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THE CANADIAN BROWNFIELDS REDEVELOPMENT AGENDA MOVES ALONG

What Does Ontario's Proposed Brownfields Legislation Mean for Municipalities?

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While Canada has well established contaminated lands regulatory regimes, it nonetheless lags behind the United States in promoting and providing programmatic support for brownfields redevelopment initiatives. Developers and landowners in major Canadian cities like Toronto, Vancouver, and Montreal have long recognized the benefits of redeveloping prime locations abandoned because of contamination. Until recently, the political will necessary to legislate liability protection for public and private participants in redevelopment projects has been found wanting. Consequently, institutional investors and other interests have similarly shied away from funding projects that have long struggled without success to compete with greenfield developments. All that began to change with Toronto's bid for the 2008 Olympics.

Toronto's bid envisioned redevelopment the city's waterfront, which is predominantly made up of former industrial sites. The waterfront and port lands of Toronto (like those of Montreal and Vancouver) have fallen into disuse or have been abandoned because of changing land use requirements over the last century and the poor economic prospects of remediation in the current, stringent regulatory environment. In pursuit of the Olympics, however, the federal government, the Province of Ontario and the City of Toronto focused public policy on facilitating waterfront development in Toronto. Likewise, across Canada, all three levels of government have set plans for their own waterfront lands and, more importantly, have begun crafting a legislative environment more conducive to redevelopment. Ontario, for example, has introduced a legislative package to encourage brownfields redevelopment, and it appears likely that other Canadian provinces will follow Ontario's lead.[1] The federal government is considering Adapting a national program, and the National Roundtable on the Environment and the Economy (a federal agency) has been consulting widely on federal financial and tax incentives for redevelopment projects.[2] These tentative, though promising, brownfields efforts have survived the award of the Olympics to Beijing instead of Toronto, although they may not proceed as urgently as they might have otherwise. The brownfields issue, having come to the legislative forefront through the Olympic bid, has garnered public policy and private sector proponents who continue to sustain the momentum favouring further progress.

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[1] *Brownfields Statute Law Amendment Act, 2001,* 37th Leg., 2nd Session (Ont.2001), hereinafter referred to as Bill 56. As of October 16, 2001, Bill 56 had yet to receive third reading. The text of Bill 56 and links to additional relevant information are available at the Ontario Legislature's website at http://www.ontla.on.ca/library/bills/56372.,htm.

[2] In June, 2001, the National Roundtable on the Environmental and the Economy commissioned the Waterfront Regeneration Trust (WRT) and the law firm of Osler, Hoskin & Harcourt LLP to prepare a background paper as a follow-up to a study (WRT, January 2001) that assesses current issues and obstacles associated with contaminated and brownfields property assessment and redevelopment in Canada.

Ontario's Bill 56

On May 17, 2001 the Minister of Municipal Affairs and Housing introduced Bill 56, an omnibus bill entitled the *Brownfields Statute Law Amendment Act, 2001*[3]. Bill 56 received second reading on June 28, 2001 and has been referred to a standing committee. This legislation, which is expected to become law, will form the foundation of the province's brownfields redevelopment initiative. In broad brushstrokes, Bill 56 relies upon three essential elements to promote brownfields redevelopment. First, it provides for a regulatory liability regime that speaks to virtually all participants in the brownfields redevelopment cycle.[4] The regime offer protection against a host of regulatory orders under the terms of Ontario's *Environmental Protection Act* (the "EPA"), the *Water Resources Act* and the *Pesticides Act*.[5] Certain conditions must nevertheless be met and exemptions can be subject to reopeners. Second, Bill 56 provides for the creation of a risk assessment based remediation regime as well as an administrative regulatory regime.[6] At the moment, risk assessment is available only subject to Ministry of the Environment discretionary policy in Ontario, is unavailable federally under most statutes, and is inconsistently available in other Canadian jurisdictions. Third, Bill 56 provides for limited municipal tax incentives in support of brownfields redevelopment.[7]

Bill 56 and Municipalities

There has been considerable discussion of the impact of Bill 56 on owners and redevelopers of contaminated lands, and on bankers participating in brownfields redevelopment, yet little has been said of the impact of this legislation on municipalities and their redevelopment efforts. It is apparent from the U.S. experience that municipalities can have a significant impact on the success of brownfields redevelopment programs. In the paragraphs below, we will briefly outline how Bill 56 addresses municipal priorities, and how it will affect municipal behaviour in respect of brownfields.

From a municipal perspective, five issues or priorities are connected to brownfields redevelopment and will be discussed below:

1. Returning brownfields to productive use;
2. Ensuring the safety of municipal inhabitants and the integrity of the environment;
3. Establishing the extent of municipal jurisdiction to verify remediation, environmental integrity, and the safety of sites proposed for development;
4. Protecting municipalities from potential liability arising from the grant of municipal approvals and permits for the development and use of brownfields; and

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[3] Bill 56, *supra*, note 1.

[4] *Ibid,* at s. 168.7(1)

[5] *Environmental Protection Act*, R.S.O. 1990, c.E.19; *Ontario Water Resources Act*, R.S.O. 1990, c.O.40; *Pesticides Act,* R.S. O., 1990, c. P. 11

[6] Bill 56, ss.168.4 and 168.9

[7] *Ibid.,* at Part III, Municipal Act Amendments, s. 442.7.

5. Determining the extent of liability protection applicable to municipally owned or controlled properties.

While Bill 56 addresses each of these issues, it lacks important features in certain respects. Attempts to redress those deficiencies are likely to succeed only with greater federal government participation.

Returning Brownfields to Productive Use

Adequate financing is an obvious, necessary ingredient in any formula designed to return brownfields to productive use. The public sector, embracing all levels of government, can play a key role in ensuring that such financing is available. Public sector participation in the form of financial incentives is crucial to bridging financing gaps and bringing projects online, as few private sector entities view brownfields projects as attractive or viable, particularly at the early stage of project evaluation. Financial incentives, or rather the lack thereof, is an issue over which Bill 56 has been sharply criticized.[8] Bill 56 would amend the *Municipal Act* to enable a municipality to offer incentives to brownfield owners in the form of municipal tax relief.[9] Such relief could either freeze or cancel property taxes or, if authorized by Ontario's Minister of Finance, take the form of school tax relief. Bill 56 also allows local and regional governments to share the expense of providing tax incentives.[10] A degree of local control is retained, as municipalities will set the eligibility requirements that a property owner must satisfy in order to qualify for these incentives.[11] In effect, it places the costly tasks of administering and financing brownfields incentives into the hands of local governments. In this regard, Bill 56 is seen to fall short of providing the levels of financial incentives necessary to stimulate development. Further, Bill 56 does not create a specific role for the provincial government in the form a provincial loan fund or some other financial incentive program.

In comparison, successes achieved in the United States owe much to the manifold approach adopted by federal and state authorities. A multifaceted strategy is advisable for Canada as it seems very likely that, in Canada as in the United States, market forces alone will not provide the impetus necessary to push forward significant brownfields redevelopment over the long term. Through the National Roundtable consultative process, Canadian federal agencies have been studying U.S. financial incentive programs to inform the creation of analogous Canadian incentives.[12] Federally, in the United States, the U.S. Environmental Protection Agency (the U.S. EPA) fosters brownfields renewal through its *Brownfields Economic Redevelopment Initiative.*[13] This initiative establishes a revolving loan fund program to capitalize qualifying projects.[14]

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8 See http://www.ontla.on.ca/hansard/committee_debates/37_parl/Session2/gengov/GO10.htm

9 Bill 56, Part III, Municipal Act Amendments, s. 442.7

10 *Ibid.*

11 ibid.

12 Supra note 2.

13 EPA *Brownfield Economic Redevelopment Initiative,* available at http://www.epa.gov/swerosps/bf/html/tba.htm

14 See http://www.epa.gov/swerosps/bf/html-doc/econinit.htm

After its ten years in operation, the U.S. EPA initiative yields important lessons for governments, investors and lenders and demonstrates the positive impact of customized fiscal policy instruments. In the Brownfields National Partnership announced by Vice President Gore in May 1997, the U.S. federal government committed more than $300 million from more than 25 federal agencies and partners for investment in brownfields, plus an additional $141 million in loan guarantees.[15] The *Brownfields Cleanup Revolving Loan Fund Demonstration Pilot Program* has also proven to be an important federal iniative.[16] This program provides funding assistance for assessing, testing and financing redeveloping brownfields.

Among the recommendations put forth in Canada is the adaptation of the loan and mortgage insurance programs operated through the federal Canada Mortgage and Housing Corporation (CMHC). With a federal policy directive, the CMHC could establish a brownfields program that provides both loans and mortgage insurance in appropriate cases. The banks have named federal mortgage insurance, which is a tool used in a variety of higher risk financing, as the *sine qua non* of making loan capital available from traditional banking sources. In addition, the Canadian federal government will be considering recommendations on incentives in the form of favourable income tax treatment, which would mirror that made available under the 1997 U.S. Taxpayer Relief Act.[17] This Act includes a tax incentive that made it possible for investors in brownfields properties to deduct their clean-up expenses immediately, cutting the cost of this type of investment dramatically.[18]

Canadian municipalities are unlikely to choose to shoulder the financial burden which bill 56 foists on them as the price to be paid to facilitate brownfields redevelopment. It is more likely that, for success to be achieved in Ontario and elsewhere, both the federal and provincial governments will have to step forward with additional financial programs.

Ensuring the Safety of Inhabitants and Environmental Integrity

Bill 56 will enshrine in regulations the existing and widely used *Guidelines for Use in Contaminated Properties in Ontario*.[19] These guidelines, which do not currently have the force of law in Ontario, set out remediation criteria that are based on generic risk analyses. Encoding the criteria in regulations will bring Ontario into alignment with other Canadian jurisdictions and should provide municipalities with a sense of certainty over standards. In addition, Bill 56 will give legislative sanction to a site-specific risk assessment regime.[20] This regime will put into place the necessary expertise to help identify the risks associated with specific sites and set remediation criteria based on those risks. It will operate at the provincial level and will provide a degree of expertise that far exceeds the capabilities of local governments in terms of site-specific risk assessment.

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15 *Brownfields National Partnership Action Agenda (1999),* available at http://www.epa.gov/swerosps/bg/99aa.htm

16 *Supra* note 14

17 Taxpayer Relief Act, Pub.L. No. 105-34 (1997)

18 EPA *Brownfields Tax Incentive*, available at http://www.epa.gov/swerosps/bf/html-doc/taxfact.htm

19 Bill 56, s. 168.4

20 *Ibid*

Jurisdiction Over Remediation, Environmental Integrity, and Site Safety

Throughout Canada, municipalities struggle with the extent of their jurisdiction to verify the suitability of contaminated, or formerly contaminated, lands for proposed redevelopment. Municipal responses vary, and often impose exceedingly stringent environmental criteria without regard to use (and jurisdiction). Municipalities demand varying levels of proof of compliance with applicable criteria seeking indemnity from redevelopers. As a result, increased friction has developed between landowners and municipalities. Such acrimony could leave municipalities even more inclined to support rigid verification standards; conversely, private sector interests are even more disenchanted over the issues of municipal jurisdiction and remediation expertise. While Bill 56 grants no added jurisdiction to municipalities, it codifies two systems of compliance verification that should serve to lessen friction surrounding municipal verification. First, Bill 56 codifies the use and filing with the Ministry of the Environment of a record of site condition RSC) at the conclusion of remediation activities.[21] This instrument is to be prepared by the landowner and its technical experts. Both its filing and its accuracy operate as a condition precedent to the extension of regulatory immunity under Bill 56. Second, Bill 56 provides for the issue of approval certificates by the Ministry of the Environment that can be registered in respect of sites that have undergone a site-specific risk assessment.[22] The creation of these two verification instruments – backed by the force of law – should do much to reduce the friction over municipal jurisdiction. The legislative status of these instruments, and the consequences for their falsification, should give municipalities comfort as to their worth for verification purposes. At the same time, they are likely to find favour among developers in that they operate as a trigger for much sought-after legislative immunity.

Lack of Immunity for Municipal Approvals/Permitting

Bill 56 does not answer the questions that are sometimes raised about municipal civil liability for development on contaminated or formerly contaminated lands. On the one hand, the legislation provides no specific protection from liability for municipalities, perhaps signalling that no such protection is required. On the other hand, the Ministry of the Environment has been provided with legislative protection from civil liabilities arising from any inaccuracies in an RSC.[23] That is was thought necessary to provide the Ministry with protection suggests that regulatory liability is a real prospect, and that

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21 *Ibid*., at Part XV.1
22 *Ibid*., at s. 168.6
23 *Ibid*., at Part XV.1, s. 168.1(3)

municipalities need to be concerned about relying on the accuracy of RSCs. While municipal responses will certainly vary, the absence of civil liability protection for municipalities relying on an erroneous RSC can undermine the certainty and procedural uniformity which the introduction of that instrument is intended to create. In simple terms, municipalities may well continue to be inclined to seek the safest possible remediation criteria (an approach largely incompatible with the brownfields redevelopment agenda), or more likely, municipalities will require indemnities and other assurances from developers.

Regulatory Liability Protection for Municipalities

Regulatory liability under the EPA typically follows two types of actors: those who caused or permitted pollution in respect of remediation orders, and those who are owners or exercise control over the undertaking as regards preventative measures orders.[24] Bill 56 affords municipalities and municipal representatives (together defined as "municipalities") regulatory liability protection from both types of liability in defined circumstances, as described below.

Non-Municipal Properties

Bill 56 provides immunity from orders applicable to municipalities in circumstances where they could be said to have come into control of non-municipal properties by exercising the day-to-day functions of local government;[25] for example, by extending the supply of water and electricity, or responding to a danger posed by the presence of a contaminant. Under Bill 56, municipalities are deemed not to occupy or have charge of, management or control over a non-municipal property as a result of any actions taken by them for the purpose of conducting an investigation, or responding to any danger or injury or risk of damage, or injury to property, that results from the presence of a contaminant under a property.[26] As well, any action taken by a municipality pursuant to the *Municipal Tax Sales Act,* the *Building code Act,* the *Fire Protection and Prevention Act,* or any other Act prescribed by regulation, will not attract regulatory liability.[27] This type of protection may go some distance towards quieting municipal concerns that the exercise of day-to-day local government powers would attract liability for contaminated lands polluted by others. One can only hope that this legislative approach will help engender a less defensive approach to municipal approvals and permitting.

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[24] *Environmental Protection Act,* R.S.O. c.E. 19, ss 17 and 18

[25] Bill 56, s. 168.13

[26] *Ibid.,* at s. 168.13(2)

[27] *Ibid.,* at s. 168.13(3). *Municipal Tax Sales Act,* R.S.O. 1990, c. M. 60; *Building Code Act,* S.O. 1992, c. 23; *Fire Protection and Prevention Act,* S.O. 1997, c. 4

Municipal Property – Tax Sales

Bill 56 also affords municipalities a two-year period of immunity from regulatory liability in respect of property that vests with a municipality in the course of a municipal tax sale.[28] The two-year period can be extended by application.[29] Municipalities are granted the flexibility to investigate a property subject to a tax sale, and also have the option, but not the obligation, to acquire title to the property after a municipal tax sale under the *Municipal Tax Sales Act*.[30] If the municipality registers a notice of vesting and acquires title to a property under the *Municipal Tax Sales Act,* Bill 56 provides liability protection from orders under the EPA, except in circumstances that arise from the gross negligence or wilful misconduct of the municipality.[31] If the municipality does not dispose of the property within the allotted time, it will lose its special protection and will be subject to the liabilities associated with the property.[32]

Municipal protection is also subject to a specific exception termed "exceptional circumstances." The grounds for issuing an "exceptional circumstances" order are broader than those applicable to an emergency order and include a danger to human health or safety, a risk of harm to the quality of the environment, and the actual or serious risk of injury or damage to property, plant or animal life.[33] The Environmental Review Tribunal cannot stay an "exceptional circumstance" order.[34] Since many abandoned brownfields are forfeited for taxes, it is important that municipalities develop the flexibility to safely exercise their powers and dispose of those properties to developers. In this respect, the protection afforded municipalities in tax sales is an important feature of Ontario's brownfields program. It remains to be seen whether the period allotted to this process is sufficiently long to conduct thorough investigations, and to effect sale or properties, without attracting liability.

Conclusion

Insofar as its treats municipal priorities, Bill 56 can serve as a useful model for other Canadian jurisdictions – with some notable exceptions. The most important relates to financing. Brownfields programs are unlikely to gain much headway without federal and provincial financing programs to provide incentives to private sector lenders and

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28 Bill 56, s. 168.14(4)
29 *Ibid*., at s. 168.14(5)
30 *Municipal Tax Sales Act,* R.S.O. 1990, c. M. 60
31 Bill 56, S. 168.14(1)(a)
32 *Ibid*., at s. 168.14(4)
33 *Ibid.,* at s. 168.15(1)
34 *Ibid*., at Part II, s. 19 (19)(2)

investors. The economics of brownfields redevelopment are simply beyond the means of government. If the federal and provincial governments follow through by providing financial incentives, Bill 56 may achieve notable success, as it already provides regulatory incentives for municipalities to participate in the redevelopment cycle. The liability protection made available to municipalities in this legislation, together with the institution of legislatively-sanctioned verification instruments and the codification of both criteria and risk assessment processes, all combine to set the stage for municipal policies that are more favourable to redevelopment. While it is unlikely that the lack of protection from civil liability will forestall municipal action in this area altogether, because of the prospect of civil liability related to reliance on erroneous or false verification instruments, municipalities could insist on enhanced protection (in the form of further assurances) from developers. Nevertheless, this should constitute only a small hurdle to the advancement of the redevelopment agenda.

The fact that Ontario is pressing ahead with its legislative program, and that the federal government continues to examine its role, bodes well for the future of Canadian brownfields redevelopment programs. It is likely that a number of Canadian provinces, if not all of them, will follow suit in the near future. Whether a coordinated federal-provincial approach will emerge to address redevelopment issues will depend largely on the leadership exercised by the federal government in the months to come.

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