N.B. 1952, c. 67, s. 8;.Nova Scotia, Statute of Limitations, R.S.N.S. 1967, c. 168, s. 32(2); Northwest Territories, Limitation of Actions Act, R.O.N.W.T. 1956, c. 59, s. 48. In Nova Scotia it is only the right to acquire such easements in any city or unincorporated town which has been abolished. Prescriptive easements to light or air which had been acquired in British Columbia, Manitoba, Ontario, New Brunswick and in the cities and unincorporated towns of Nova Scotia, prior to a certain date were not invalidated. The only prohibition in these provinces was the right to acquire such easements by prescription in the future. Thus prescriptive rights to the access and use of light and air acquired prior to the following dates in the following provinces are still valid: British Columbia March 12, 1906; Manitoba-July 7, 1883; Ontario-March 5, 1880; New Brunswick-April 10, 1875; Nova Scotia-April 15, 1953 (for cities and unincorporated towns)."] from Perspectives, *infra,* note 91.

17. [1904] A.C. 179.

18. *Ibid.*, p. 187.

19. [1967] 1 W.L.R. 1547 (C.A.).

ordinary notions of mankind. He then continued in his review of the lower court decision to say:

> "First, I think the judge was entitled to have regard to the locality. . . such as whether it is residential or industrial or the like.
>
> Second, I think the judge was entitled to have regard to the higher standards expected for comfort as the years go by. . . . In some cases a higher standard may be reasonably required."[20]

The later case of *Allen* v. *Greenwood*[21] addressed the question as it related to sunlight on a greenhouse,

> The plaintiff's answer all this simply by submitting that they are entitled, by virtue of their prescription right to light, to all the benefits of the light, including the rays of the sun. Warmth, they say, is an inseparable product of daylight. . . . This reply commends itself to me.[22]

Goff, L.J. continues however,

> I desire, however, to add one important safeguarding proviso to this judgment. On other facts, particularly where one has solar heating (although that may not arise for some years) it may be possible and right to separate the heat, or some other property of the sun, from its light, and in such a case a different result might be reached.[23]

It is arguable that in residential districts, where expectations for natural illumination and quality of life are high, the demand for direct sunlight is not unreasonable. As per Buckley, L.J. in *Greenwood*, "[It] seems to me that in the case of a dwelling house it might well be argued (I do not say with what degree of success for this must depend on expert evidence) that adequate light was important not only for illumination but also for health and hygiene."[24] So too, Lord Denning's comments regarding changing needs and expectations for comfort and reasonableness of expectation may justifiably take into account public policy considerations including promotion of public welfare through alternate energy technology.

The second major shortcoming of the ancient lights doctrine as it relates to the protection of solar access is the acquisition of the right. Even if an enforceable scientific standard of direct sunlight could be

20. *Ibid.*, pp. 1552-3.
21. [1979] 1 All E.R. 819.
22. *Ibid.*, p. 827.
23. *Ibid.*, p. 828.
24. *Ibid.*, p. 829.

established and the prescriptive right to light re-established by statute, pursuant to the doctrine the prescriptive period only starts with the erecting of the collector. Thus, our solar collecting landowner would remain vulnerable to the activities of his neighbour until the right was established through time. Legislating a shorter time period for acquisition of the right (for example, five years for existing users, ten for new projects)[25] would reduce anxiety perhaps, but would not alleviate the problem.

In light of other available responses to the problem of protection of solar access the revival of the doctrine of ancient lights is a less than ideal solution. Nonetheless the doctrine is worthy of examination as it does demonstrate that "the law can recognize and protect a natural resource that supplies significant benefits to individuals."[26] The recognition of *sunlight* as a resource would represent an extension of the ancient lights doctrine but more importantly would mark a fundamental change in our approach to solar access protection.

III. *Common Law Nuisance*

The tort of nuisance is defined as an unreasonable interference with the ordinary use of enjoyment of land by the owner (or occupier). Potentially then, if the erection and employment of a solar collector is considered an acceptable use of one's land then interference with that use by way of an obstruction on neighbouring properties may be actionable. Unfortunately, to date Canadian courts have been reluctant to accept this application of the nuisance doctrine. In the case of *Earl Putnam Organization Ltd.* v. *Macdonald*[27] the plaintiff sought damages and a mandatory injunction to force the defendant to remove a wall which interfered with the plaintiff's right to light and quiet enjoyment of the property. The judgment of Lacourciere J.A. drew upon Halsbury to establish no natural right to lateral light existed,

> The difference between the right to light and the right to freedom from smell and noise is that the former has to be acquired as an easement, in addition to the right of property, before it can be enforced; the two latter are ab initio incident to the right of property.[28]

25. For a discussion of this proposal see Sally McKee, *Solar Access Rights,* (1982), 23 Urban Law Journal 437 at 453 (hereinafter referred to as McKee).
26. Martha Freeman, *Securing Solar Access in Maine* (1980), 32 Maine Law Review 439 at 440.
27. (1978), 21 O.R. 815 (C.A.).
28. *Ibid.*, p. 818.

On this basis, and in the absence of any express, implied or prescriptive easement "the law [is] clear that a landowner may so build on his land so as to prevent any light from reaching his neighbour's window."[29] The result in *Earl Putnam* is consistent with North American judicial opinion which regards utilization of land for construction of new buildings a positive, reasonable effort in spite of negative impacts to light on existing structures.[30] By failing to accept the right to light as a property right caselaw has held the owner (occupier) of land is without legal basis for claiming a nuisance — if no right exists how can an interference with that "right" be sustained?

The major exception to this long-standing judicial refusal to recognize obstruction of light as an actionable nuisance arises in the case of spite fences:[31] that is fences which are constructed solely for the purpose of obstructing light and air. The justification for protecting access to light and air in these situations is based on the motive itself and on the fact that no useful purpose is served by the obstruction.[32] Unfortunately, the spite fence exception is an American phenomena yet to be adopted in Canadian jurisprudence.

In spite of the historical predeliction against a proprietory right to light the tort of nuisance may yet be a tenable means of protecting access to sunlight.[33] Granted, extension of the doctrine to include protection of solar access would be an innovative step, however recent trends in the field no longer necessitate a quantum leap to achieve this end.

Recent decisions have maintained, "[t]he category of interests covered by the tort of nuisance ought not to be and need not be closed, [in my opinion], to new or changing developments associated

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29. *Ibid.*, p. 818.
30. For an articulation of the American position, see *Fountainebleu Hotel* v. *Forty-Five Twenty-Five Inc.* (1959), 114 So. 2d. 357.
31. Franklin Gevurtz, *Obstruction of Sunlight as a Private Nuisance,* (1977), 65 Cal. Law Review 94, at 99 (hereinafter referred to as Gevurtz).
32. *Ibid.*, p. 101. See *Barger* v. *Barringer,* 151 N.C. 419, 66 S.E. 439 (1909); *Hornsby* v. *Smith* 191 Ga. 491, 13 S.E. 2d 20 (1941); *Burke* v. *Smith,* 69 Mich. 38, 37 N.W. 838 (1888).
33. For an interesting discussion of the relation between tort and property law as they relate to nuisance, see Philip Girard, *An Expedition to the Frontiers of Nuisance* (1980), 25 *McGill Law Review* 565.
34. *Nor-Video Services Ltd.* v. *Ontario Hydro* (1978), 4 C.C.L.T. 244 at 256 (Ont. H.C.).

from time to time with normal usage and enjoyment of land."[34] However, in order to draw access to sunlight into the category of protected interests it is essential to consider several factors.

First, the issue remains as to whether the interference with light is an interest which should be accorded protection within the parameters of nuisance; should receipt of sunlight be an element of use and enjoyment of property? With all due respect, earlier decisions which preclude the action because there is no legal basis for claiming a right to light, fail to consider the fundamental goal of this particular tort outlined in *Sedleigh-Denfield* v. *O'Callagan,*[35]

> A balance has to be maintained beween 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 manking living in society, or more correctly in a particular society.[36]

The legal right which is the basis for action is not the right to light as such but the right to the use and enjoyment of land defined in terms of "plain, and sober and simple notions."[37] It is arguable that the right should extent to light. To quote Franklin Gevurtz,

> The denial of a right to light is merely a conclusion that the interest in unobstructed light and air is not to be judicially protected. But the interest in unobstructed sunlight is indistinguishable from other interests that nuisance law protects. The property holder's ownership of airspace over land cannot justify the conclusion that others have no right in sunlight and air. Ownership is qualified by nuisance law; it cannot preclude the application of nuisance law.[38]

Canadian case law has lent some support to the application of the *Sedleigh-Denfield* criteria in other fact situations; the doctrine has been applied in cases of telephone harassment,[39] interference with

35. [1940] A.C. 880.
36. *Ibid.*, p. 903.
37. *Walter* v. *Selfe* (1851), 4 De G. and Sm. 315, at 322 per ;Sir J.L. Knight Bruce V-C.
38. Gevurtz, *supra,* note 31, p. 99.
39. *Motherwell* v. *Motherwell,* [1976] 6 W.W.R. 550 (C.A.).
40. *Supra,* note 34.
41. *National Capital Commision* v. *Pugliese,* [1979] 2 S.C.R. 104.

reception of television signals,[40] abstraction of ground water,[41] and newly constructed buildings increasing neighbouring roof snowload minimums.[42] In all four examples, the legal basis for action was the legal right to use and enjoyment[43] of the occupier's land.[44] In determining that the plaintiff's right was substantially impugned the activities of, and relations between, the neighbouring properties were considered. The assessment it seems is two-fold; first, as already mentioned, the use and enjoyment by the plaintiff must be within the parameters of plain, sober and simple notions of ordinary use. Related thereto, the law does not extend protection through nuisance to hypersensitive individuals or industries; "it is against interferences to what objectively can be considered ordinary uses of property or enjoyments of life that protection is afforded."[45] Second, as per Hawbrand, J.A. (as he then was) in *N.C.C.* v. *Pugliese*[46]

> . . . it is not sufficient to ask whether an occupier has made reasonable use of his own property. One must ask whether his conduct is reasonable considering the fact that he has a neighbour. . . . The taking of all reasonable care is not a defense to an action for nuisance. If an operation cannot by the existence of reasonable care be prevented from causing a nuisance, then it cannot be lawfully undertaken, unless there is either statutory authorization, or consent of those injured.

Considerations of locale and duration of the alleged tort must be weighed in determining the unreasonableness of the defendant's actions.

The question as to whether blocking direct sun rays on a solar collector constitutes an interference with the comfort and convenience of living according to the standards of the average

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42. *T.H. Critelli* v. *Lincoln Trust & Savings Co. et. al.* 86 D.L.R. (3d) 724 (Ont. H.C.); affirmed Ont. C.A. (1979), 28 O.R. (2d) 701n.

43. Some question was raised in *Pugliese* regarding English common law rights relating to ground water; however, the S.C.C. "chose to dodge the issue". See John McLaren, "Case Comment: *A.G. Manitoba* v. *Campbell*" (1984), 26 C.C.L.T. 326.

44. It is noteworthy that the extension of the doctrine has yet to include interference with aesthetics; see *Re Simpson and Ontario Hydro* (1979), 17 C.E.L.R. 321 (Ont. Div. Ct.); *Muirhead* v. *Timber Brothers Sand and Gravel Ltd.* (1977), 3 C.C.L.T. 1 (Ont. H.C.). This may constitute a mixed blessing in that a major argument against the utilization of solar technology has been the unsightly appearance of the collectors which allegedly mar residential aesthetics. Witness the City of Saskatoon which is presently drafting a municipal by-law to ban erection of solar collectors on front lawns.

45. *Supra,* note 34, p. 256.

46. (1978), 17 O.R. (2d) 129, at 153-4.

man[47] must be viewed in light of the impact of the interference upon health and physical comfort.[48] Courts have also considered impact on broader social concerns such as a healthy environment as well.[49]

By way of example, the more liberal interpretations of actionable nuisance have included interference with a "recreational amenity,"[50] and "invasion of privacy."[51] Viewed within this context, the interference with the successful utilization of a solar collector should be actionable. Certainly all would agree that the Canadian environment requires that structures install central heat in order to be habitable year round. If that heating facility is impaired the impacts upon physical comfort and health are, to say the least, readily ascertainable. One need not deal with degrees of benefit which are effected — interference with the operation of the solar collector will for several months of the year, determine whether the householder will use the premises at all.

Beyond the level of the individual, it is arguable that broader social concerns for energy conservation, promotion of alternate energy technologies would favour a finding for the plaintiff.

Accepting for the moment that ordinary use and enjoyment includes functional central heating, the stumbling block remains as to whether a solar collector is of a particularly delicate or sensitive nature and therefore not actionable because of the "special use" involved. Viewed from the defendants perspective — does the activity of the plaintiff make a nuisance out of conduct or actions which would otherwise be harmless?[52]

Following the leading case of *Robinson* v. *Kilvert*[53] the scope of sensitive uses have included outdoor amphitheatres extremely susceptible to outside light sources,[54] a marble works harmed by airborne effluents from surrounding industries,[55] and a telegraph

47. See Clerk and Lindsell, *Clerk & Lundsell on Torts,* 15th ed. para. 23-06.
48. See *Stoakes* v. *Brydges,* [1958] 32 A.J.L. 205.
49. See *Bautur* v. *Naneff* (1971), 14 D.L.R. (3d) 513 (Ont. H.C.).
50. *Supra,* note 34, p. 256.
51. *Supra,* note 39, p. 565.
52. *Supra,* note 34, at p. 256. It is at this juncture that the consideration of the plaintiff's motive may come into play that is, was the plaintiff's "harmless" action motivated by spite? See *Hollywood Silverfox Farm* v. *Emmett, «1936»* 1 All E.R. 825.
53. (1889), 41 Ch. D. 88.
54. *Amphitheatres Inc.* v. *Portland Meadows,* 198 P.2d 847 (1948).
55. *Bradbury Marble Co.* v. *Laclede Gas Co.,* 106 S.W. 594 (1908).

office adversely affected by induced currents from neighbouring electric cars.[56] The basis for the determination that no nuisance existed in such circumstances was succinctly articulated by Lord Robertson in *Eastern & South African Telegraph Co.* v. *Cape Town Tramways Companies,*[57]

> If the apparatus of such concerns requires special protection against the operations of their neighbours, that must be found in legislation... A man cannot increase the liabilities of his neighbour by applying his own property to special uses whether for busines or pleasure.[58]

To find otherwise and protect the delicate use would, in Flemming's opinion, permit the plaintiff to "unilaterally enlarge his own rights at the expense of another's."[59]

The use of a solar collector is arguably not a sensitive or delicate use. In the *Nor-Video* case,[60] Robins J. refuted the contention that the plaintiff, who had used his property to erect a receiving tower for television broadcase signals, was engaged in a sensitive use. Using the hypothetical parallel of a group of individuals with television antennae he concluded, "the residents were simply maintaining a commonplace domestic facility and using their property, in terms of modern society, in a normal, and by no means exceptional, manner."[61] So too, a solar collector, although not yet common place and still innovative in nature, is not exceptional. As with Nor Video's cable operations we are dealing with an activity which is federally sanctioned (and indeed subsidized).[62] Realities must be addressed in determining what is "exceptional." In the United States, for example,

> Solar experts estimate that by the mid-1980's solar heating will cost no more than oil or gas heating in most parts of the country. Solar heating may already be less expensive than all-electric

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56. *Eastern & South African Telegraph Co.* v. *Cape Town Tramways Companies,* [1902] A.C. 381.
57. *Eastern & South African Telegraph Co.* v. *Cape Town Tramways Companies,* ;[1902] A.C. 381.
57. *Ibid.*
58. *Ibid.*, p. 393.
59. Flemming, *Law of Torts,* 6th ed., p. 389 (hereinafter referred to as Flemming).
60. *Supra,* note 34 *contra, Bridlington Relay* v. *Yorkshire Electricity Board,* [1965] Ch. 436.
61. *Ibid.*, p. 257.
62. See Sewell, *supra,* note 5.

> heating in many areas. As a result, 10% of all new buildings will be equipped with solar heating by 1985; this figure could reach 50% by the year 2000![63]

What may seem a non-conforming method of home heating may become a highly utilized technology in the near future.

In this same vein, the social utility argument, often raised by the American defendant in justifying the reasonableness of his conduct,[64] operates in favour of the plaintiff. As we are dealing with a private action, the limits on the weight of this argument are obvious,[65] nonetheless the long-range benefit to the public at large in promoting solar energy use is worthy of note. So too the link between solar technology and a cleaner environment should not be discounted. *Gautier* v. *Naneff*[66] is illustrative of how judicial support now lends itself to environmental protection in common law nuisance cases.[67]

In commenting on Gautier, John McLaren has stated that the decision is a

> valuable precedent for the contention that the effect of the defendant's operation on the environment is a legitimate consideration in weighing the conflicting interests in an anti-pollution suit.[68]

Arguably the activity of the plaintiff in constructing and utilizing a solar collector is reasonable and sober employment of his property in accordance with notions of ordinary use, and serves the public at large in promoting a cleaner environment and alternate energy consumption.

Coupled with consideration of the plaintiffs of use of a solar collector is the reasonableness of the defendant's activities,

> [T]he law of torts does not attempt to impose liability or shift the loss in every case where one person's conduct has some detrimental effect on another. Liability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear in the circumstances.[69]

Although obviously dependent on the particular circumstances

63. Gevurtz *supra*, note 31, p. 108.
64. See *Sanderson* v. *Pennsylvania Coal Co.*, 6 Atlantic 453 (1886).
65. See Flemming, *supra*, note 59, p. 390.
66. *Supra*, note 49.
67. See also *McKie* v. *K.V.P. Co. Ltd.*, [1948] 3 D.L.R. 201 (Ont. H.C.).
68. J. McLaren, *The Modern Law of Nuisance*, Alberta Law for the 80's, vol. 3, (Calgary: L.E.S.A.) 1980, p. 5 at 20.
69. Flemming, *supra*, note 59, p. 386.

involved, a few general comments might be made regarding reasonableness as it relates to solar energy use. In most cases the blocking of sunlight reaching a solar collector would materially effect the efficacy of the equipment and would thus constitute more than a "trifling inconvenience."[70] Depending on the extent of the interference damages might be awarded in lieu of injunction, although this would seem to run counter to alternate energy promotion.

In speaking of the United States experience Franklin Gevurtz has noted,

> Some courts apparently fear that recognition of a course of action for obstruction of light and air will prevent any use of adjoining land. This fear is groundless. Protection of reasonable access to light and air will no more prevent all use of adjoining land then did recognition of rights to percolating water, about which similar fears were expressed. Since sunlight strikes at an angle, only structures sufficiently tall and sufficiently close to adjacent structures will cause an obstruction. If buildings are adequately spaced, as is the case in many residential areas, no unreasonable restraints will be placed on adjoining lots by permitting an action for obstruction of light.[71]

Within the Canadian context, the case of *T.H. Critelli Ltd. et al.* v. *Lincoln Trust & Savings Co. et al.*[72] addresses this same concern of inequitably preventing an individual from using his property for fear of precipitating a nuisance. The plaintiff, Critelli, constructed a two-store building in conformity with the local zoning and the National Building Code standards for roof snow load. Some years later the defendant constructed a nine-storey building on the lot adjacent to the plaintiff. The resulting lee created by the defendant's structure caused a marked increase in the snow which accumulated on the plaintiff's roof and the consequent snow-load requirement increased to almost four times that needed at the time of construction. The plaintiff sued in nuisance for the costs of guaranteeing roof strength in light of the new demand.[73] The decision of Grange J., addressed the question of balancing property interests and reasonable use,

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70. *St. Helen's Smelting* v. *Tipping* (1865), 4 B. & S. 608.
71. Gevurtz, *supra*, note 31, p. 111.
72. *Supra*, note 42.
73. It is noteworthy that no negligence was found in the construction of the plaintiff building nor any failure to comply with statutory provisions.

> There is, in my view, in cases such as this, a good deal of legal advantage in being there first... The defendant Lincoln Trust [unlike the plaintiff] knew before construction of the existence of the plaintiff's building and that the planned construction would inevitably cause damage. Surely it was encumbent upon Lincoln Trust to take steps to prevent that damage.[74]

The notion of first in time was also raised in *Non-Video;* in the opinion of Robins J., the defendant Hydo was obliged at the time of embarking upon its project to ascertain any perceptible risk to the plaintiff's existing interests. Failing to do so "amount[ed] to conduct unreasonable enough to complete the tort of nuisance.... The defendant by the placement of its electrical installation commandeered, at least partially, the plaintiff's beneficial use of its property."[75]

Applying the Grange argument to the question of solar use is only possible to a limited degree. In the situation wherein a solar collector is established prior to construction on neighbouring lots development by the defendant is not precluded, however some effort should be made to respect that pre-existing use. Complimenting building height and site location considerations would be the most obvious means of protecting the plaintiff's use when some flexibility exists — say for example in new residential or industrial areas. However, the limits on the *Critelli* decision are obvious in an established or urban downtown area where land values necessitate maximum usage of property. By way of illustration, what of the hypothetical wherein a highrise apartment is proposed directly south of a solar collector on a considerably lower building? If constructed, the building will virtually eradicate any benefits of the energy source.

It is at this juncture that a balancing of the utility against the harm must be undertaken. It is unlikely in this situation that an injunction would be given to prevent construction due to the locale[76] and the adequacy of the damage remedy.[77]

Quite appropriately, the defense of locale is applicable to the question of solar use and nuisance. After all, to adapt Lord Justice

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74. *Supra,* note 42, p. 728.
75. *Supra,* note 34, p. 259.
76. The limitations on downtown solar collecting in general have been the source of discussion. See, G. Hayes, *Solar Access Law* (Environmental Law Institute: Cambridge, Mass.) 1979.
77. *Supra,* note 42, p. 728.

The singer's oft-quoted comment in *Sturges* v. *Bridgman*[78] ". .. what would be a nuisance in [Suburbia] would not necessarily be so in the [Inner-City]." Unlike the traditional approach to locale, wherein the character of the neighbour is determined by the type of trade or manufacture engaged in, the common feature of locale when there has been an interference with solar use would be the *type* of structures in the area as it relates to land use. This assessment would not preclude the atypical structure provided it could be site located in such a manner as to prevent harm to the defendant. In juxtaposition to our downtown urban locale,[79] it is arguable then, that in a developing residential area my neighbour[80] should be enjoined from constructing a home which radically differs from the community norm to a height which will shade my solar collector.[81] Considering the locale the conduct is "unreasonable," in the circumstances.

In summary, it is arguable that the solar energy utilizer is engaged in an acceptable, and indeed laudible, use of his property which when interfered with negatively affects his use and enjoyment of that property, perhaps to a degree of inhabitability. The defendant, for his part, is liable if the interference is unreasonable in light of the locale. Questions of social utility, sensitive use and the legal basis for the action may be dealt with to the advantage of the plaintiff. On this basis the nuisance is not only actionable — it may be successfully maintained.

IV. *Trespass*

By definition the tort of trespass involves a direct (and in most cases, intentional) physical interference with ones property rights;[82] including the right to exclusive possession of the airspace vertically above the land. Over the past 70 years of air travel, the extent of ownership of this airspace has been the subject of much debate[83] and in spite of the "cujus est solum ejus est utque ad coelum" maxim in

78. (1879), 11 Ch. D. 852.
79. See hypothetical, *supra,* p. 22.
80. Note: In this discussion possible statutory limitations such as municipal zoning will not be addressed.
81. In residential community planning the viability of solar zoning — to anticipate and facilitate solar use, is most obvious.
82. See Flemming, *supra,* note 59, p. 35.
83. For a discussion of the "ad coelum" maxim as it relates to air travel see *Atlantic Aviation* v. *N.S. Light and Power* (1965), 55 D.L.R. (2d) 55 (N.S.S.C.), and J. Richardson, *Private Property Rights in Air Space at Common Law* (1953), 31 Can. Bar Rev. 117.

Flemming's opinion, caselaw has "establish[ed] no wider proposition than that the air above the surface is subject to dominion insofar as the use of space is necessary for the proper enjoyment of the surface."[84] Even if the "ad coelum" doctrine is narrowly construed, the owner of solar collector who finds his equipment shaded by an entry into the air space above his property should be able to maintain an action in trespass.[85] Thus, for example, a construction crane intentionally swung over the defendant's property from adjacent land would be a trespass.[86]

The limitation of a trespass action in protecting solar access is obvious — there must be a direct entry into the landholder's airspace. Therefore the blocking of angled rays as they transverse a neighbour's land would not constitute trespass. At Canadian latitudes "no sunlight ever falls from directly overhead and the number of properties crossed by a ray of sunlight below height of potential obstructions increases in winter, when the demand for solar energy for space heating would be highest."[87] Thus in only the most blatant of invasions will trespass afford solar access protection.

V. *Express Easements*

An express easement is a privately negotiated right, privilege or benefit without profit which accrues to the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose.[88] In terms of solar access, theroetically the owner of the solar collector might approach his neighbour and offer to purchase an easement across the property so that the maximum possible direct rays angled across the adjoining property will reach his collector unobstructed. Should he agree, the owner of the servient tenement and all subsequent title holders are thenceforth restricted in the use to which they may make of the land.

Although outwardly a practical solution to solar access protection the question remains as to whether Canadian courts would enforce such an agreement beyond the two "contracting parties;" that is, would an easement to ensure solar access be considered an

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84. Flemming, *supra,* note 59, p. 42; see *Bernstein* v. *Skyviews,* [1978] Q.B. 79.
85. The space occupied by the "invader" is being used as a corridor for the light necessary to properly enjoy the collector, is it not?
86. *Lewvest Ltd.* v. *Scotia Towers Ltd.* (1981), 10 C.E.L.R. 139 (Nfld., T. Div.).
87. Ministry of Energy, *Perspectives on Access to Sunlight* (Toronto), reprinted 1980, p. 7 (hereinafter referred to as *Perspectives*).
88. Blacks Law Dictionary, 5th ed.

enforceable incorporeal hereditament? After examining the question of easements in some detail, Cheshire & Burns have concluded, "Whether or not a new right, complying with the accepted requirements of an easement will be judicially recognized or not is very difficult to forecast."[89] As *Keppell* v. *Bailey*[90] established, not all incidents to property will be enforced in rem.

> There are certain known incidents to property and its enjoyment, among others, certain burdens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner. . . . But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner;. . . great detriment would arise and caprice of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their land and tenements a peculiar character which should follow them into all hands, however remote.[91]

To determine the probable judicial response to the question one must briefly examine the issues which arise in considering the "nature of the easement beast": first, to establish and maintain an easement there must be a dominant and servient tenement held by different capable persons.[92] As well, the easement must accommodate the dominant tenement, that is, there must be "a direct nexus between the enjoyment of the right and the user of the dominant tenement."[93]

Both criteria are satisfied in the case of a solar easement. Of necessity the solar easement must burden immediately surrounding lands, as it is these properties over which the angled sunrays pass. The dominant tenement is thereby assured that the solar energy received will be maximized and in turn the collector will be used at peak efficiency. Use and enjoyment of the property is consequently enhanced,[94] and the value of the property is increased.[95]

In determining whether the solar easement would be recognized by the courts, the most important issue is whether the right conveyed is

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89. Cheshire & Burns, *Modern Law of Real Property,* 13th ed., p. 496 (hereinafter referred to as Cheshire & Burns).
90. (1834), 2 My. & K. 517.
91. *Ibid.*, p. 535.
92. Megarry & Wade, *The Law of Real Property,* 4th ed. pp. 806-813 for a complete discussion (hereinafter referred to as Megarry & Wade).
93. Cheshire & Burns, *supra,* note 94, p. 491.
94. In the more extreme cases without the easement any structure on the property may otherwise be inhabitable.
95. According to *Re Ellenborough Park,* [1955] 3 All E.R. 667 (Ch. D.) the increase to property value is a relevant, though not decisive, factor.

capable of forming a grant. More specifically, the nature and bounds of the right must be clear and well defined;[96] a common sense requirement in terms of providing surety regarding the extent of the interest to future owners who were not party to the original agreement.

To date English caselaw has held that right to an unspoiled view cannot be the subject of a grant[97] nor can an easement be created for the general flow of air over property to propel a windmill.[98] By the same token, an easement may be granted for a defined channel of air such as a ventilation shaft for a cellar[99] provided the parameters of the right are well defined. Reminiscent of our doctrine of ancient lights, a prescriptive easement has been upheld for the right to a "flow of light to a particular window."[100] Such an easement "satisfies the test of certainty, for not only does the light pass over the servient tenement along a defined channel, but it can be interrupted by an obstruction placed across its line of approach."[101]

Although an express solar easement goes one step further than the general right to light, demanding a higher standard as to the quality of light (i.e. *direct* rays),[102] this should not preclude its enforceability. In spite of the hesitancy of the courts to embrace new easements, as per Lord St. Leonard in *Dyce* v. *Hay*[103] "[t]he category of servitudes and easement must alter and expand with the changes that take place in the circumstances of mankind." As discussed earlier the advent of solar technology and the necessity of encouraging alternate energy utilization as our traditional sources are depleted, constitutes a significant change in society's "circumstances."

In response to the realities of creating a solar easement, the owner of the dominant tenement should approach his neighbour with a clear and explicit written proposal drafted in such a way that some of the possible problems outlined may be circumvented. With respect to the description of the nature and extent of the burden, one of the two distinct approaches which have emerged in the United States should

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96. Megary & Wade, *supra,* note 94, pp. 812-813.
97. *William Aldreds Case* (1610), 9 Co. Rep. 576. See also *McBean* v. *Wyllie* (1902), 14 *Man. R.* 135.
98. *Webb* v. *Bird* (1862), 13 C.B. (N.S.) 841.
99. *Bass* v. *Gregory* (1980), 25 Q.B.D. 481.
100. Cheshire & Burns, *supra,* note 94, p. 493. See *Harris* v. *De Pinna* (1886), 33 Ch. D. 238.
101. *Ibid.*.
102. See ancient lights, infra, p. 279.
103. (1852), 1 MacQ. 305.

be undertaken; the first articulates the easement in energy jargon, defining the necessary solar envelope in mathematical terminology. Although initially more expensive to establish due to the unavoidable necessity of a survey, the easement is probably more secure due to its very precision. In the alternative, a general easement may be drafted which provides sunlight to the collector during daylight hours. This latter approach is readily understood by the parties concerned and subsequent landowners and is less costly to establish.[104] In either case, a defined, easily ascertainable channel should be established, leading to a specifically detailed collector. In this regard we are again adapting the ancient lights doctrine to include reference to the focus of the light. Pursuant to the doctrine, the easement traditionally protected light falling upon a defined aperture, and did not protect the general incidence of light onto the building.[105] The surface of the solar collector is in one sense like a window in that the sunlight enters most collectors through glass and is trapped on a darker absorber plate where it is converted into heat — a greenhouse effect.[106] Further credence might be afforded the new easement if both the envelope and the "aperture" were defined.

Furthermore, it should be clear to both parties that the light reaching the collector is to be direct sunlight — thus ensuring an understanding as to the extent of the right.

Two other stumbling blocks remain in the ensuring acceptability of the solar easement;[107] first courts are loath to recognize easements where the servient owner is under a positive obligation to spend money or perform a service. For example, in *Regis Property Co. Ltd.* v. *Redman*[108] a covenant by the servient tenant to supply hot water and central heating involved a service being performed and was thus not an easement. To ensure uninterrupted light, it may be encumbant upon one of the parties to trim vegetation or remove other natural obstructions from the easement, a positive delegation which the legal draftsperson would wish to avoid. Rather than impose a duty upon the owner of the servient tenement (and possibly

104. S.D. Pfeiffer, *Ancient Lights: Legal Protection to Solar Energy,* (1982), 68 A.B.A. Journal 288, p. 289 (hereinafter referred to as Pfeiffer).
105. Perspectives, *supra,* note 90, p. 4. The easement does not protect the same aperture is materially altered either.
106. For a detailed explanation of solar technology, see David McDaniels, *The Sun: Our Future Energy Source* (Toronto: John Wiley & Sons Inc., 1979).
107. See Cheshire & Burns, *supra,* note 94, pp. ;496-7.
108. [1956] 2 Q.B. 612.

necessitate financial expenditure on his part) the owner of the dominant tenement should undertake the role of groundskeeper. Although an inconvenience, the burden is not insurmountable and may offer a valuable negotiating point. Second, courts have been reluctant to enforce negative easements. Lord Denning explained this predeliction of the law in *Phipps* v. *Pears,*[109] a case wherin a negative easement for protection from weather was claimed.

> Seeing that it is a negative easement, it must be looked at with caution, because the law has been very wary of creating new negative easements. . . If such an easement were to be permitted, it would unduly restrict your neighbour in his own enjoyment of his own land.[110]

In reality, the express solar easement is most often a negative easement, that is the servient tenant agrees not to obstruct light. However, historically, easements to light and support have been upheld in spite of their negativeness.[111] Certainly an easement to *sunlight* should be of a similar genre and subject to the same exception.

In the suburban context, be it a new or an established area, the express easement is a viable means of solar access protection; the private nature of the original agreement allows it to be tailored for the needs and desires of individuals.[112] Nonetheless, it should be noted that the express solar easement is a purely voluntary transfer of property rights; thus if any (or all) of the adjoining landowners refuse to co-operate, the benefits to the solar energy user may be greatly impaired. As well, the viability of solar energy as an economical alternative energy source may be defeated should the adjoining landowner place too high a price on the envelope.

Despite the traditional hesitancy of the courts a carefully drafted solar easement may well meet with judicial approval in Canada today. In view of other utility easements which have been statutorily imposed on landowners, the voluntary efforts of individuals to secure a constant, renewable energy supply should not be objectionable in terms of public policy. In the United States express solar easements almost always have been upheld by the courts and according to many

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109. [1964] 2 All E.R. 357.
110. *Ibid.*, pp. 357-358.
111. Cheshire & Burns, *supra,* note 94, p. 497.
112. *A Legal Review of Access to Sunlight in Sunny Alberta* (Alberta, submitted to Alberta Environmental Research Trust) 1981, p. iv (hereinafter referred to as *Sunny Alberta*).

authorities offer one of the more promising methods of protecting solar access.[113]

To compliment these individual initiatives some 15 of the United States had by 1980 enacted statutes to provide recording and granting requirements for enforceable solar easements. As a result, government involvement is minimal, and providing the criteria are satisfied, enforceability is guaranteed.[114]

Government action of a similar nature is not foreseeable in Canada; thus solar energy users must continue to rely on their own initiative in securing solar easements.

VI. *Restrictive Covenants*

By definition, a restrictive covenant is an agreement by which a landowner obliges himself and his successors in title not to do some act relating to use of the land.[115] This covenant arises in three distinct situations: (a) an individual dividing his property who wishes to ensure the separated parcel will not be used in a contrary manner, (b) adjoining landowners who are able to agree and incorporate a restrictive covenant into their respective deeds, (c) in a general development scheme by a real estate developer.[116]

The two former situations have some limited application to protection of solar access. In the case of an individual dividing his property: provided the covenant is clearly drafted to limit the uses of the servient land and the covenant is included in the purchaser's deed, the benefit and burden will pass to the respective assignees "subject, in the case of burden, to proof that the legal estate if acquired, has been acquired with notice of the covenant."[117] The inclusion of such a covenant at the division of a property requires either a high degree of forethought on the part of the dominant owner (i.e. "I may wish to install a solar collector at some time"), or the present existence of a collector which must be assured continued access. In actual fact then, the number of instances wherein an

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113. Pfeiffer, *supra,* note 113, p. 289.

114. *Ibid.*.

115. Blacks Law Dictionary, 5th ed. In order for the agreement to be binding,

1. The covenant must touch and concern land of the covenantee;

2. The contracting parties must intend the benefit to run with the land;

3. There must be privity of estate between the contracting parties. See Cheshire & Burns, *supra,* note 94, p. 571.

116. *Sunny Alberta, supra,* note 115, p. 9.

117. H.D. Anger & J.D. Honsberger, *Canadian Law of Real Property* (Toronto: Canada Law Book, 1959), p. 598 (hereinafter referred to as Anger & Honsberger).

individual would be dividing land with solar protection in mind would be limited. Nonetheless, for those within these parameters, the restrictive covenant is most suited to this end.

The negotiating of a restrictive covenant between adjoining landowners is limited by the same restrictions as an express easement; the agreement is entirely voluntary, possibly expensive and no expenditure should be required of the servient tenement. In the result the owner of the solar collector finds himself in a less than enviable bargaining position. However, there is no problem in registering such a covenant nor any reluctance on the part of the courts to enforce it,[118] a decided advantage over the easement.

The building scheme is often used to maintain minimum standards in planned residential areas. Pursuant to these schemes, homeowners and their assignees purchase property within a defined area wherein known obligations are imposed on owners throughout. By way of example, in *Mulligan* v. *Country Club Heights Ltd.*[119] the court upheld a building scheme which prohibited design, construction or siting of any building which would destroy or seriously impair the view of another landowner. The exact terms incorporated in the deed referred to setback and height restrictions and plan approval by the grantor developer.[120] By virtue of the scheme each owner was both burdened insofar as he could not violate his covenant, and benefited as between himself and the various other purchasers.

In terms of protecting solar access the optimal utilization of restrictive covenants would be enjoyed in "large new subdivisions and those of moderate size surrounded by low-rise development."[121] In these communities, pursuant to a common building scheme, guarantees could be provided to ensure direct access to sunlight by articulating height, siting, and vegetation restrictions. Once established, the common building scheme becomes enforceable as between purchasers of lots within the scheme providing certain prerequisites are established: (1) both parties derived title from a common vendor, (2) prior to the defendant and plaintiff purchases both lots were part of a building scheme imposed by the vendor and

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118. For a more complete discussion of advantages and disadvantages see *infra,* page 282 in reference to building schemes.

119. (1961), 27 D.L.R. (2d) 444 (N.B. S.C.).

120. *Ibid.*, p. 446-7. For similar cases, see *Powell* v. *Hennsley,* [1909] 1 Ch. 680; *Goolen* v. *Anstee* (1868), 18 L.T. 898.

subject to restrictions consistent with the vendor's scheme, (3) the restrictions were for the benefit of all lots intended to be sold or retained by the vendor, (4) the purchasers of the lots were aware of the restrictions and the intended benefits of the scheme and purchased on that footing.[122] As noted in *Mulligan* restrictive covenants to protect views have been upheld by the courts, as have covenants dealing with vegetation, structural design, building and site aesthetics.[123] Height, setback and plan approval restrictions are the common approach to defining these covenants and would also be the method of ensuring solar access. Thus there would be a degree of "familiarity" for both lay, legal and construction persons faced with the solar covenant: a new use of an old tool.[124]

The advantages to the building scheme accrue to all parties involved in the development. If properly promoted, a solar subdivision may prove a most remarkable commodity in certain locations.

> As recent studies have shown an "enormous public reservoir of good will" towards solar energy, such covenants could well become popular among developers. Indeed, some may find them attractive as an inexpensive means of marketing a "solar subdivision" without the economic risk of actually purchasing and installing solar equipment.[125]

In establishing these subdivision restrictions prior to construction, two other positive repercussions follow: first, if incorporated into the planning stage "[t]he scope of the solar right can be the best possible in the circumstances."[126] Second, the assured protection ab initio and the community commitment encourages solar use as a "first choice" rather than a retrofit. So too, on a wider scope, the acceptance and utilization of solar technology in general is benefited by such development schemes.

From the purchasers perspective, the restrictive covenant adds no extra initial cost to his decision to incorporate solar heating into his home. The covenant is a given, and *vis à vis* his neighbour there is no need to negotiate to ensure continued access. On a similar note should disagreements arise, restrictive covenants are directly enforceable between land owners without government intervention.

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122. Perspectives, *supra,* noe 90, p. 29.
123. Anger & Honsberger, *supra,* note 120, p. 599.
124. Perspectives, *supra,* note 90, p. 26.
125. *Sunny Alberta, supra,* note 115, p. 10.
126. Perspectives, *supra,* note 90, p. 30.

By the same token, however, the expense and time commitment incumbant in a self-help remedy is a decided disadvantage.

From the lawyer's perspective, although, the initial drafting of the covenants itself should be done by specialists, once the technical requirements are established, the clearly articulated building scheme becomes a viable means of protecting solar access. The individual covenants need not be identical; that is, they might vary throughout the defined area, thus permitting a good degree of flexibility. It is necessary to stress however, "[a] building scheme is not created by the mere fact that the owner of an estate sells it in lots and takes varying covenants from various purchasers. There must be notice to the various purchasers of what I may venture to call the local law imposed by the vendors on a defined area."[127] It is encumbant upon the solicitor to determine the existence and reciprocal nature of the building scheme — that is either an express or implied obligation on the part of the vendor to impose similar restrictions on other lots.[128] In *Re Campbell and Cowdy,*[129] for example, the developer-vendor had included a clause in the agreement of sale which outlined he was "not bound to impose the same or any other restrictions on the lands covered by the same plan. . .,[130] as a result there was no obligation on the developer to impose similar restrictions on other lots. "In fact the form of agreement used [made] it clear that the company expressly negatived any such obligation."[131] If the lands within, and subject to, the building scheme are clearly defined, and the nature and extent of the title burden on is clearly understood, then the lawyer can assure his client of enforceability — a claim he would be reluctant to make with an express easement.

It is somewhat of a paradox that advancement of solar law through the employment of restrictive covenants, or more specifically building schemes, has resulted in this land use control tool being employed as a two-edged sword. Some States residential developments have included restrictive covenants which bar "appliances and installations" on dwelling roof tops if they are

127. *Ibid.*, p. 27.
128. *Reid* v. *Bickerstaff,* [1909] 2 Ch. 305, at 319.
129. Anger & Honsberger, *supra,* note 120, p. 600.
129. [1928] 1 D.L.R. 1034 (Ont. S.C.).
130. *Ibid.*, 1036.
131. *Ibid.*, p. 1037.

visible to neighbours.[132] Home owners' associations have also used covenants to require approval of exterior additions and with this power have purposely blocked solar construction.[133]

Ironically,[134] due to the high initial costs and innovative nature of the technology, commercialization of solar energy has been aimed at high income consumers willing to venture into new technologies. Unfortunately, it is these same consumers who are commonly restrained by such covenants in planned developments where a cohesive look is a priority.[135] In response one state, California, has declared "anti-solar" covenants against public policy[136] and enacted legislation declaring any covenant which "effectively prohibits or restricts the installation or use of a solar energy system unenforceable."[137]

The Canadian position remains very much open to debate, primarily because of the rarity of any attempt to covenant either "for or against" solar collectors. Certainly the Canadian attitude toward solar energy has been positive and thus those developers in viable locations who wish to attempt a solar subdivision should be encouraged. Once again, we are faced with the chicken and egg dilemma in that "lack of awareness and apprehension still plague most developers and builders, many of whom are still waiting for more demonstrated acceptance by home buyers."[138] Yet how will acceptance be demonstrated but through the development and sale of solar communities?

VII. *Conclusion*

Although tort law has laid the foundation for an action in nuisance if there is interference with solar access, the probable success of a court action is not clear. Arguably, the present trend of the courts is to expand the purview of nuisance to respond to changing societal needs, and certainly this offers a forum more conducive to solar access protection. In spite of public policy considerations, however,

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132. John Wiley, *Solar Energy and Restrictive Covenants: The Conflict between Public Policy and Private Zoning* (1979), 67 Cal. Law Rev. 350 at 352 (hereinafter referred to as Wiley).
133. *Ibid.*.
134. Wiley, *supra,* note 135, p. 353.
135. *Ibid.*.
136. For a case on point see *Kaye* v. *Old Orchard Association* (1979), 1 Solar Law Reports ;503, as discussed in Pfeiffer, *supra,* note 112.
137. *California Civil Code,* ss. 714 (West Supp. 1979).
138. *Sunny Alberta, supra,* note 115, p. 11.

the legal argument to maintain such an action must be soundly based. Application of relevant caselaw should establish the reasonableness of the plaintiff's use of the property and the direct relationship between the defendant's actions and interference with ordinary use and enjoyment of the property. Faced with tipping the balance between the "maxims cujus est solum ejus usque ad coelum et ad infernos" and "sic utere tuo ut alienum non laedas," the plaintiff must admit the practical limitations of locale and utility of the competing conduct on solar use. In the ideal scenario (a residential, pre-existing collector situation for example,) wherein access is essential to ensure habitability of the residence the defendant may argue nuisance with some success by drawing in historical doctrines and adapting recent jurisprudential parallels.

Nonetheless, a tort action should not be the primary means of protecting solar access. An individual solar user should attempt to negotiate a solar easement with his neighbour to secure the long-term viability of his home heating alternative. Once again the enforceability of such an easement demands a liberal attitude in the courts, however, if the easement is carefully drafted to meet the technical requirements of this tool, if the acceptability of solar easements in other jurisdictions can be outlined, and the perceived social need highlighted, the hesitancy of the courts to accept new easements should be overcome.

The restrictive covenant is in many respects the most judicially acceptable means of protecting solar access. If privately negotiated in accordance with legal requirements, individual land owners may register the covenant and can anticipate few problems in enforcing the agreement. The building scheme is also viable and possibly a positive marketing strategy in new residential communities.

In the final assessment none of the common law responses offer a panacea to the solar access problem. The individually negotiated property-based responses are purely voluntary and potentially expensive to acquire. Building schemes face a reluctant construction community and the legal barriers in enforcing express easements, although not insurmountable, may well discourage many alternate energy users. The tort response on the other hand is tainted with some uncertainty and is potentially expensive.

It is unfortunate that solar energy users may well be forced to take the legal initiative to protect their interests. If the state actively promotes the employment of alternate energy sources it should protect, or at a minimum advise, the individuals who pioneer such

policy. Although precedent exists for protecting solar access statutorily[139] there has been no direct federal or provincial legislative response to the need.[140] Any action must be premised on a perceived societal need or desire. Realistically, one cannot foresee the advent of such regulation until the promotion of alternate energy becomes a political priority in Canada. In the meantime, solar pioneers must rely on the common law alternatives and fend for themselves while society as a whole gains from their efforts.

139. Possible legislation responses including statutory easements, zoning, transfers of air space etc., however, these solutions are beyond the scope of this paper. See Matuson, *supra,* note 8; McKee, *supra,* note 25; Pfeiffer *supra,* note 112.

140. An attempt to establish a right to sunlight has been twice introduced in Alberta as a private member's bill but on both occasions died on the order paper. See Alta. Bill 228, (1980).