

Greening Canada's Brownfields:

A National Framework for Encouraging Redevelopment of Qualifying Brownfields through Removal of Crown Liens and Tax Arrears

Prepared for

**The Government of Canada
and
Provincial and Municipal Governments**

By

**The National Round Table on the Environment and the Economy
and
The Canadian Brownfields Network**

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1. Introduction

1.1 Purpose

This framework has been prepared to assist the Government of Canada and provincial and municipal governments interested in redeveloping brownfields. It outlines an opportunity for governments in Canada to encourage redevelopment of many of the country's estimated 30,000 or more urban brownfield sites through a coordinated, practical and nationally consistent approach to removing Crown liens and tax arrears on qualifying properties.

The proposal has been prepared by the National Round Table on the Environment and the Economy (NRTEE) and the Canadian Brownfields Network (CBN), two organizations committed to advancing the concept of sustainable development in Canada's communities.¹

The proposal:

- briefly outlines the challenges to brownfields redevelopment in Canada, including the barriers presented by Crown liens and municipal tax arrears on brownfield sites; and
- describes the key elements of a simple national framework for coordinating the involvement of the federal government and provincial and municipal governments in removing liens and tax arrears on qualifying brownfield properties as an incentive for redevelopment.

The framework could be the catalyst to help form the basis of legislation, regulations, bylaws or other governance instruments, as well as intergovernmental agreements, such as memoranda of understanding, designed to encourage brownfields redevelopment through the removal of liens and tax arrears.

The proposal is based on consultations conducted by the NRTEE and the CBN aimed at identifying immediate and cost effective opportunities for encouraging brownfields redevelopment in Canada. In particular, the two organizations benefited from the insights and suggestions from an experts group workshop convened in Ottawa, Ontario, in March 2005 to consider approaches to removing Crown liens and tax arrears on brownfield sites. The workshop included representatives from:

- federal government departments with an interest in environment, infrastructure, land management, taxation and financial policy;
- seven provincial governments;
- a number of major municipal governments from across Canada; and
- developers and lawyers experienced with urban development.

(See Annex 3 for a list of workshop participants.)

The workshop allowed the NRTEE and CBN to confirm core approaches, test preliminary ideas, explore additional opportunities and mechanisms, and identify best practices in various jurisdictions across the country.²

¹ For more information on the NRTEE and the CBN, see their websites at: http://www.nrtee-trnee.ca/eng/index_e.htm; and <http://www.canadianbrownfieldsnetwork.com>

² The workshop was conducted on a "not for attribution" basis, to encourage an open and free-flowing discussion by participants without the constraints of having to represent particular interests or policies.

1.2 Background

National Brownfield Redevelopment Strategy for Canada

In 2002-2003, at the request of the Government of Canada, the NRTEE prepared and released a national brownfield redevelopment strategy for Canada.³ The strategy noted that there might be 30,000 brownfield sites in cities and communities across Canada.

While there is no single, legal definition of a “brownfield” in Canada, it is generally considered to be an abandoned, vacant, derelict or underutilized commercial or industrial property where past actions have resulted in actual or perceived contamination and where there is an active potential for redevelopment.⁴ These sites include decommissioned refineries, former railway yards, old waterfronts and riverbanks, old warehouses, abandoned gas stations, former drycleaners and other commercial properties where toxic substances may have been used or stored.

Left idle, brownfields adversely impact a neighbourhood’s image and quality of life, and in some cases pose risks to human health and the environment. However, with the right kind of incentives and partnerships, and the removal of identified barriers, brownfields can generate significant public benefits in terms of increased economic activity, increased tax revenues, lower municipal infrastructure costs, reduced health and safety risks, preservation of outlying agricultural land through reduction in urban sprawl, improved air quality and reduced air pollution and greenhouse gas emissions in urban areas, and improved quality of life in neighbourhoods.

The national strategy identified several major barriers that without strategic intervention, keep such sites abandoned or idle, with little prospect of remediation or reuse. These barriers include: lack of access to capital; regulatory liability risk; civil liability risk; limited access to insurance protection; regulatory delays; stigma and risk perception; and lack of awareness among many key public sector and private sector groups.

The strategy proposed actions under three strategic directions for transforming brownfields into economically, socially and environmentally healthy properties:

- Applying Strategic Public Investments to Address Upfront Costs
- Establishing an Effective Public Policy Regime for Environmental Liability and Risk Management
- Building Capacity for and Community Awareness of Brownfield Redevelopment

Canadian Brownfields Network

The CBN was officially launched in March 2004 in direct response to a recommendation from the national strategy. The member-based network is uniquely positioned as the enabling mechanism to implement the national strategy’s recommendations and accelerate brownfield redevelopment activities in Canada by raising awareness of the economic and environmental benefits and transforming the market through outreach and capacity-building initiatives. It seeks to:

³ *Cleaning up the Past, Building the Future: A National Brownfield Redevelopment Strategy for Canada* (National Round Table on the Environment and the Economy, 2003)

⁴ This definition is used in the national strategy. See Annex 2 for a glossary of other terms relevant to the issue of brownfields liens and tax arrears.

- create linkages and connectivity through a national brownfields forum to accelerate redevelopment and urban revitalization across Canada;
- continue to raise awareness of the benefits of brownfield redevelopment;
- position brownfield redevelopment as an essential, constructive approach to the challenges of sustainable community planning.

The network has developed strategic alliances with provincial environment industry associations and other organizations that have an interest in brownfield redevelopment in Canada, and continues to attract additional support.

The Challenges of Liens and Tax Arrears

The national strategy specifically identified the presence of Crown liens and tax arrears on brownfield properties as an important financial barrier to redevelopment. It proposed that the federal and provincial governments consider removing these constraints for qualifying sites. (See Annex 1 of this framework proposal for the full text of the strategy’s recommendation on removal of liens and tax arrears.)

Through informal discussions with municipalities and developers, and the experts group workshop, the NRTEE and CBN have identified examples where such barriers have hindered redevelopment of brownfields in Canadian cities. The experiences with two properties in Brantford, Ontario are illustrative.

66 Mohawk Street, Brantford, ON – Cockshutt/Go Vacation

This site was occupied from 1904 to 1957 by the Cockshutt Plow Company, which manufactured farm machinery and tractors. The property is 6.4 hectares in area. Since 1957, the property has been home to a wide variety of industrial and commercial operations including GO Vacation, which manufactured vacation vehicles. This property owed \$915,000 in municipal property taxes. Once the City vested ownership of the property after an unsuccessful tax sale, outstanding liens were lifted by the federal and provincial governments. The property had owed \$750,000 in mortgage financing to the federal government, as well as approximately

\$1,000,000 in outstanding federal liens and \$112,000 in provincial liens. The City is in the process of demolishing all buildings on site except the former Cockshutt Office and Timekeepers Buildings, which are designated heritage buildings under the Ontario Heritage Act. This demolition will include the removal of underground storage tanks.

The former Cockshutt and Timekeepers buildings, both now designated as heritage structures



186 Pearl Street, Brantford, ON – Bay State Abrasives

A .38-hectare site located in a residential area, this brownfield site was home to Brantford Emery Wheel Company from 1910-1920 and the Brantford Grinding Wheel Company from 1920-1939. The most recent occupant of the site, Bay State Abrasives was a company involved similar manufacturing operations. In 1993, the property fell into the hands of the provincial government who took no responsibility for the condition of the site. The City undertook Phase I, II, and III environmental site investigations on the site, absorbing 100% of the costs after failing to receive assistance from the provincial government. At its tax sale, the property had municipal tax arrears amounting to \$418,075. This amount included the most of the remediation

costs accrued by the City when remediating the site. Federal liens on the site amounted to \$337,395, which were lifted when the City vested the property. A provincial lien also existed on title amounting to \$313,680 and again was cleared after vesting by the municipality. The property has since been converted into a local park for the community.



Bay State Abrasive Industrial Site

Both of these sites languished for a number of years and neither site would have been redeveloped unless and until the liens and tax arrears were lifted.

In the past two years, a number of municipal governments, as well as several provincial governments, have expressed a strong interest in encouraging brownfields redevelopment through the incentive of removing liens and tax arrears on qualifying properties. Municipal governments, in particular, have urged all parties to focus less on the potential “dollars lost” resulting from the removal of liens and tax arrears, and more on the potential “dollars gained” that a redeveloped property will generate for all orders of government.

However, all parties recognize the need for cooperative, consistent and transparent approaches if this form of incentive is to succeed.

2. A National Framework for Removing Liens and Tax Arrears

The NRTEE and the CBN believe that there is an opportunity for governments at all levels in Canada to encourage the redevelopment of many brownfields through a simple, consistent and coordinated approach to removing Crown liens and tax arrears on qualifying sites. (The national strategy itself details a number of initiatives that address the full range of barriers. This current proposal focuses only on the challenges presented by liens and tax arrears.)

To facilitate implementation and reduce any administrative costs, the recommended framework seeks to rely on existing processes and legislation to the greatest extent possible.

As noted in the introduction, the framework could form the basis of legislation, regulations, bylaws or other governance instruments, as well as intergovernmental agreements, such as memoranda of understanding.

This section describes the five key elements of this approach:

1. Shared Objective
2. Qualifying Brownfield Properties
3. Eligibility Criteria/Principles
4. Policy Safeguards
5. Application Protocol

2.1 Shared Objective

Recommendation

That the federal government and provincial and municipal governments cooperate to develop a simple, consistent and coordinated approach to removing Crown liens and tax arrears on qualifying brownfield sites as a cost-effective means of encouraging brownfield redevelopment projects that contribute positively to the economic, social, and environmental benefit of Canadian municipalities.

Rationale

As noted in the *National Brownfield Redevelopment Strategy*, removal of liens and tax arrears:

- reduces upfront costs to brownfield developers and provides greater certainty of funds to developers at early project stages (e.g. during purchase negotiations), when it is difficult to obtain regular financial assistance; and
- represents a highly cost-effective approach to delivering financial assistance to brownfields, because it can be delivered for free (except for administration costs) to sites that may be of zero or very little worth to the government in the absence of any redevelopment.

The framework offers a practical, common, national approach, with sufficient flexibility to take into account specific provincial and municipal circumstances. This reflects one of the conclusions of the national strategy, which called on governments to develop a consistent, national approach.

2.2 Qualifying Brownfield Properties

Recommendation

That the coordinated national framework for the removal of Crown liens and tax arrears apply only to brownfield properties that have been abandoned or are held in trusteeship or by municipalities and that, with the removal of liens and/or tax arrears, have a reasonable expectation of redevelopment following cleanup.

Rationale

The recommended definition of a qualifying brownfield property can serve as a broad, initial minimum criterion for consideration of the removal of liens and/or tax arrears.

A single definition helps ensure that any coordinated national approach begins with a consistent, standard scope of applicability. Consistency in the overall scope of applicability would provide greater certainty to prospective developers and help ensure that all properties are treated in a comparable manner across all jurisdictions.

However, there will be a need for flexibility, given that there is no single type of brownfield. The term covers a wide variety of contaminated properties – publicly or privately owned, held under trusteeship, or abandoned or “orphaned” without ownership. Each brownfield comes with its particular set of problems and opportunities. If the process for removing liens and/or tax arrears is scoped too narrowly, many properties will be excluded, thus limiting the overall impact of removing the lien and tax arrears barriers. Too broad a scoping, on the other hand, could be seen as coming at too high a public cost in terms of foregone taxes, or be viewed as contrary to the “polluter pays” principle. It could also risk triggering additional abandonment and non-payment of taxes on these sites by the owners.

The flexibility needed to take into account differences in provincial and municipal practices and laws and in individual sites can be provided through the more detailed property eligibility criteria, discussed in element 3, below.

The recommended definition for qualifying properties incorporates two core elements:

- *abandoned property*: that is, where ownership of the site has reverted to the Crown, is no longer owned by a financially viable owner as witnessed by its eligibility for a municipal tax sale, or is owned by a municipal government as a result of a failed tax sale; and
- *reasonable prospects for redevelopment*: that is, where there is definite interest in cleaning up and redeveloping the site, based on the anticipated costs of cleanup and eventual market value (or public good value) of the property following cleanup.

Note: The removal of the lien or tax arrears is from the title of the property and does not release the original defaulter from the amount owing to the Crown.

2.3 Eligibility Criteria/Principles

Recommendation

That the national framework apply a core set of criteria or principles to support consistent and transparent approaches to removing liens and tax arrears on qualifying brownfield properties.

That the criteria or principles include the following core factors:

- **the property is in arrears for municipal taxes and is eligible for a municipal tax sale;**
- **the property is in the hands of a trustee, or has been abandoned by a trustee or is an orphan site, and there is no financially viable owner against whom action can be taken to recover past due taxes and liens;**
- **a municipality or private entity is prepared to assume control of the site with a remediation plan to commence within a specified period of time following approval of the lien removal;**
- **if the property is being acquired (by a municipality, conservation authority or other public body) for a public use (e.g., a park or other public facility) and a restrictive covenant is imposed on the property limiting it to such future use;**
- **there is a high potential for redevelopment; and**
- **the total amount of the liens is significant relative to the current value of the site.**

Rationale

The *National Brownfield Redevelopment Strategy* called for governments to develop a consistent, national set of criteria, “so that developers and purchasers would know whether a particular site, wherever it might be located, was eligible for lien removal.”

While there is a need for flexibility in the eligibility criteria to take into account the circumstances of different jurisdictions and sites, national consistency can be supported by agreement to a core set of criteria or principles.

These core criteria could be embodied in statute, or included in regulations or memoranda of understanding to provide greater consistency and certainty for all parties, regardless of location. For example, a federal policy directive to remove liens against affected properties could be linked through federal-provincial agreements that, among other things, standardize these criteria.

The recommended core criteria/principles incorporate economic, social, and environmental considerations, in keeping with the concept of sustainable development. The approach reflects that:

- the eligible property must be in arrears for municipal taxes (that is, properties on which businesses are operating as a going concern should not be eligible for this program);
- the eligible property must be in need of intervention (due to its being orphaned or in trusteeship, without a financially viable owner);
- there must be a clear interest in and high potential for redeveloping the site, as demonstrated through preparation of a redevelopment plan consistent with a community development plan; and

- the market value of the property once cleaned up may be slightly above or below the combined cost of land and cleanup.

Public Use of the Property

The criteria should also provide for the case when a public body proposes to acquire the property for a public use, such as a park.

“Automatic Approval”

There could be provisions in the application process of the framework for an “automatic approval” if the property meets all the identified core criteria (see 2.5, below). Other brownfield properties could be reviewed on a case-by-case basis and a process developed to provide approval or a denial (with reasons) within a specified timeframe following submission of a completed application form, as specified.

Public Health and Safety

Public health and safety concerns of the brownfield property could be reflected in the criteria. (For example, the criteria could include “*where the brownfield property presents a demonstrable risk to public health and safety.*”). However, while the question of public health and safety risks is certainly linked to a number of brownfield properties, some jurisdictions have taken the view that such risks are not part of the liens and tax arrears problem *per se*, but rather, a *consequence* of the abandonment of the properties. Therefore, it is recommended that public health and safety risks not be embodied in the core national criteria and principles, but instead be applied only in those cases where they may be warranted.

2.4 Policy Safeguards

Recommendation

That the national framework include mechanisms to

- **prevent defaulters from repurchasing a property after liens or tax arrears have been removed;**
- **avoid undue enrichment of purchasers;**
- **provide regulatory liability protection for those entering a brownfield site for a purpose related to redevelopment of the property.**

That mechanisms for implementing these safeguards include:

- **a waiver letter by prospective purchaser;**
- **a letter of credit or other financial assurance;**
- **provincial legislation protecting municipalities and their agents from liability when undertaking investigations of brownfield sites.**

Rationale

Encouraging brownfields redevelopment through the removal of liens and tax arrears essentially involves a decision to forego public monies owed in exchange for the prospect of a revitalized property that will again contribute municipal, provincial and federal taxes. Such a decision must be open and transparent to counteract potential public and political perception that polluters or defaulters are being “let free” of their obligations, or that developers are benefiting at public cost.

Therefore, the national framework process will need to include policy safeguards to help communicate the nature of these brownfield transactions and build the necessary public and political trust and credibility.

Eligible Purchasers

To be eligible for the removal of liens or tax arrears registered against the qualifying brownfield property, prospective purchasers of the property must be “innocent purchasers” (as that term is understood in various provincial environmental legislation). They must also be arms-length from any person or companies that either:

- caused or contributed to the contamination of the site in the first place; or
- defaulted on taxes (interrupted or halted the flow of revenues to the federal, provincial or municipal government).

The federal *Bankruptcy and Insolvency Act* contains definitions and language in this regard that can be adapted for brownfields redevelopment.

There also is a need to establish a mechanism to ensure that the purchaser is not the original defaulter or polluter. One simple yet effective tool would be a *waiver letter* signed by the purchaser warranting that it is not a defaulter or polluter, and that it will not sell, transfer, assign or otherwise dispose of the property to a defaulter or polluter of that property unless the full

original amount of the liens and taxes forgiven has been reimbursed by such party to the relevant government bodies.

Undue Enrichment of Purchaser

The framework must ensure that the purchaser of the brownfield property does not unduly benefit from the removal of the lien or tax arrears and fully implements the commitment to remediate and redevelop the site. The *National Brownfield Redevelopment Strategy*, for example, recommended that: “The actual removal of the lien or tax arrears should not be finalized until the completion of cleanup, to prevent a situation where a lien is forgiven and then no redevelopment takes place.”

There are precedents in some municipalities for such a safeguard. In Kingston, Ontario, for example, developers must pay any municipal taxes owed and go through an evaluation process before receiving grants to help cover their extra costs. However, some municipalities have found that the removal of liens and tax arrears at the start of the process acts as an additional upfront incentive in attracting developers to the site.

One effective tool to protect the financial liability of a government considering the removal of a lien or tax arrears is to obtain a *letter of credit* or other financial assurance to cover the unpaid liens and tax arrears. The letter of credit or financial instrument would be posted by the municipal government (if the property is to be used for public purposes) or the purchaser and released after completion of the cleanup and redevelopment.

(Note that these policy safeguards should not prevent an arms length developer or new purchaser from making a reasonable profit on the redevelopment of brownfield properties, as financial gains are the best incentive for redevelopment.)

Regulatory Liability

Effective regulatory and civil liability protection for participants in brownfield redevelopment is a cornerstone of a successful long-term national strategy for revitalizing Canada’s brownfields. The national strategy concluded that uncertainty over liability affects every participant in brownfield redevelopment, from current owners and prospective developers, to lenders, insurers and municipal governments.

For example, in some provinces and municipalities, municipal officials and prospective developers or their agents may assume liability if they enter a brownfield site. This strongly discourages them from investigating the condition of the lands and developing a clean-up plan.

Some provinces have legislation to protect municipalities that undertake assessments on brownfield properties. Alberta is considering a modification to its legislation that would cover those who inadvertently exacerbate a problem during the assessment. British Columbia is reviewing its Contaminated Sites legislation. Québec allows access to orphan sites for municipalities and creditors wanting to assess sites. Ontario has legislation allowing municipalities to undertake a number of actions, including accessing sites for the purpose of assessment of non municipal-owned properties, without risk of regulatory orders. It also extends specified regulatory liability protection in instances where there is a failed tax sale and a property then vests in the municipality. The municipality then has five additional years following the vesting in which to undertake the specified protected actions without fear of regulatory orders.

2.5 Application Protocol

Recommendation

That a national approach for removing liens and tax arrears adopt a clear, transparent application protocol that uses existing processes, tools and responsibilities wherever feasible.

That the application protocol be enshrined in legislation, regulations, bylaws or memoranda of understanding between governments, as appropriate, to give it force, credibility and visibility.

That an “early warning” information exchange and notice of intent period be established among all governments with respect to liens and tax arrears on the brownfield property.

That each government participating in the application protocol establish a “one stop” window or “brownfields liaison office”, which will coordinate the removal of liens or tax arrears on behalf of that government.

That the municipal brownfield liaison office be responsible for coordinating the sharing all relevant information with other governments.

That municipalities be compensated from the sale proceeds for the administrative costs of tax sales and coordination of information.

That all levels of government be required to register any liens or tax arrears on title as soon as this information becomes known to them, to avoid any “hidden” liabilities associated with a property during investigation.

Rationale

The process of administrating removal of liens and tax arrears could be administratively burdensome and time-consuming, given that a particular brownfield property may involve decisions by the federal, provincial and municipal governments, each with its own decision-making process and timelines for approval. Therefore, there is a need for a clear, simple and transparent protocol for removing liens and tax arrears for a qualifying brownfield property. The protocol can pull together the other elements of the process: shared objectives; qualifying definition; eligibility criteria; and policy safeguards.

The protocol would help ensure that:

- all tasks are undertaken in an efficient, timely and coordinated manner;
- the potential for overlap and duplication of effort by various participants is reduced;
- administrative costs are kept to a minimum;
- public trust, credibility and support are built.

To achieve this result, the protocol should reflect, and incorporate to the extent possible, existing processes, legislation and other governance instruments, and working relationships and arrangements among governments.

To give it force, the protocol itself could be enshrined in legislation, regulations, bylaws or memoranda of understanding between governments.

The overall protocol should be characterized by a high level of information exchange and cooperation from the time that a municipality or developer expresses an interest in the brownfield property.

Key Steps in the Protocol Process

The following list outlines the key steps and tasks to be covered by the application protocol. (The list is provided as general guidance to interested governments. Protocols could be developed with specific reference to, or incorporation of, existing legislation, processes and agreements.)

The trigger for the process would be a proposed or failed municipal tax sale of a property in tax arrears (that may or may not have liens registered against it) and a municipality wanting to encourage redevelopment on the site. A failed tax sale generally results in the property becoming orphaned or reverting to trusteeship, with no financially viable owner (unless the municipality is prepared to register a notice of vesting in its name.)

1. Determination of Eligibility

The first step under the protocol would generally involve a confirmation that both the property and purchaser are eligible for consideration of the removal of liens and/or tax arrears.

- Where a property is eligible for a tax sale or following a failed municipal tax sale for a property, the developer interested in redeveloping the site submits written expression of interest in the brownfield property to the municipal government's brownfield liaison office; the developer also provides a waiver letter to municipal brownfields office warranting that it is an "innocent purchaser", unrelated or arms-length from either the original polluter or the defaulter of taxes;
- The municipality's brownfield liaison office reviews whether the property meets the qualifying definition established in the protocol;
- If the site is eligible, then the municipal government contacts the brownfield liaison offices ("one stop windows") of the provincial and federal governments, informing them of the potential for redevelopment on the site under the protocol, and seeking confirmation whether either government has liens registered against the property;
- Given that information on liens and tax arrears on a property is not always up-to-date, a 60-day notice of intent could promote a timely and coordinated approach; during this period, the federal and provincial governments would be required to register their liens or notify the municipality that they intend to place a lien on the property;
- The municipality's brownfield liaison office coordinates sharing of all information on all existing liens and tax arrears, as well as the history of site (including identification of the original polluter(s) and defaulter); if the federal government is involved, this sharing of information would need to be in accordance with federal access to information and privacy rules, including the federal *Personal Information Protection and Electronic Documents Act*;
- A joint working group could be convened (a "creditor conference") where all parties whose interests are registered against a property could discuss applicable liens or tax arrears on that property, as well as plans for redevelopment;

- The municipal government (or joint working group, if established) reviews the extent to which the property meets the core criteria and principles established in the protocol, and confirms that the application can proceed to the next step.

2. *Preparation of Site Remediation Plan*

The second step would involve the following tasks prior to the municipal tax sale:

- if the site meets all or most of the core criteria and principles and is eligible for the removal of liens and tax arrears, then the developer undertakes appropriate site assessments to prepare a remediation plan;
- the developer prepares a remediation plan in accordance with provincial requirements and submits a copy of that plan, together with its redevelopment proposal, to the municipal brownfield liaison office (which shares the information with the other governments involved or with the joint working group, if established);
- the developer also submits a letter of credit or other acceptable financial assurance to help safeguard integrity of the removal of liens or tax arrears.

3. *Tax sale and removal of liens and tax arrears*

The third and final step would involve the following tasks:

- upon sale of the property to the developer, if no letter of credit or other acceptable financial assurance is provided, the developer is given written assurance that all registered liens and tax arrears will be de-registered from the property title once the site remediation has occurred, to prevent a situation where a lien is forgiven and then no redevelopment takes place;
- following the sale, the municipal government is reimbursed a pre-negotiated percentage (or amount) of the revenue from the sale to cover its upfront administrative costs;
- any funds remaining are distributed to the federal, provincial and municipal governments based on a pre-negotiated formula (for example, a one-third share each, or on a pro rata basis based on the amount of the liens or tax arrears).

Memorandum of Understanding

A memorandum of understanding (MOU) among municipal, provincial and federal governments can be an effective tool for promoting coordination and timeliness in the application protocol.

The MOU can:

- establish a notification process informing all parties about all legal encumbrances, helping ensure all tax debts from all government parties are considered before proceeding to the tax sale;
- identify roles and responsibilities; and
- create an equitable system of distribution for any funds resulting from a qualifying brownfield property sale.

Annex 1:

National Brownfield Redevelopment Strategy for Canada

Recommendation 1.2

1.2 Remove Liens and Tax Arrears Against Qualifying Brownfield Sites

Recommendation

That the federal and provincial governments jointly develop principles and criteria for removing federal and provincial liens and tax arrears in specific situations.

That the federal and provincial governments amend their applicable bankruptcy and corporations legislation to ensure that when a trustee in bankruptcy quitclaims a property owned by a bankrupt company, then the property vests in the Crown; if the company is incorporated under the Canada Business Corporations Act, then the property vests in the Crown in right of Canada; if the company is provincially incorporated, the property will vest in the province.

Rationale

Removal of liens and tax arrears:

- reduces upfront costs to brownfield developers and provides greater certainty of funds to developers at early project stages (e.g. during purchase negotiations), when it is difficult to obtain regular financial assistance
- represents a highly cost-effective approach to delivering financial assistance to brownfields, because it can be delivered for free (except for administration costs) to sites that may be of zero or very little worth to the government in the absence of any redevelopment.

Discussion

Many brownfield properties are delinquent in their property tax payments to the point where they are subject to a *municipal tax sale*. However, such properties are often difficult to sell, because of deteriorated conditions, known or perceived site contamination, and the anticipated high costs of remediation. If left vacant, these sites typically are prone to vandalism and become a burden to the municipal government. Although many of these sites do not pay municipal taxes, they do draw heavily upon municipal resources in the form of police, fire and inspection services, as well as enforcement and infrastructure maintenance services.

Often, such properties are also encumbered by outstanding Crown *liens**, both federal and provincial, which cannot be cancelled through a municipal tax sale. The combination of back taxes and Crown liens can render a local redevelopment proposal unfeasible. The prior agreement to remove all or part of these liens could be a deciding factor in the financial viability of a potential brownfield redevelopment project. This form of incentive has been offered in the past on an ad hoc basis by all levels of government. (The actual removal of the lien or tax arrears should not be finalized until the completion of cleanup, to prevent a situation where a lien is forgiven and then no redevelopment takes place.)

Some provinces are considering developing a set of criteria and protocols to qualify brownfield redevelopment projects for removal of all provincial liens in the event of investor interest. This process would be more effective if clear and consistent criteria and processes were established across all governmental jurisdictions, so that developers and purchasers would know whether a particular site, wherever it might be located, was eligible for lien removal. In particular, a federal

program to remove liens against affected properties could be linked through a federal-provincial agreement that, among other things, standardizes criteria and protocols.

Changes to federal and provincial legislation are also needed to address the special question of brownfield sites that are caught up in bankruptcy proceedings. The courts have interpreted section 20 of the federal *Bankruptcy and Insolvency Act* to mean that when a trustee in bankruptcy *quitclaims* a property, the property returns to the bankrupt company. However, this in effect creates an orphan site, with no entity in control of the property—a development that can have dramatic and even dangerous consequences.

To ensure that there is some entity in control of the property when a trustee in bankruptcy quitclaims a property, the *Bankruptcy and Insolvency Act*, the *Escheats Act* and the federal *Canada Business Corporations Act*, as well as the provincial equivalents, will need to be amended to state that, under these circumstances, the property vests in Her Majesty in right of Canada, or the province, as appropriate. It is also vital that the designated ministry receive the necessary funding to manage these sites until remediation.

(It should be noted that removal of the lien does not release the original debtor from the amount owing to the Crown. Similarly, the vesting of property in the right of the federal or provincial government does not release the original polluter from liability, nor, with proper safeguards, would it create any additional liability for the Crown).

Source:

Cleaning up the Past, Building the Future:

A National Brownfield Redevelopment Strategy for Canada

(National Round Table on the Environment and the Economy, 2003), pp. 20-21

Annex 2: Glossary of Selected Brownfield Redevelopment Terms

Brownfield

An abandoned, vacant, derelict or underutilized commercial or industrial property where past actions have resulted in actual or perceived contamination and where there is an active potential for redevelopment.

Escheat

The reversion of property to the federal or provincial Crown, as provided by law, for example when property is abandoned.

Greenfield

A vacant property with no actual or perceived contamination, usually located outside urban centres and without municipal services.

Liability

Civil Liability

A legal obligation that arises under the law of private rights, referred to as common law, in comparison with the criminal or administrative law. Civil liability is an action commenced by a court action.

Regulatory Liability

A legal obligation laid out by a statute that creates a regulatory offence. Regulatory offences are usually considered more minor than criminal offences, since they are only intended to secure the effective regulation of conduct in the interest of the community.

Joint and Several Liability

The doctrine of joint and several liability makes any joint defendant against whom a judgment is entered in an action liable to the claimant for the entire judgment, regardless of the defendant's share of fault. The defendant then has right of contribution and indemnification against the other defendants. If the other defendants are insolvent, then, despite being as little as 1 percent responsible for the damages, the sole remaining solvent defendant must contribute 100 percent of the award.

Lien

The right to retain the lawful possession of the property of another until the owner fulfils a legal duty to the person holding the property, such as the payment of lawful charges for work done on the property. A mortgage is a common lien. In its widest meaning, this term includes every case in which real or personal property is charged with the payment of any debt or duty; every such charge being denominated a lien on the property. In a more limited sense, it is defined to be a right of detaining the property of another until some claim is satisfied.

Municipal tax sale

This is the statutory process followed by municipalities to recover property tax arrears. There is an initial notice period during which the municipality sends notices to the property owner initiating the process and requesting payment of a "cancellation price" within a specified timeframe. If the cancellation price is not paid, then the property is offered for sale to the highest bidder. If there are no bidders, the property vests in the municipality.

Quitclaim

A transfer of land or real property without guarantee of a clear title.

Quitclaim Deed

A deed that transfers the owner's interest to a buyer but does not guarantee that there are no other claims against the property.

Remediation

The action taken to cleanup, contain or remove the risk posed by contamination at a site.

Risk assessment

The process of identifying and evaluating risks to human health, human safety and/or the environment from the actual or potential presence and/or use of specific pollutants.

Site assessment (environmental)

An approach for identifying and assessing potential environmental concerns in respect of activities conducted at a facility and/or the potential presence of contamination at a site in accordance with accepted standards (typically Phase 1 & 2 Environmental Site Assessments as described by the Canadian Standards Association).

Site-specific risk assessment (SSRA)

A risk assessment that incorporates characteristics of a site (e.g. physical and chemical characteristics, geology, soil type and biology) to establish the risk posed by a specific contaminant or hazard present at a site.

Vested

Having the rights of ownership, although enjoyment of those rights may be delayed until a future date.

Source:

Cleaning up the Past, Building the Future:

A National Brownfield Redevelopment Strategy for Canada

(National Round Table on the Environment and the Economy, 2003)

Annex 3: Experts Group Workshop Participants

The following is a list of participants in the experts group workshop convened by the NRTEE and the CBN to consider approaches to removing Crown liens and tax arrears as an incentive for encouraging redevelopment of qualified brownfield sites.

The workshop was held in Ottawa, ON, March 9th, 2005.

Participants:

Abbott, Neil, Partner, Banking and Restructuring, Gowlings LLP
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Bordeleau, François, Agent, Affaires législatives en matière d'impôt, Agence du revenu du Canada
Bouthillier, Diane, Conseillère, Section générale de l'administration provisoire des biens non-réclamés, Le Curateur public du Québec
Brendon, Casey, Manager, Operation Support, City of Toronto
Brennan, James W., Director, External Relations, The Canadian Real Estate Association
Brown, Victoria, Manager, Municipal Excellence, Municipal Advisory Services Unit, Alberta Municipal Affairs
Burgess, Geoffrey, Senior Economist, Environmental Economics, Environment Canada
Ceroici, Walter, Head, Land Section, Alberta Environment
Chang, Victor, Manager, Special Projects, Environmental Protection Branch, Saskatchewan Environment
Donahue, Madeleine, Senior Counsel, Macleod Dixon LLP
Drapeau, Bernard, Conseiller en matière de biens sans maître et compagnies dissoutes à la Direction générale et de l'administration provisoire des biens non réclamés, Le Curateur public du Québec
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Hughes, Ken, Manager of Revenue, Financial Services Branch, City of Ottawa
Jackson, Jennifer, Legal Counsel, Planning and Development Law, Legal Services Branch, City of Ottawa
Kennedy, Nancy, Director, Provincial Local Initiatives Branch, Provincial Local Initiatives Branch, Ontario Ministry of Finance
MacCallum, Don, Project Manager, Canada Lands Company Ltd.
Mc Kenzie, Guy, Associate Deputy Head, Infrastructure Canada
McInnis, Danny, Field Supervisor, Pollution Prevention Division, Prince Edward Island Department of Environment, Energy and Forestry
Osborn, Grant, Senior Policy Advisor, Provincial Local Finance Secretary, Ontario Ministry of Finance
Paquin, Pierre, Lawyer, Hot Properties Committee, Urban Development Institute of Québec
Salloum, Doug, Manager, Development and Portfolio Risk, Green Funds, Federation of Canadian Municipalities

Savio, Dario, Director, Collections and Compliance Branch, Tax Revenue Division, Ontario Ministry of Finance
Short, Ed, Senior Tax Policy Officer, Business, Property and Personal Income, Finance Canada
Sprague, Mike, Director, Remediation Branch, New Brunswick Department of Environment and Local Government
St. Cyr, Pierre, Urbaniste, Société du Havre de Montréal
Susak, Bill, Deputy City Engineer, City of North Vancouver
Tansley, Larry, City Solicitor, City of Brantford
Taylor-Lee, Kristine, Policy Analyst, Contaminated Sites, Environment Canada
Ward, John, Unit Head, Legislation and Finance Unit, British Columbia Ministry of Water, Land and Air Protection

CBN Advisory Panel:

Ceschi-Smith, Marguerite, Director, Federation of Canadian Municipalities
Kovacevic, Michael, Lawyer, Goodman and Carr LLP
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Pilon, Adrien, Vice-président et Directeur, Centre d'excellence de Montréal en réhabilitation de sites (CEMRS)
Ross, Angus, President, L&A Concepts
van Velzen, Kevan, Manager, Environmental Assessment and Liabilities, City of Calgary

OBSERVERS:

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Geracimo, George, President, Hot Properties Committee, Urban Development Institute of Quebec
Jones, Kevin, Co-Founder/Director - CBN, Vice-President, OCETA
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