

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**

March 2005



National Round Table
on the Environment
and the Economy

Table ronde nationale
sur l'environnement
et l'économie



Contents

1. Introduction	1
1.1 Purpose	1
1.2 Background	2
2. A National Framework for Removing Liens and Tax Arrears	5
2.1 Shared Objective	5
2.2 Qualifying Brownfield Properties	6
2.3 Eligibility Criteria/Principles	7
2.4 Policy Safeguards	9
2.5 Application Protocol.....	11
Annex 1: <i>National Brownfield Redevelopment Strategy for Canada</i>	
Recommendation 1.2	14
Annex 2: Glossary of Selected Brownfield Redevelopment Terms	16
Annex 3: Experts Group Workshop Participants	18

1. Introduction

1.1 Purpose

This framework has been prepared to assist the Government of Canada and the provincial and municipal governments interested in redeveloping brownfields. It outlines an opportunity for the governments in Canada to encourage redevelopment of many of the country's estimated 30 000 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 brownfield 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 as well as the provincial and municipal governments in removing, as an incentive for redevelopment, liens and tax arrears on qualifying brownfield properties.

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

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

understanding, designed to encourage brownfield 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 redevelopment of brownfields in Canada. In particular, the two organizations benefited from the insights and suggestions of 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 of:

- 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

and <http://www.canadianbrownfieldsnetwork.com>

² The workshop was conducted on a “not for attribution” basis so as to encourage an open and free-flowing discussion among participants unhindered by the constraints of representing 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 the possible existence of some 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; in some cases, they 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.

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 brownfield liens and tax arrears.

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

The strategy proposed actions in the following 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; and
- 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 outlined in the national strategy. The member-based network is uniquely positioned as the enabling mechanism to both implement the national strategy's recommendations and accelerate brownfield redevelopment activities in Canada; it will do so by raising awareness of the economic and environmental benefits and by transforming the market through outreach and capacity-building initiatives. The network seeks to:

- 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; and
- position brownfield redevelopment as an essential, constructive approach to the challenges of sustainable community planning.

The network, which has developed strategic alliances with provincial environment industry associations and other organizations with an interest in brownfield redevelopment in Canada, 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 as well as at 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

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

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 the



site except for the former Cockshutt Office and Timekeepers buildings, both designated heritage buildings under the Ontario Heritage Act. This demolition will include the removal of underground storage tanks.

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 company Bay State Abrasives, the most recent occupant of the site, was involved in similar manufacturing operations. In 1993, the property fell into the hands of the provincial government, which took no responsibility for the condition of the site. The city undertook Phase I, II, and III environmental site investigations on the property, and absorbed 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 most of the remediation costs accrued by the city during remediation of the site. Federal liens on the site amounted to \$337,395, which were



lifted when the city vested the property. Again, a provincial lien, which also existed on the title and amounted to \$313,680, 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. Neither site would have been redeveloped if the liens and tax arrears had not been lifted.

In the past two years, a number of municipal governments, as well as several provincial governments, have expressed a strong interest in encouraging brownfield 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 governments at all levels in Canada have the opportunity 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 administrative costs, the recommended framework intends 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*, the removal of liens and tax arrears:

- reduces up-front 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 worth zero, or very little, to the government in the absence of any redevelopment.

The framework offers a practical, common, national approach that has sufficient flexibility to take into account specific provincial and municipal circumstances. It 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 clean-up.

Rationale

The recommended definition of a qualifying brownfield property can serve as a broad, initial minimum criterion when removal of liens and/or tax arrears is being considered.

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

However, given the many types of brownfields, flexibility is needed. The term covers a wide variety of contaminated properties: those publicly or privately owned; those held under trusteeship; or those abandoned, or “orphaned,” without ownership. Each brownfield comes with its own 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 either as coming in at too high a public cost in terms of foregone taxes, or as contrary to the

“polluter pays” principle. As well, too broad a scoping could risk triggering additional abandonment and non-payment of taxes on these sites by the owners.

The flexibility needed to take into account the differences in provincial and municipal practices and laws, as well as 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 definite interest in cleaning up and redeveloping the site is present, based on the anticipated costs of clean-up and the eventual market value (or public good value) of the property following clean-up.

Note: The removal of the lien or tax arrears applies to 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:

- **that the property is in arrears for municipal taxes and is eligible for a municipal tax sale;**
- **that the property is in the hands of a trustee, 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;**
- **that 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;**
- **that if the property is being acquired (by a municipality, conservation authority, or other public body) for a public use (e.g., for a park or other public facility), and a restrictive covenant has been imposed on the property limiting it to such future use;**
- **that there is a high potential for redevelopment; and**
- **that 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.”

Although the eligibility criteria must be flexible so that circumstances of different jurisdictions and sites can be taken into account, national consistency can be supported by agreement to a core set of criteria or principles.

These core criteria can be embodied in statutes, 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.

In keeping with the concept of sustainable development, the recommended core criteria/principles incorporate economic, social, and environmental considerations. This approach reflects the following points:

- 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);
- that the eligible property must be in need of intervention (due to its being orphaned or in trusteeship, without a financially viable owner);
- that there must be a clear interest in, and high potential for, redeveloping the site, as demonstrated through the preparation of a redevelopment plan consistent with a community development plan; and

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

Public Use of the Property

The criteria should also provide for instances in which 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 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 denial (with reasons) within a specified time frame following submission of a completed application form..

Public Health and Safety

Public health and safety concerns related to the brownfield property can be reflected in the criteria. (For example, the criteria could include the statement “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 are rather a *consequence* of the abandonment of the properties. It is therefore recommended that public health and safety risks not be embodied in the core national criteria and principles, but instead be applied only in those specifically warranted cases.

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

Rationale

In effect, encouraging brownfield redevelopment through the removal of liens and tax arrears involves a decision to forgo public monies owed in exchange for the prospect of a revitalized property that will once again contribute municipal, provincial, and federal taxes. Such a decision must be open and transparent to counteract potential public and political perceptions that polluters

or defaulters are being “let free” of their obligations, or that developers are benefiting at public cost.

Thus the national framework process will need to include policy safeguards, not only to help communicate the nature of these brownfield transactions but also to 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 the various provincial environmental legislations). They must also be at arm’s 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).

In this regard, the federal *Bankruptcy and Insolvency Act* contains definitions and language that can be adapted for brownfield redevelopment.

A mechanism must be developed to ensure that the purchaser is not the original defaulter or polluter. One simple yet effective tool is a *waiver letter* signed by the purchaser, warranting that the purchaser is neither a defaulter or polluter and 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 not only does not unduly benefit from the removal of the lien or tax arrears but also 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 not only pay any municipal taxes owed but also 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 for attracting developers to the site.

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

(Note that these policy safeguards should not keep an arm's 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 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 of a failed tax sale and a subsequent property vestment in the municipality. The municipality then has five additional years after 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 a 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,” to 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 of all relevant information with other governments.

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

That all levels of government be required to register any liens or tax arrears on a 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 the removal of liens and tax arrears can 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. A clear, simple, transparent protocol is thus needed for removing liens and tax arrears on a qualifying brownfield property. The protocol could pull together such other elements of the process as shared objectives, a 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; and
- public trust, credibility, and support are built.

To achieve this result, the protocol should reflect, and incorporate as much as possible, existing processes, legislation, and other governance instruments, as well as 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.

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

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 that wants 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 generally involves a confirmation that both the property and the purchaser are eligible for consideration of the removal of liens and/or tax arrears. That step involves the following actions:

- If a property is eligible for a tax sale or there occurs a failed municipal tax sale for a property, the developer wishing to redevelop the site submits a written expression of interest in the brownfield property to the municipal government’s brownfield liaison office. The developer also provides a waiver letter to the municipal brownfield office, warranting that he or she is an “innocent purchaser” unrelated to, or at arm’s length from, both the original polluter and the defaulter of taxes.
- The municipality’s brownfield liaison office reviews the information as to whether the property meets the qualifying definition established in the protocol.
- If the site is eligible, the municipal government contacts the brownfield liaison offices (“one-stop windows”) of both the provincial and federal governments, informing them of the potential for redevelopment on the site under the protocol; it also seeks confirmation of the governments’ registered liens against the property.
- Given the oft-cited lack of up-to-date information on liens and tax arrears on a property, it is advisable for the municipal government to issue a 60-day notice of intent; such notice promotes a timely and coordinated approach. During this period, the federal and provincial governments are 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 the sharing of all information on all existing liens and tax arrears, as well as on the history of the site (including identification of the original polluters and defaulters). If the federal government is involved, this sharing of information must accord 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”) so that all parties with interests 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; it then confirms that the application can proceed to the next step.

2. *Preparation of Site Remediation Plan*

The second step involves completing the following tasks or actions 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, the developer undertakes the 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. (That office then 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 the integrity of the removal of liens or tax arrears.

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

The third and final step involves 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 receives written assurance that all registered liens and

tax arrears will be deregistered from the property title once the site remediation has occurred (this prevents a situation in which a lien is forgiven but 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 a pro rata basis linked to amount of 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 that informs all parties about all legal encumbrances, thereby helping to ensure that 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 clean-up, 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 time frame. 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 clean up, 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, Ontario, on March 9, 2005.

Participants

Abbott, Neil, Partner, Banking and Restructuring, Gowlings LLP

Beaulieu, Michel, Chargé de projet, Service des lieux contaminés, Ministère de l'Environnement du Québec

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

Fasken, Mitchell, President, Kimshaw Holdings Limited

Gee, Thelma, Senior Planner, Planning and Development Division, Provincial Planning and Environmental Services Branch, Planning Reform Group, Ontario Ministry of Municipal Affairs and Housing

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, Ontario Ministry of Finance

MacCallum, Don, Project Manager, Canada Lands Company Ltd.

McInnis, Danny, Field Supervisor, Pollution Prevention Division, Prince Edward Island Department of Environment, Energy and Forestry

McKenzie, Guy, Associate Deputy Head, Infrastructure Canada

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

Lomas-Jylha, Tammy, Director, Canadian Brownfields Network

McGalliard, Tad, Senior Project Manager, Brownfields Program, International City/County Management Association

Miller, Glenn, Vice-President, Education and Research, Canadian Urban Institute

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

Bogdan, Makuc, Senior Analyst, Cities Secretariat, Office of the Deputy Head, Policy and Research, Infrastructure Canada

Geracimo, George, President, Hot Properties Committee, Urban Development Institute of Quebec

Jones, Kevin, Co-Founder/Director – CBN, Vice-President, OCETA

*Latham, Todd, Co-Founder/Director – CBN, General Manager, EcoLog Information Resources
Group*

*Morley, David, Departmental Senior Policy Advisor, Office of the Minister of State,
Infrastructure Canada*

NRTEE Staff and Consultants

*Melamed, Sara, Special Projects Manager, National Round Table on the Environment and the
Economy*

Shillington, Tom, Consultant, Shillington and Burns Consultants Inc.