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Planes, Trains & Automobiles -- Liening Transportation Infrastructure in Canada

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Editor's Note

Canada's transportation build-out is accelerating. This paper offers a practical, system-by-system roadmap to lien rights on rail, air, and road projects across jurisdictions. It frames the sector and answers the payment-security question: when do liens attach and when do constitutional limits, Crown ownership, or policy bar them? It pairs sector data and major projects with clear, fast-use guidance for practitioners handling complex, multi-jurisdictional work.

On rail, the paper clarifies definitional gaps around “railway” and “railway right-of-way,” and the risk of importing definitions from other statutes. It maps the federal-provincial divide and distills the core rule: lien statutes may reach railways, but not land “vital and essential” to a federal undertaking-steering practitioners to trust remedies where liens cannot attach. It then highlights how interjurisdictional immunity limits provincial incursions into federally regulated corridors on large projects.

On airports, the paper traces federal jurisdiction over aeronautics and shows how provincial lien regimes collide with the federal “core.” Recent decisions separate lien-proof work (runways, terminals, taxiways) from peripheral improvements that may be lienable, avoiding building-by-building micro-analyses when redevelopment is integral to operations. The takeaway is a practical matrix for assessing lien exposure on airport programs and tenant improvements.

On roads and highways, the paper confirms the general availability of liens on provincially owned projects, but highlights limits on liening certain public highways, bridges, and rights-of-way. It synthesizes cases distinguishing true “highways” from transit systems, identifies statute-driven workarounds (e.g., liens to holdback rather than land), and closes with a concise checklist counsel can deploy across provinces.

The authors summarize jurisdiction-specific answers on when liens do and do not attach across federal undertakings and provincial/municipal works. This paper should prove useful to lawyers advising clients on transportation projects on when liens are available, and when they need to pivot to alternative trust, holdback, or adjudication remedies, ***112** including the recent introduction of prompt payment and adjudication on federal projects.

1. INTRODUCTION

The Canadian transportation sector contributes roughly 4.3% to the country's GDP, amounting to $96.5 billion in monetary terms. [2]

The Canadian rail system currently has 48,010 route kilometers of track, owned mostly by Canadian National (45%) and Canadian Pacific (27%), with the remaining 28% owned by other railway companies. As of 2022, Class I railway carriers in Canada had 2,121 locomotives, 46,807 freight cars and 393 passenger cars. [3] It is expected that since the fastest-growing commodities are largely oriented towards overseas trade, growth in transportation demand is expected to concentrate on rail and road corridors connecting to major ports in the coming years. [4] In 2023, rail companies reported a 5.3% increase in transported volumes of bulk commodities. [5]

On the passenger rail side, in November 2023, the Minister of Transport announced the launch of the Request for Proposals stage for the High Frequency Rail project between Québec City and Toronto. The High Frequency Rail project will be the largest Canadian infrastructure project ever and once operational, will span the corridor between Québec and Ontario with dedicated passenger tracks. [6] A preferred bidder was identified in February 2025 and is now working with the crown corporation responsible to finalize and, subject to approvals, enter into the Pre-Development Agreement. [7]

Air traffic in Canada is almost back to pre-pandemic levels. 2024 showed another 4% increase over 2023, with 156.7 million passengers using Canadian airports. This was just under the 2019 level (96.2%), prior to the COVID-19 pandemic. [8] On the cargo side, there was also continued growth in 2024, with the total amount of cargo loaded and unloaded at Canadian airports rising by 5.1% from 2023. Domestic cargo in 2024 increased 5.9% from 2023 to 802,000 tonnes. International cargo grew ***113** 8.2% to 534 000 tonnes while transborder cargo fell 3.5% to 243 000 tonnes. [9]

In 2023, Canada had 37,290 Canadian registered aircraft, 25,007 licensed pilots, 2,150 licensed authorities held by 1,444 air carriers operating in Canada (40% Canadian and 60% foreign), 16,002 aircraft maintenance engineers, 859 approved maintenance organizations, 564 certified aerodromes and 1,460 non-certified aerodromes. [10]

In March 2025, the federal government introduced a policy statement on investment at National Airports System airports operated by airport authorities. [11] The policy statement aims to attract private investment for modernising and expanding airports, enhancing infrastructure to meet growing demand for air travel. It outlines three avenues, subleases, subcontracts and subsidiaries, for private investors and developers to collaborate with airport authorities.

In response, various airports have announced major infrastructure upgrades. Aéroports de Montreal has embarked on Flight Plan 2028, involving several projects over the coming years including the addition of local parking areas and a new jetty for satellite boarding gates, the construction of drop-off areas, the opening of the REM station and the demolition of the existing multi-level parking lot. By 2035, the plan will culminate with the completion of additional drop-off areas and parking facilities, as well as the extension of the terminal façade. [12]

The Greater Toronto Airport Authority is implementing Pearson LIFT, a multi-billion-dollar investment in Toronto Pearson, consisting of three major programs. The first program is underway and will deliver vital upgrades and revitalization of the airport assets, aiming to improve on-time performance, reduce emissions, mitigate climate-change impacts and accommodate near-term passenger growth. Phase 2 looks at expanding terminal facilities, while Phase 3 will consist of revitalizing existing Terminals 1 and 3. [13]

Canada being the vast country that it is, the National Highway System alone spans more than 38,000 km. Municipalities collectively own approximately 7,000 km of highways across Canada, more than 155,000 ***114** km of arterial and collector roads, nearly 530,000 km of local roads and about 21,000 km of lanes and alleys. [14]

Much of the road infrastructure is in poor shape. In Nova Scotia, for example, just 27% of roads were reported to be in ‘good’ or better condition, [15] leading to an announcement from the provincial government that $500M would be earmarked for work on roads and bridges in 2025-26. [16]

It is clear that whether it relates to trains, planes or automobiles, a lot of money will be spent on construction and repair of transportation infrastructure in Canada over the coming decades. Inevitably, some contractors and suppliers will find themselves embroiled in payment disputes and will resort to asserting a construction lien to secure their claims for payment. In some cases, however, they may find a lien remedy is not available. This paper will explore if and to what extent unpaid contractors, subcontractors and suppliers on Canadian transportation projects can avail themselves of construction liens.

2. TRAINS

2.1 What is a Railway?

As will be discussed below, some provincial lien acts expressly extend their application to railways or railway rights-of-way. [17] None of those Acts, however, define "railway" or "railway right-of-way". Definitions can be found in other legislation such as provincial or federal railway legislation or specialized Acts like the *City of Toronto Act*, which provides that "the Toronto Transit Commission is deemed to be a street railway company for the purposes of *The Railways Act*, being chapter 331 of the Revised Statutes of Ontario, 1950." [18]

Generally speaking, the fact that "railway" has been defined for the purpose of another statute does not allow one to import that same definition into the relevant lien legislation. [19] In *Simpson v. Gateman-* ***115** *Milloy Landscape Contractors Ltd.*, [20] for example, the court refused to import the definition of "street" from the *Local Improvement Act* into the former *Construction Lien Act*, which contained no such definition. Instead, the court held that in such situations, it was "thrown back to the ordinary dictionary meaning of the words".

The *New Shorter Oxford English Dictionary* [21] defines "railway" as follows:

> **1** A way or road laid with rails (orig. of wood, later usually of metal) on which the wheels of wagons are made to run; the way composed of rails so laid; any set of rails intended to facilitate the motion of wheels.

2 A track consisting of a pair of metal rails on which carriages or wagons conveying passengers or goods are moved by a locomotive or powered carriage; a set or network of such tracks; an organization or company whose business is the conveyance of passengers or goods on such tracks.

2.2 What is a Railway Right-of-Way?

The court in *Advanced Construction Techniques Ltd. v. OHL Construction Canada* [22] was asked to determine whether a lien on a Toronto subway station was a lien on a "railway right-of-way". In doing so, the court considered definitions from various other pieces of legislation:

> 110 Mr. Kirsh, counsel for the general contractor relies upon various pieces of provincial legislation addressing the definitions to be applied in establishing whether a railway right of way exists for the purposes of determining the applicable perfection provisions.

> 111 The Toronto Transit Commission obviously is responsible for the overall subway construction project. In Section 394(2) of the *City of Toronto Act, 2006*, provides with respect to the TTC that:

> "Status as street railway company

(2) The TTC is deemed to be a street railway company for the purposes of *The Railways Act*, being chapter 331 of the Revised Statutes of Ontario, 1950"

***116** 112 Section 1(o) of *The Railways Act*, R.S.O. 1950, c. 331, defines a "railway":

"railway" means any railway which the company has authority to construct or operate, and includes all branches, sidings, stations, depots, wharfs, rolling stock, equipment, stores, property real or personal, and works connected therewith, and also any railway bridge, tunnel, or other structure which the company is authorized to construct."

113 Section 1(c) of *The Railways Act*, defines a "company" as:

(c) "company" means a railroad, street railway or incline railway company, and includes every such company and any person or municipal corporation having authority to construct or operate a railway or street railway or incline railway.

114 Counsel then relies upon *Brennan v. Toronto Transit Commission*, 2001 CarswellOnt 3310 (Ont. S.C.J.), at para. 2 the Court considered the TTC as a " "street railway company", finding that:

The TTC is a "street railway" (City of Toronto Act, 1997 (No.2), S.O. 1997, c.26) which includes stations, equipment, works connected therein, tunnels, other structures which it is authorized to construct under the Railways Act, R.S.O. 1950, c.331, 5.1(0); *Lofting v. Toronto Transit Commission*, [1958] O.W.N. 243 (Ont. C.A.)."

[emphasis added]

115 Counsel for OHL asserts that Ontario Regulation 192/07, a regulation to the *Development Charges Act*, 1997, S.O. 1997, c. 27, titled "*Toronto-York Subway Extension*" specifically considers and clarifies the scope of the Toronto-York Spadina Subway Extension, noting that it includes *inter alia*:

(a) real property for rights of way, subway stations, subway commuter facilities and related facilities; ...

(c) subway stations, including entrances, exits and ancillary station facilities such as ventilation shafts; ...

(f) tunnel and signal systems;

***117** (g) track systems and running structures, including crossovers, railtracks and ancillary operating facilities; ...

(i) road works, utility relocations and traffic management measures to facilitate the construction and operation of the subway, subway trains, subway stations and subway commuter facilities ...

[...]

120 A "street railway" is defined at section 1 (u) of *The Railways Act* as follows:

"street railway" means a railway constructed or *operated along and upon a highway* under an agreement with or by-law of a city or town**,** although it may at some point or points deviate from the highway to a right-of-way owned by the company, under the powers conferred by section 243, and includes all portions of the railway within the city or town and for a distance of not more than one and one-half miles beyond the limits thereof, although such one and one-half miles may be constructed under a bylaw of or agreement with a municipal corporation other than that of such city or town, and also includes any part of an electric railway

> which lies within the limits of a city or town ***and*** is constructed or operated along and upon a highway and includes buses and other vehicular means of transportation operated as part of or in connection with a street railway
>
> [Emphasis added].
>
> 121 As previously noted the term "railway right of way" is not defined in the *Act*.
>
> 122 A "right of way" is typically an easement, although pursuant to *The Railways Act*, a railway right of way may be owned as a fee simple interest. An "easement" is an interest in land owned by another person, consisting of the right to use or control the land for a specific purpose. The acquisition of a right of way by way of an easement does not give the holder a fee simple interest or the right to exclusive possession; the degree of occupation for such right of way will be governed by the document conceding such grant. [see ***118** *Kendrick v. Martin*, [2011] O.J. No. 4721 (Ont. S.C.J.). *Miller v. Tipling*, [1918] O.J. No. 110 (Ont. C.A.). *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746 (S.C.C.)]

The court concluded that for there to be a valid right-of-way for the purposes of the *Construction Lien Act*, the right-of-way had to be validly registered under the *Land Titles Act*. In the result in that case, the court found the Toronto Transit Commission to be a street railway, but since it did not have a right of way, either by easement or in fee simple, on the land in question, there was no "railway right of way".

2.3 Federal Railways

2.3.1 Definition of "Crown" in Provincial Statutes

A reference to the Crown, without more, in a provincial statute means the Crown in Right of the Province only.[23] Since the various provincial lien acts, in their definition of "Crown", make no reference to His Majesty the King in Right of Canada, those acts never purported to apply to the federal Crown.[24]

2.3.2 Application of Lien Acts to Federal Railways

The *Constitution Act, 1867* gives provincial legislatures the exclusive power to make laws in relation to Local Works and Undertakings other than the following:

> a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

> b) Lines of Steam Ships between the Province and any British or Foreign Country;
>
> c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces. [25]

***119** Section 91(29) brings these express exceptions to provincial jurisdiction under federal legislative power. In other words, s. 92(10) lists several exemptions to provincial powers, and s. 92(29) then provides that those things that are not provincial are federal. The *Constitution Act, 1867* therefore gives the federal parliament the legislative power over interprovincial or international railways and leaves the provincial parliaments with authority over intraprovincial railways. [26] Even a local work, however, can be placed under federal jurisdiction by a unilateral declaration that the work is for the general advantage of Canada or for the advantage of two or more of the provinces. [27]

Therefore, jurisdiction over trains depends mainly on whether the trains are part of an interprovincial or international enterprise or are strictly intraprovincial. In the former case, they would fall under federal jurisdiction, in the latter under provincial jurisdiction, unless they have been declared to be for the general advantage of Canada or two or more provinces. The Canadian Transportation Agency defines federally regulated railways as follows: [28]

A railway company that meets one of the following criteria:

- Operates across provincial, territorial, or international boundaries;
- Operates within Nunavut, the Northwest Territories, or the Yukon;
- Is owned, controlled, leased or operated by a federally regulated railway company;
- Has been declared by Parliament to be for the general advantage of Canada; or,
- Is an integral part of an existing federal undertaking.

At the time of writing, 26 railways hold a valid certificate of fitness and come under the federal legislative authority of Parliament. [29]

Based on century-old precedent, as a general proposition liens arising under provincial statutes cannot be enforced against railways because railways are subject to the exclusive legislative authority of the federal government. [30] However, precedent also establishes that federal undertakings are not completely immune from builders' lien legislation. [31]

***120** The early cases concerning liens on railways were summarized by the Supreme Court of Canada in *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [32] itself not a railway case, but a case concerning an interprovincial pipeline:

> The general principle was stated by Sir Hugh M. Cairns, L.J. in *Gardner v. London, Chatham and Dover Railway*:
>
> When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred.
>
> In the same judgment and speaking of the effect of an authorized mortgage of the "undertaking" he said: --
>
> The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis* -- that is to say, the earnings of the undertaking -- must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot; under their mortgages, or as mortgagees -- by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking -- either prevent its completion, or reduce it into its original elements when it has been completed.
>
> 23 To the same effect, in the case of execution, are *Peto v. Welland Railway Company*, and *King v. Alford* (an engine house and turntable of a railway) which followed *Breeze v. The Midland Railway Company* (a station house).

> ***121** 24 These considerations, *a fortiori*, become controlling when the question arises as between Provincial and Dominion jurisdictions. The mutilation by a province of a federal undertaking is obviously not to be tolerated in our scheme of federalism, and this from the beginning has been the view taken of provincial legislation of the nature of that before us.

> 25 In *Johnson & Carey Co. v. Canadian Northern Railway Co.*, which followed *Crawford v. Tilden*, as a binding decision, a lien claimed by a sub-contractor against a portion of the defendant's railway, under Dominion jurisdiction, was denied. The governing case had gone before both the Divisional Court and the Court of Appeal, and in both the judgment was unanimous. In *Larsen v. Nelson & Fort Sheppard Railway*, a similar ruling was made. In *Western Canada Hardware Co. Ltd. v. Farrelly Bros. Ltd.*, the Appellate Division of the Supreme Court of Alberta, speaking through Stuart J.A., found against the application of *The Mechanics' Lien Act* to an irrigation ditch constructed under the authority of Dominion legislation.

When deciding whether mechanics' lien legislation could apply to a quarry owned by Canadian National Railways adjacent to its railway line, the Supreme Court of Canada rejected the idea that the land on which the quarrying was carried out could not be subject to provincial lien legislation because the lien would interfere with the operation of a federally authorized transportation undertaking. The court held that there was no principle of absolute immunity from provincial legislation of railways that are under exclusive federal regulatory control and that provincial legislation may, to some extent, apply to interprovincial and international railway systems in respect of operations which are not integral to the transportation facility. The quarry was one such operation that was not essential to the railway in its day-to-day functioning. [33] Railway sheds or switching stations, on the other hand, are essential. [34] In a non-lien context, the Supreme Court of Canada has held that a hotel run by a railway company did not form part of the railway, no matter how much the hotel might contribute to the success of the undertaking. [35]

Again, in a non-lien context, in *Winnipeg (City) v. Canadian Pacific Railway*, [36] a railway company owned and operated a railway ***122** maintenance and repair facility. When the company commenced construction of a new structure within that facility which was to house employees' lockers, lunch and conference room and bathrooms, it was held that the construction was within a facility of the company that significantly supported its core function of running trains. Therefore, construction within that facility was immune from the control of municipal by-laws.

The Nova Scotia Court of Appeal held that there was no lien for the supply of services and materials for the cleaning and painting of a bridge of the Canadian National Railway, holding that "the reference to railway companies in the *Mechanics' Lien Act* is obviously to railways operated by private companies," not federally regulated ones. [37]

The most recent decision on point is *Canadian Pacific Railway Co. v. Kelly Panteluk Construction Ltd.*, [38] which concerned the application of the Saskatchewan *Builders' Lien Act* to construction services provided to a railway spur line Canadian Pacific was building near Belle Plaine, Sask. The contractor provided the earthworks for the projects, including work on the embankments.

In addition to the Supreme Court cases mentioned above, the Saskatchewan Court of Appeal also relied on *Perini Ltd. v. Consolidated Denison Mines Ltd.*, [39] where builders' lien legislation was found inapplicable only to the extent that it sterilized a federal undertaking in its function and activity or impaired its status and essential capacities to a substantial degree. The Court of Appeal concluded that builders' lien legislation *can* apply to railways with the qualification that a lien cannot be registered against the land of the railway if that land is essential to the operation of the railway as a federal undertaking. As

set out above,[40] the "vital and essential part of the undertaking" test continues to apply in this context. In *Kelly Panteluk*, it was common ground that the land in question was such land. Since there could be no lien in this situation since railway land was essential to the operation of the railway as a federal undertaking, and since the requirements to retain a holdback, create a holdback trust account, and create a charge on that holdback were all dependent on the existence of a lien, the contractor ***123** could only pursue a trust claim in the absence of a valid lien claim on the railway's lands.

2.3.3 Interjurisdictional Immunity

Another line of cases has argued against the application of provincial lien legislation to federal railways based on interjurisdictional immunity.

Two constitutional doctrines generally come into play when provincial statutes have the potential to intrude into Parliament's exclusive jurisdiction: paramountcy and interjurisdictional immunity. The doctrine of paramountcy applies in the context of competing federal and provincial legislation to assist in assessing whether the provincial legislation must give way to the "paramount" federal legislation because of operational conflict.[41] Since there is no federal enactment that somehow competes with builders' lien legislation, the doctrine of paramountcy does not come into play.[42]

The doctrine of interjurisdictional immunity is triggered when either a provincial legislature or the federal parliament has enacted legislation that appears to trench upon a legislative power assigned by the constitution to the other, and, when the issue is not one of competition between provincial and federal legislation, but the potential application of provincial legislation, for which there is no federal counterpart, to a federal concern.[43]

Builders' lien legislation is valid provincial legislation under s.92(13) of the *Constitution Act 1867*, which gives each provincial legislature exclusive jurisdiction to make laws in relation to "property and civil rights in the province". Normally, a valid provincial law of general application, such as builders' lien legislation, may validly affect a federal matter. Interjurisdictional immunity is the exception to this general rule.[44]

As described by the Ontario Court of Appeal, "the interjurisdictional immunity principle holds that 'a basic minimum and unassailable content' must be assigned to each head of federal legislative power. Because federal legislative power is exclusive, provincial laws cannot ***124** affect that essential core. A provincial law, valid in most of its applications, must be read down not to apply to the core of the exclusive federal power. The application of this principle differs from the paramountcy doctrine in that it does not require conflicting or inconsistent federal legislation, or even the existence of federal legislation."[45]

Incidentally, the interjurisdictional immunity principle has its roots in a 19th century case concerning a railway. In *Canadian Pacific Railway v. Notre Dame de Bonsecours (Parish)*,[46] the Privy Council held that the Province of Québec could not regulate the construction of a ditch alongside a federal railway based on federal Parliament's "exclusive right to prescribe regulations for the construction, repair and alteration of the railway and for its management", but the province could order the railway company to clear a blockage in the ditch that caused flooding on nearby land:

> 7 The *British North America Act*, whilst it gives the legislative control of the appellants' railway *quà* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, inter alia, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the " "railway legislation," strictly so called, applicable to those lines which were placed under its charge

> should belong to the Dominion Parliament. It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to ***125** cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the Legislature of Quebec.

The test for interjurisdictional immunity has undergone some recent changes in the Supreme Court of Canada. In 2000, the Ontario Court of Appeal applied a trilogy of Supreme Court cases to state the test as follows: "If a provincial law affects a vital or essential or integral part of a federally regulated enterprise, then the otherwise valid provincial law does not apply to that enterprise."[47] In 2007, in *Canadian Western Bank v. Alberta*,[48] the Supreme Court went back to a stricter test:

> 77 Although our colleague Bastarache J. takes a different view on this point, we do not think it appropriate to *always* begin by considering the doctrine of interjurisdictional immunity. To do so could mire the Court in a rather abstract discussion of "cores" and "vital and essential" parts to little practical effect. As we have already noted, interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction. If a case can be resolved by the application of a pith and substance analysis, and federal paramountcy where necessary, it would be preferable to take that approach, as this Court did in *Mangat*.

In *Vancouver International Airport v. Lafarge Canada Inc.*,[49] the British Columbia Court of Appeal noted that development, but stressed while ***126** the doctrine was now consigned to a more limited role than was previously enjoyed, "interjurisdictional immunity continues to provide guidance in those circumstances where the jurisprudence historically has dictated its application". In *Vancouver Airport*, the subject matter of aeronautics and federal undertakings for the operation and management of airports was one such example. Railways are another.

Interjurisdictional immunity was discussed in a railway context in the Ontario Court of Appeal decision in *Halton (Regional Municipality) v. Canadian National Railway Company*.[50] In that case, CNR was in the process of constructing an "intermodal hub" in the town of Milton. The project was to enable shipping containers to be moved by freight train for most of their journey to and from the Greater Toronto Area and then be moved into and out of the intermodal hub by heavy trucks, designed to lead to a reduction in heavy truck traffic on Canadian highways along with the broader environmental benefits that this entails.

Obviously, a project of that size affected many local residents adversely, including through the disruption caused by ongoing construction, the noise and heavy truck traffic it will generate, its environmental impact, and the demands it will impose on local infrastructure. Not surprisingly, then, the project was not uniformly welcomed. A number of municipalities, including the Region of Halton, an upper-tier municipality, sought declarations that CN was obligated to seek and obtain requisite approvals under more than 65 listed provincial laws, regulations, and municipal bylaws (the "listed local laws") and enjoining CN from continuing construction or operation until it complied with those listed local laws.

The Ontario Court of Appeal, like its British Columbia counterpart, commenced this discussion by stating that limits are imposed on the reach of interjurisdictional immunity in two different ways [citations omitted]:

> 46 First, the doctrine is to be used with restraint. It should "*in general* be reserved for situations already covered by precedent" [...]
>
> 47 Second, to prevent interjurisdictional immunity from being given broad sweep the doctrine is applied strictly even in those spheres where it is available for consideration. To be rendered ***127** ineffective under this doctrine a law must: (1) impair, (2) a "core" or "vital and essential" element of the exclusive power.
>
> 48 "Impair" is a higher standard than "affect", the standard that once applied. For interjurisdictional immunity to be conferred under the current law, the impugned law must intrude in a significant or serious way on the exercise of the core competence, although "it need not paralyze it" or " "sterilize it".
>
> 49 A "core" of a federal power -- the thing that must be impaired by the impugned law for interjurisdictional immunity to operate -- has been described as the "'basic, minimum, and unassailable content' of the legislative power in question which is 'necessary to make the power effective for the purpose for which it was conferred"'. As indicated, the core is often identified by considering what is "vital or essential" to achieve the purpose for which exclusive legislative power was conferred.
>
> 50 There are generally two steps in an interjurisdictional immunity inquiry. The first step is to determine whether the impugned law trenches on the protected core of the other level of government's exclusive legislative jurisdiction. This involves determining what is in the core of the power or undertaking, a determination that should be guided by precedent. This is done by asking, what is the "basic, minimum, and unassailable content" of the legislative power in question, which is "necessary to make the power effective for the purpose for which it was conferred":. If interjurisdictional immunity could apply based on this inquiry because the impugned law will intrude upon the protected undertaking, the second step is launched, which is to resolve whether the impugned law's intrusion on the exercise of the protected undertaking is sufficiently serious to invoke the doctrine. This involves determining whether the impugned law "impairs" an aspect of the law or undertaking that "makes them specifically of [the exclusive] jurisdiction":

Halton first argued that the intermodal hub was not a railway undertaking, since the trucking component of the hub was critical and a dominant feature, since most of these trucks would not be owned or operated by CN, and since many of them would be conducting short haul operations within Ontario.

***128** The court disagreed. There was ample evidence establishing that the function of the intermodal hub was to enable the transport of goods in and out of the Greater Toronto Area by rail, and the use of containers to permit goods to be transferred more effectively from truck to railcar at the intermodal hub did not change this:

> 57 It follows, in my view, that the involvement of the trucks does not alter the function of the intermodal hub as an essential part of the railway undertaking. The intermodal hub serves the railway in the same way a more conventional railway station does, as a location to embark and disembark cargo. Trucks must use the intermodal hub to provide the railway with access to cargo, an indispensable and necessary function to the railway's viability. This in no way undercuts the fact that the intermodal hub is a vital part of the railway installation.

Halton then argued that there was no precedent for establishing that the construction and operation of an intermodal hub lay at the "core" of federal railway jurisdiction, and therefore the first step of the test for interjurisdictional immunity was not met. That, according to the Court of Appeal, was too rigid an interpretation, and it was sufficient that there was precedent establishing that the location, construction, and operation of installations that serve the railroad's operation have been recognized as vital or essential aspects of a railway undertaking that falls exclusively under federal jurisdiction.

Finally, the Court of Appeal agreed with the court below that the bylaws in question impaired the "core" of a federal undertaking:

> 69 The application judge found that all three bylaws impair CN's core function relating to the construction and operation of the intermodal hub. He based his decision on his conclusion that in order to comply with those bylaws "prior to building the intermodal hub CN is required to apply for exemptions from curb cut and grading bylaws by applying for and obtaining official plan amendments." He held that the bylaws "cannot apply to require CN to seek official plan amendments prior to building its intermodal hub" without impairing the core federal powers at issue. I see two strains of reasoning in this explanation. First, the official plan approval that he found to be required under each of the three bylaws confers broad discretion on municipal officials that effectively authorizes them to prohibit the construction of the intermodal hub, since official plan amendments are highly discretionary. The power ***129** to prevent the project is impairing. Second, he found that the official plan approval will require years of proceedings. Although he did not articulate it, it is clear from his reasoning that he found this delay would itself constitute an impairment of the core federal power.

The test for applying the doctrine of interjurisdictional immunity was therefore met, and CN was not obligated to seek and obtain requisite approvals under the various local laws.

To summarize, while a federal undertaking is not immune from provincial legislation, interjurisdictional immunity applies when provincial legislation would impair, without necessarily sterilizing or paralyzing, the federal power or undertaking. The latest word on this in a railway context is the 2025 Federal Court of Appeal decision in *BNSF Railway Company v. Greater Vancouver Water District*, [51] where the court held that a province had no jurisdiction to expropriate or require a railway to permit the construction of a road or utility line on, a railway right of way subject to federal jurisdiction.

2.3.4 Non-Federal Railways Tied to Other Federal Undertakings

Provincial or local railways can become subject to federal jurisdiction if they can be regarded as essential or conducted in common with a core interprovincial undertaking. [52] In *United Transportation Union v. Central Western Railway Corp.*, [53] a provincial railway acquired track from a federal railway, but its line was entirely within Alberta. The company brought empty cars to elevators and transported the loaded cars to points on the line for transportation by a federal railway to destinations within the province and beyond. The Supreme Court of Canada held that there was insufficient operational connection between the two railways to constitute the provincial company an interprovincial railway.

This matter has more recently been decided in the context of the airport rail link between Toronto's Union Station and Pearson International Airport. UP Express, the company operating the line, is a division of Metrolinx, an agency of the Government of Ontario under the *Metrolinx Act, 2006*. [54] On March 18, 2009, the Union-Pearson AirLink Group Inc. (“UPAG”) and related SNC-Lavalin entities applied to the Canadian ***130** Transportation Agency for a determination to confirm that the proposed rail service link was not a railway whose construction or operation was subject to subsections 90(1) and 98(1) of the *Canada Transportation Act*. To do so, the Agency had to determine whether the proposed construction or operation of the UPAG project fell under federal jurisdiction and therefore required a certificate of fitness and federal approval to construct and operate the proposed railway line. The Agency released Decision 291-R-2009 on July 8, 2009. [55]

The Agency set out the test as follows:

> A railway is within the legislative authority of Parliament and, thus, within the purview of the Agency, if any of the following conditions are met:
>
> • the railway work or undertaking connects or crosses provincial borders;
>
> • a company operates a railway across international borders;
>
> • the work is declared to be for the general advantage of Canada;
>
> • the railway work is owned, controlled, leased or operated by a person who operates a railway within the legislative authority of Parliament; or
>
> • it is an integral part of an existing federal undertaking.

The proposed link would not extend beyond the borders of Ontario. There was no evidence to indicate that the project had been declared to be a work for the general advantage of Canada.

Neither UPAG, the UPAG project, nor any SNC-Lavalin entities involved in the UPAG project were to be owned, controlled, leased or operated by a person who operates a railway within the legislative authority of Parliament. The rail equipment used for the proposed link would not be part of the fleet owned and managed by a federal railway company but would be provided by the UPAG project operators. Similarly, the operating crew for the proposed service would not be supplied by a federal railway company, but would be provided by, employed by, and serve under the direction of the UPAG project operators.

The Agency noted that, at the time of filing the application, UPAG proposed that part of its operation would involve obtaining the right to operate over the Canadian National Railway Company's (CN) Weston ***131** Subdivision. UPAG argued that the physical connection of a local railway work with one of a federal railway was insufficient to bring the UPAG project under federal jurisdiction. In any event, on April 8, 2009, GO Transit and CN announced that GO Transit was acquiring CN's Weston Subdivision. As a result, GO Transit, which operates under provincial legislative authority, would become the “host railway” to the proposed service. Consequently, there would be no connection of the line to, or the use of, any of CN's lands.

Therefore, the Agency held that the project would not be owned, controlled, leased or operated by a person who operates a railway within the legislative authority of Parliament. That alone, however, did not end the inquiry. The project could still be subject to the jurisdiction of Parliament if it would be integral to an existing federal work or undertaking. That federal project or undertaking would be Pearson International Airport.

The Agency's answer to this question was based on the five principles established by the Supreme Court of Canada in *United Transportation Union v. Central Western Railway Corp.*: [56]

> 1. Whether Pearson is a core federal work or undertaking in relation to which the UPAG project might conceivably be seen as integral.
>
> 2. Whether the nature of the UPAG project's operation identifies it as a federal undertaking.
>
> 3. Whether work is occurring simultaneously between the two enterprises, such that functional integration may exist.
>
> 4. Whether the effective functioning of Pearson in any way dependent on the services of UPAG.
>
> 5. Whether there is more than a physical connection and a mutually beneficial commercial relationship with Pearson.

It is, of course, well established that Pearson comes under the federal power of aeronautics and therefore falls within federal jurisdiction. The question to be determined, then, was whether the rail link could be viewed as integral to Pearson. If so, it would be integral to aeronautics and within federal jurisdiction.

***132** UPAG's application described the project as follows:

> Rail Infrastructure:
>
> The introduction of the Union-Pearson Rail Link involves the addition of new rail infrastructure (Spur Line) into Pearson Airport, grade separation of roads along the Spur Line, and modifications to existing transit stations (Bloor GO / Dundas West TTC, Weston GO).
>
> The rail (Spur Line) connection between the expanded Georgetown South Corridor and the Pearson Airport will occur on a new single track system from just east of Highway 427 diverging to the southwest into Pearson Airport. The new track will be approximately 3.3 km in length and will run on an elevated guideway, with the exception of the segment serving the Operations and Maintenance Centre (refer to Exhibit 3 and Section 3.2.4). The Union-Pearson Rail Link will also make use of the Georgetown South infrastructure."
>
> Maintenance Facility:
>
> The new Facility, including storage tracks, maintenance tracks, a maintenance shop and operations management offices will occupy approximately 2 hectares of land leased from the GTAA, adjoining and connected to the corridor in which the Spur Line is to be located. This irregular/triangular shaped land is bound by Highway 409/427 on the east, the turn circles of Northwest Drive and Dorman Road on the west, and Network Road on the south. [...]
>
> Station Facilities:

> The Union-Pearson Rail Link Station to be constructed at Pearson Terminal 1 will be attached to, and adjacent to, the public parking garage. The Station will be located at the same level as the garage's fifth floor. [...]
>
> Interface to the existing "Automated People Mover" (APM) [...]:
>
> The UPAG project trains are entirely distinct in operation and equipment, direction and control, and operate on different trackage than the APM shuttle between terminal buildings. The two different systems meet up at the station facilities, as part of good planning to efficiently use space and to facilitate transfers and access. The Union-Pearson Rail Link Station will be located at the western end of the APM platform, but ***133** through a doorway and at a slightly different level. Access to the Union-Pearson Rail Link Station will be clearly delineated for customer and destination control with distinct signage and provision for ticketing facilities for the rail link service.

In the result, the Agency held that the UPAG project was essentially local in nature. It was intended to improve access between Pearson and the Greater Toronto area, akin to the service provided by commuter rail operators. There was no evidence that the UPAG project was intended to operate simultaneously with the APM, notwithstanding the intention that the UPAG service and the APM trains would meet. There would be no interdependence of the APM shuttle and service by the UPAG project, other than the connection at Terminal 1. The project would not interfere with and would not be an essential or integral part of the activities of the GTAA. It would be distinct from both Pearson's airside and groundside facilities, such as the APM route and the Terminal 1 parking garage. While there was clearly a physical connection and a mutually beneficial commercial relationship between UPAG and Pearson, the effective functioning of Pearson as an airport would not be dependent on the services of the UPAG project. The project was therefore held not to be sufficiently functionally integrated with Pearson to bring it under federal jurisdiction.

2.4 Provincial Railways

2.4.1 Application of Lien Acts to Provincial Crown

The Alberta *Prompt Payment and Construction Lien Act* does not apply to agreements to finance and undertake an improvement in which the Crown in Right of Alberta or provincial corporations are a party, or to public works as defined by the *Public Works Act*.[57]

The situation in British Columbia is not entirely clear, but the text of the *Builders' Lien Act* provides for limited application to the provincial Crown. While most Canadian provincial Interpretation Acts or Legislations Acts provide that no Act binds the Crown unless the Act expressly says so, the British Columbia Interpretation Act provides the opposite: unless an Act specifically provides otherwise, it is binding on the government of British Columbia. However, the Act then states that despite that general rule, an enactment that would bind or affect the government in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements, ***134** as defined in the *Assessment Act,* does not bind or affect the government. No court has expressly applied this section with respect to builders' liens, but since s. 31(6) of the *Builders' Lien Act* provides that no order for the sale of an interest in land owned by the Crown or a municipality may be made, but the court

may give judgment for an amount equal to the maximum liability under this Act, as owner against either of them, [...]", it has been held that the Act likely applies to the provincial Crown. [58]

In Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia, the respective lien acts apply to the Crown, but where the Crown is an owner, the lien does not attach to the land but constitutes a charge against the holdback. [59]

The Prince Edward Island Act includes the Crown in its definition of ""owner". [60] The Newfoundland *Mechanics' Lien Act* does not mention the Crown, so that by virtue of its *Interpretation Act*, [61] which provides that no provision of a statute binds or affects the Crown unless that statute expressly states it does, the *Mechanics' Lien Act* does not apply to the Crown. The same appears to be true for the Northwest Territories [62] and the Yukon. [63] To the contrary, the *Legislation Act* of Nunavut states that "All enactments are binding on the Government of Nunavut". [64]

2.4.2 Application of Lien Acts to Provincial Railways

Some provincial builders' lien statutes include specific provisions for railways. The Acts of Alberta, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland expressly allow for the registration of liens against lands of a railway company. [65] Section 16(3)(b) of Ontario's *Construction Act* [66] treats work done on railway rights-of-way the same as Crown-owned land.

Some provincial lien statutes state that they do not apply in respect of contracts with the Crown or Crown agencies, or to public works. Where ***135** that is the case, the possibility of liening railways will be restricted to local railways.

The Acts of British Columbia, Saskatchewan and Manitoba are silent on railway land. It has been held in British Columbia that work done on a light rail transit system was work done on a "highway" and thus excluded from the operation of the *Builders Lien Act*. [67] That decision was overruled three years later in *Defazio Bulldozing & Backhoe Ltd. v. W.A. Stephenson Construction (Western) Ltd.*, [68] in which the British Columbia Court of Appeal held that an automated light rail transit system was not a highway and the application of the Act was not excluded. As seen above, the Saskatchewan Court of Appeal, in *Canadian Pacific Railway Co. v. Kelly Panteluk Construction Ltd.*, [69] held that since the *Builders' Lien Act* was silent on railway land, it had to look at the jurisprudence to determine its applicability to such land. It would appear, therefore, that the fact that lien legislation does not expressly address liens against railway land does not mean that liens cannot attach to such land in those jurisdictions.

Only few railway companies are actually run and operated by the provinces themselves. For example, s. 4 of the *British Columbia Railway Act* [70] constitutes the British Columbia Railway Company an agent of the government. Section 3 of the *Metrolinx Act, 2006* [71] makes Metrolinx a Crown Agency in Ontario, and s. 2.2 of the *Ontario Northland Transportation Commission Act* [72] does the same for the Ontario Northland Transportation Commission.

Other intraprovincial railways fall under provincial jurisdiction but are not part of the Crown. Again, by way of example, companies like the Battle River Railway or Forty Mile Rail in Alberta are subject to the provincial *Railway (Alberta) Act*, [73] but they are not the "Crown" or a "public work" for the purposes of the Alberta *Prompt Payment and Construction Lien Act*.

The provinces differ in their treatment of railway property when it comes to liening it. In Ontario, railway rights-of-way can be liened, but the lien does not attach to the premises. Instead, the lien constitutes a charge upon the holdbacks required to be maintained under the *Construction* ***136** *Act*. [74] Ontario is unique in that respect. The other provinces expressly allowing liens against railways prescribe special ways of registering such liens, but do not prevent attachment of the liens to the land.

2.5 Municipal Railways

2.5.1 Application of Lien Acts to Municipalities

Just like they differ in their treatment of the Crown, the various Acts differ in their treatment of municipalities. The Alberta *Prompt Payment and Construction Lien Act* is silent on municipalities, except that it excludes liens with respect to a public highway or for any work or improvement caused to be done on it by a municipal corporation. [75] It has been held, however, that liens will not be allowed against lands registered as municipal reserve lands as designated by the *Municipal Government Act*. [76] Aside from highways and municipal reserve land, however, municipal land seems to be subject to liens just like any other land, subject to public policy arguments. [77] Those public policy concerns are set out in *Prairie Roadbuilders Ltd. v. Stettler (County No. 23)*:

> If public interest can be a relevant fact to the application of the Act there would not appear to be any logical reason why, in certain circumstances, privately owned land might not be exempt. A ready example in this province is hospitals. They are owned by the Crown (in which case the Act clearly does not apply), by municipalities and by private owners. Regardless of whether a hospital is owned by a municipality or is owned privately it is open to the public at large. Most, if not all, of the funding for the operations of the hospitals comes from the provincial Crown. It can be safely said that in this province no hospital is in business to make a profit. Regardless of ownership hospitals are regarded as "public" institutions.

Section 31(6) of the British Columbia Builders' Lien Act provides that "no order for the sale of an interest in land owned by the Crown or a municipality may be made, but the court may give judgment for an amount equal to the maximum liability under this Act, as owner against either of them, and any money realized on the judgment must be dealt with as if it were the proceeds of a sale of the interest in land", so ***137** municipal land in that province seems to be subject to liens, with the exception of streets. [78]

In Saskatchewan, Manitoba and Ontario, the respective lien acts apply to municipalities, but like with the Crown, the lien does not attach to the land but constitutes a charge against the holdback. [79]

In New Brunswick, liens do not attach to the estate or interest of a local government in a highway or in a highway improvement but instead constitute a charge against the holdback. [80] Presumably, that leaves other local government improvements subject to being liened. The Nova Scotia Act does not apply to streets and highways, but aside from that, the definition of "owner" expressly includes municipalities. [81]

Nothing in the Acts of Prince Edward Island and the three territories excludes municipalities, again with the exception of streets and highways. [82]

As set out above, the Acts of Alberta, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland expressly allow for the registration of liens against lands of a railway company. [83] Section 16(3)(b) of Ontario's *Construction Act* [84] treats railways the same as Crown-owned land. As also discussed, the fact that provincial lien statute is silent on railways does not mean that liens cannot attach to such land in those jurisdictions.

2.5.2 Application of Lien Acts to Municipal Railways

As set out in chapter 3.2 above, the various Acts differ in their treatment of railways, with the Acts of Alberta, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland expressly allowing for the registration of liens against lands of a railway company, [85] Ontario treating work done on railway rights-of-way, including those of local railways, the same as work done on Crown-owned land, and British Columbia, Saskatchewan and Manitoba being silent on the issue. As set ***138** out above, it would appear that railway lands can still be liened in the latter three provinces. [86] In what follows, we will discuss liens against various local railway projects.

As seen above, while the various Acts do not define "railway", based both on the "normal" Oxford English Dictionary definition and with a look to railway-specific legislation, there can be little doubt that common municipal rail projects like streetcars, subways and LRTs are "railways".

2.6 Public Policy Reasons Militating Against Liens

Some courts have concluded that railway land should not be lienable based on public policy grounds. An example is *Big Creek Construction Ltd. v. York-Trillium Development Group Ltd.*,[87] where the court held as follows:

> I do not think that it is necessary to engage in a complete analysis of whether a "subway" could count as a "railway" within the section. I think it fair to observe that there seems to be a general public policy reason for not allowing areas under government (or government agency or even private) control or supervision related to transportation of persons and goods to be liened. I would not think I would do any damage to my discretion or the public policy principle if I were to exercise my discretion in requiring a discharge of the lien (and vacation of registration) not only from the roadway (for which no discretion exercise is required) but also from the Transit Parcel (which encompasses the subway and the bus terminal).

In *Advanced Construction Techniques Ltd. v. OHL Construction Canada*,[88] an Ontario Master distinguished the decision in *Big Creek* on the basis that once a lien is vacated, as it was in that case, the possible sale of a railway to satisfy the lien is no longer a possibility, thus robbing the public policy argument of "much of its steam".

In a recent Ontario decision, the court seemed to have no issues with the prospect of selling off subway stations. In *Walsh Construction v. Toronto Transit Commission*,[89] the court held as follows:

> ***139** 841 Walsh is entitled to a lien in the amount of $57,697,627.06 against the estate, title and interest of TTC, the City of Toronto, the Regional Municipality of York, and York University in the Premises.
>
> [...]
>
> 843 Leaving aside the issue of whether this is an effective remedy and whether there is a market for the sale of a used subway station, I see no basis to dismiss this, as was argued by TTC and Toronto. This is a remedy where there is a valid lien on title. As I read the *Advanced Construction* decision, it was a question of whether a claim for lien against a subway station should be dismissed for reasons of public policy, not whether the sale remedy, where there is a valid lien on title, is contrary to public policy. Ultimately, Master Short determined that to dismiss the claim for lien would defeat the public policy objectives of the *Construction Lien Act* and he denied the argument being advanced.

> 844 What other remedies Walsh may have to utilize to obtain payment for its claim is not in issue before me. However, Walsh is entitled to a claim for lien against the Premises in the amount of $57,697,627.06 as against TTC, the City of Toronto, the Regional Municipality of York, and York University. In the event of default of payment of this amount, plus interest and costs, the Premises may be sold, and any proceeds of sale applied against Walsh's claim.

In *Peter Wilson Drilling & Blasting Ltd. v. Pitts Engineering Construction*, [90] a British Columbia County Court judge vacated a lien on the following grounds:

> Clearly the filing of the claim of lien, backed by the ultimate remedy of sale, is a powerful tool in the claimant's hands. In this case it is effectively vested with the means by which to shut down the entire A.L.R.T. system. I do not view that to be in the public interest and conclude that the continuation of the claim of lien here is against public policy. The claims of lien and *lis pendens* are therefore vacated. I recognize the difficult position that conclusion may place the plaintiff in should Pitts become insolvent but the private interest in the circumstances must give way to that of the public.

***140** However, the British Columbia Court of Appeal, in *Defazio Bulldozing & Backhoe Ltd. v. W.A. Stephenson Construction (Western) Ltd.*, [91] expressly disagreed with that position, finding that the public policy consideration had to be restricted to applications for the ultimate order directing a sale to satisfy an adjudged lien which has gone unpaid. Lambert J.A. had this to say about public policy:

> 39 I move on now to the second point. It is that the sale of any part of the A.L.R.T. system to satisfy a lien would be contrary to the public interest and that, in consequence, the Builders Lien Act does not apply to the A.L.R.T. system. I have some difficulty in understanding how this point responds to the principle of the supremacy of the legislature; how it deals with the principle that clear legislation must be applied in accordance with its terms; and how it copes with the principle that legislation binds the Crown and its agencies. Section 14 of the *Interpretation Act* was mentioned in the course of argument but was not made the basis of a submission. But, whatever the answer to those difficulties, I agree with Carrothers J.A. that this point with respect to the public interest must be limited to questions of sale. There is no public interest in any other aspect of the *Builders Lien Act* that would prevent the operation of the Act with respect to the A.L.R.T. system. And there is no question of sale in this case. So I need not consider this point further.

A Manitoba court has held, albeit in *obiter*, that the sale of public infrastructure, in that case a municipal street, pursuant to lien legislation would clearly be contrary to public policy. [92] The Supreme Court of Canada later held that *Shields* had been correctly decided, finding that streets could not be made subject to a mechanics' lien in view of the paramount right of the public to passage over such streets. [93]

Under the current Ontario *Construction Act*, of course, now that liens against municipalities are treated just like liens against the Crown in that they do not attach to the land, liens against railways will never lead to a sale of land, so the public policy

argument does lose some of its force. In jurisdictions where liens against railways continue to attach to the land, the eventual sale of a railway pursuant to lien legislation might violate public policy, but the registration of a lien might not.

*141 2.7 What is Lienable Work?

2.7.1 Work on Infrastructure

There is little doubt that where work on railway property is generally lienable, work on railway infrastructure will give rise to a lien. Work on land, signalling, power installations, stations, tracks, level crossings, tunnels and electrified lines and the like will generally pose no problems when it comes to arguing that such work is done with respect to an "improvement" for the purposes of the relevant lien legislation.

2.7.2 Work on Rolling Stock

(1) Rolling Stock as Equipment Essential to the Normal Use of the Land

Generally, security interests in rolling stock are governed by the *Canada Transportation Act*. [94] Arguably, where rolling stock is used solely within one province, the regulation of those railcars would fall within provincial jurisdiction and the relevant provincial *Personal Property Security Act* would govern. [95]

No court has ever ruled on whether the supply of trains or other rolling stock alone constitutes a lienable supply of services or materials under provincial mechanics' lien legislation.

Until 2010, there would have been no argument, at least in Ontario, that the supply of trains could give rise to a lien. In *Kennedy Electric Ltd. v. Rumble Automation Inc.*, [96] a lien claimant had installed a massive robotic assembly line in a building to assemble Ford pick-up trucks. The Court held that that work was not lienable because it was moveable (i.e. portable) and not an integral part of the building. The Court held that a moveable installation did not improve the building in which it was located as it did not become a part of the building.

Courts have consistently held that where any machinery supplied to an improvement can be removed from the site, no matter how cumbersome that removal might be, such supply of machinery is not an "improvement". In *Beloit Canada Ltd. v. Fundy Forest Industries Ltd.*, [97] for example, the New Brunswick Court of Appeal found that a ***142** corrugating paper machine which weighed 2,500,000 pounds, installed on a concrete foundation in a building but removable from it, was not an improvement. Even actual structures that could be removed and used elsewhere, such as portable schoolhouses, did not constitute an "improvement". [98]

After the Court of Appeal decision in *Kennedy Electric*, however, the Ontario legislature amended the definition of "improvement" to include "any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works". [99] The intent, after the legislative amendment, was that the work done in *Kennedy Electric* would now be lienable. [100]

Based on that new definition, the law with respect to portable structures has recently undergone a change, at least in Ontario. In *On Point Ltd. v. Conseil des Écoles Catholiques du Centre Est*, [101] the court held that portable classrooms were "improvements" within the meaning of the *Construction Act* because they were indeed essential to the normal use of the land in this case and therefore fell within the new definition. The court found that lien rights arose where the structure was manufactured for specific land or in respect of a specific construction project, but not where the portable was manufactured with no end destination in mind.

By their very nature, trains are moveable. However, based on the current Ontario definition, trains could arguably constitute equipment essential to the normal use of the structure or works. However, they would still have to somehow be "installed". That is not a defined term under the Act. While the mere fact that they could be moved does not make their supply non-lienable

after the legislative amendment, it is likely that some sort of connection would still be required, and that if the trains could simply be driven to (and from) the project by way of other lines, or somehow be lowered onto the tracks and lifted off again, there would be no "installation".

Again, until recently, it would have been very clear that such work was not lienable, but there is now a case to be made, albeit maybe not a strong case, that where trains are custom made for a particular project, work on those trains might give right to a lien, at least in Ontario. Again, ***143** however, no court has ever opined on this, and it would be a very novel argument.

(2) Rolling Stock as Part of the Overall Project

In Alberta, "improvement" means anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to be or become part of the land. On that basis, large, mobile, custom-built mining equipment was held not to be an improvement to the land in *Rahco International Inc. v. Laird Electric Ltd.* [102]

A later decision, however, concluded that even in the event that mobile pumphouses did not constitute an "improvement", the oilsands project they were part of was an improvement, and therefore work done on the pumphouses was lienable. [103] That decision was based on the Saskatchewan Court of Appeal decision in *Grey Owl Engineering Ltd. v. Propak Systems Ltd.*, [104] in which the court held as follows:

> 18 In short, it is a mistake to begin and end the inquiry with whether the storage tanks are the improvement. The issue is whether Grey Owl provided "services" "on or in respect of an improvement for an owner, contractor or subcontractor" within the meaning of s. 22 and, as part of this analysis, identify the improvement in question.

> 36 As can be seen from the Stauth affidavit, Grey Owl was retained to provide engineering drawings with respect to storage tanks that were to be used by the contractor or principal subcontractor "as part of their oil extraction system." In such circumstances, it is an error to ask whether the claimant claims a lien in the storage tanks as an "improvement." Applying Hansen, the "improvement" with respect to which the legislation is concerned is the project that will lead to the extraction of oil.

It was subsequently confirmed that Alberta courts consider "improvement" from the perspective of the "overall project" involved. [105] Based on that line of cases, it might be arguable that the "improvement" in ***144** question is an entire LRT system, for example, and the fact that rolling stock is movable does not make them non-lienable *per se*.

2.8 How to Lien

Where and to the extent that railway lands are lienable, some Acts provide for special rules when it comes to registering a lien against such lands. In Alberta, New Brunswick. Nova Scotia, Prince Edward Island and Newfoundland, such liens are registered in the ordinary way, but it is a sufficient description of the land to describe it as the land of the railway company. [106] In Ontario, a lien against a railway right-of way does not attach to the land, but constitutes a charge against the holdback [107] and is therefore given, not registered. The lien in Ontario must be given to the manager or any person apparently in charge of any office of the railway in Ontario. [108]

As discussed above, the fact that lien legislation in the other jurisdictions does not expressly address liens against railway land does not mean that liens cannot attach to such land in those jurisdictions. Presumably, in those jurisdictions, the lien against such land would be registered in the same way as any other liens.

3. PLANES

3.1 Federal Jurisdiction

The Government of Canada has its own regime for the design and construction of airports. Under the *Aeronautics Act*, [109] the federal Minister of Transport is responsible for constructing, maintaining and operating ""aerodromes", or airports.

Canada has several groups of airports that are owned and operated by provincial and territorial governments. This group of airports, which primarily serve remote or Arctic locations, include airports operated by the provinces of Manitoba, Ontario and Saskatchewan and the territorial governments of the Yukon, Northwest Territories and Nunavut. [110] Ownership and operation of non-NAS airports was offered ***145** to local authorities. Many of these also are locally based airport authorities/commissions, while other airports are owned and managed directly by local municipalities.

Unlike the federal jurisdiction over railways, federal jurisdiction over aeronautics has traditionally been based on the peace, order and good government power of Parliament, [111] although the reasons for this are not necessarily clear. [112] One result of this special treatment of aeronautics is that the exclusion of strictly local undertakings from federal jurisdiction under s. 92(10)(a) does not apply. As noted by Professor Hogg, since jurisdiction over aeronautics has been held to depend upon its national dimension or national concern, the question whether a particular undertaking is interprovincial or merely local is probably irrelevant. [113] It has been held, therefore, that federal jurisdiction extends to entirely intraprovincial airlines. [114]

Federal jurisdiction over aeronautics includes both the construction of airport buildings and the operation of airports [115] and extends to airside development, terminal development, infield development and utilities and airport support. [116] However, federal jurisdiction does not extend to every last aspect of aeronautics. In *Quebec (Minimum Wage Commission) v. Construction Montcalm Inc.*, [117] the Supreme Court of Canada held as follows:

> The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word "construction". To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern: the *Johannesson* case. This is why decisions of this type are not subject to municipal regulation or permission: the *Johannesson* case; *City of Toronto v. Bell Telephone Co.* [[1905] A.C. 52.]; the result in *Ottawa v. Shore and Horwitz Construction Co.* [(1960), 22 D.L.R. (2d) 247.] can also be justified on this ground. Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other ***146** similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities and, therefore, upon its suitability for the purposes of aeronautics. But the mode or manner of carrying out the same decisions in the act of constructing an airport stand on a different footing. Thus, the requirement that workers wear a protective helmet on all construction a sites including the construction site of a new airport has everything to do with construction and with provincial safety regulations and nothing to do with aeronautics: see *R. v. Beaver Foundations Ltd.* [(1968), 69 D.L.R. (2d) 649.] and *R. v. Concrete Column Clamps (1961) Ltd.* [[1972] 1 O.R. 42.] See also Re *United Association of Journeymen, etc. Local 496* and *Vipond Automatic Sprinkler Co. Ltd.* [(1976), 67 D.L.R. (3d) 381.], where Cavanagh J. of the Alberta Supreme Court held that "the fact of construction of a building

> called an air terminal does not ... show that the construction is connected with aeronautics" and that, while an aerodrome is a federal work, employees constructing such a building are subject to provincial labour relations legislation. In my opinion what wages shall be paid by an independent contractor like Montcalm to his employees engaged in the construction of runways is a matter so far removed from aerial navigation or from the operation of an airport that it cannot be said that the power to regulate this matter forms an integral part of primary federal competence over aeronautics or is related to the operation of a federal work, undertaking, service or business. (For the purpose of the main submission, it is unnecessary to express any view as to whether Parliament could, in a provision of an ancillary nature, incidentally touch upon the conditions of employment of workers engaged in the construction of airports).

3.2 Liening Airport Lands

The arguments against lienability of airport lands mirror those against liening federal railways. It has been held by the Nova Scotia Court of Appeal, for example, that a contract with the federal Crown for the installation of an air conditioning system at the Halifax International Airport did not give rise to lien rights, since the Airport was the property ***147** of the federal Crown and therefore not subject to the *Mechanics' Lien Act*. [118] Similarly, the Alberta Court of Appeal, in *Iona Contractors Ltd. (Receiver of) v. Guarantee Co. of North America*, [119] held that "[a]n added complication in this appeal is that airport lands fall under federal jurisdiction, and so cannot be liened. This is primarily because it would be incompatible with the regulation of airports to permit any portion of the airport lands to be sold to satisfy the liens."

3.3 Leased Airport Lands

Until the 1990s, airports in Canada were owned, operated or subsidised by the federal government. [120] In 1994, the Government of Canada published the National Airports Policy, which called for the commercialization both of Canadian air navigation and Canadian airport services. Under this policy, the federal Crown retains its control over aeronautics and maintains its role as regulator of air safety and security. Under the National Airports Policy, all airports in national, provincial and territorial capitals, as well as all those with more than 200,000 passengers a year, were designated National Airports System (NAS) airports. [121]

The following airports have been designated National Airports System (NAS) airports:

1. Calgary International Airport

2. Charlottetown Airport

3. Edmonton International Airport

4. Greater Fredericton Airport

5. Gander International Airport

6. Halifax-Robert L. Stanfield International Airport

7. Iqaluit Airport

8. Kelowna International Airport

9. London International Airport

10. Greater Moncton International Airport

11. (Montré al) Mirabel International Airport

12. Montreal Pierre Elliott Trudeau International Airport

13. Ottawa International Airport

14. Prince George International Airport

15. (Québec City) Jean Lesage International Airport

***148** 16. Regina International Airport

17. St. John's International Airport

18. Saint John Airport

19. Saskatoon John G. Diefenbaker International Airport

20. Thunder Bay International Airport

21. (Toronto) Lester B. Pearson International Airport

22. Vancouver International Airport

23. Victoria International Airport

24. Whitehorse International Airport

25. Winnipeg James Armstrong Richardson International Airport

26. Yellowknife International Airport

The latter three airports are owned and operated by their respective territorial governments. In respect of the other 23 airports, the federal Crown went from being an owner and operator to an owner and landlord. It now leases airports to private operators called Canadian airport authorities, which are "free to operate airports on a commercial basis". [122] That process was described in *Greater Toronto Airports Authority v. Mississauga (City)*: [123]

> 11 The National Airports Policy led to the creation of the GTAA and Nav Canada. The GTAA is a private non-profit corporation. Its Board of Directors consists of nominees from the regional municipalities of Durham, Halton, Peel and York, the City of Toronto, the Province of Ontario and the federal government. GTAA Board members reflect the interests of business, organized labour and consumers. In December 1996, the federal Crown leased Pearson Airport to the GTAA under a 60-year Ground Lease. As the local airport authority, the GTAA's mandate is to manage, operate and develop the airport for the term of the lease.

> 12 Nav Canada is also a private non-profit corporation. Established under the *Civil Air Navigation Service Commercialization Act*, S.C. 1996 c.20, the corporation has the exclusive right and obligation to own, operate and develop Canada's civil air navigation system. This system includes air traffic control systems and a variety of communication, navigation ***149** and information services provided to aircraft in Canadian-controlled airspace. These services are provided through numerous facilities across Canada, including seven air control centres, 81 flight service stations, one stand-alone terminal control unit and 44 air traffic control towers. At and around Pearson Airport is an extensive network of air navigation facilities including buildings, aeronautical radio antenna towers, and other radar systems and navigational aids, which are functionally integrated with other installations across the country to form a national system.

As far as the lienability of such lands is concerned, the fact that they are leased should be of no consequence, since the Supreme Court of Canada, in *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [124] established that provincial legislation can no more restrict the rights of lessees of the federal Crown than it can restrict the rights of the federal Crown itself.

That may be a complete answer and prevent any liens even against the leasehold interest on all PINs owned by the federal Crown. [125]

In *Vancouver International Airport v. Lafarge Canada Inc. (c.o.b. Lafarge Construction Materials)*, [126] the court found that the purpose of a lease from the federal Crown to an airport authority was to permit the authority to engage in a federal undertaking, namely the construction, management and operation of an interprovincial and international airport over which the federal Crown has maintained strict control. The mandate conferred upon the authority by the federal Crown also extends to the whole field of aeronautics, which includes the in-air and on-ground aspects of air traffic, management, and travel. Therefore, while the lien

filed against the leasehold interest did not purport to charge the federal Crown land, it did charge the lease which went to the core of the federal undertaking in respect of aeronautics. Therefore, such liens were held to violate the doctrine of interjurisdictional immunity and therefore be invalid and of no force and effect. [127]

***150** However, the Court of Appeal in *Vancouver International Airport* did not rule on the applicability of *Spooner*, since it had not been argued by the parties and since it was unnecessary in that case because the case could be disposed of solely on the basis of the doctrine of interjurisdictional immunity.

Despite *Spooner*, then, it might be possible to argue that a provincial builder's lien can be created in relation to a leasehold interest in federal Crown lands for work that does not go to the core of the undertaking. [128] The doctrine of interjurisdictional immunity has been applied to airports. The Ontario Court of Appeal decision discussed above for the proposition that 'a basic minimum and unassailable content' must be assigned to each head of federal legislative power was a decision concerning construction at Toronto's Pearson International Airport. [129] The British Columbia Court of Appeal has held that provincial builders' liens against airport lands may violate the doctrine of interjurisdictional immunity and therefore be invalid and of no force and effect if they bear upon the core of the federal undertaking and aeronautics. [130] In discussing which parts of airport construction go to the core of the federal undertaking, the court in *Vancouver International Airport v. Lafarge Canada Inc.* [131] cited from the Ontario Court of Appeal decision in *Greater Toronto Airports Authority v. Mississauga (City)*: [132]

> [54] Mississauga's last and alternative argument is that not all of the new buildings at Pearson Airport are integral to an aeronautics undertaking; those buildings that are not are subject to Ontario's building code regime. Mississauga contends that MacPherson J. erred in not examining each building separately. This contention has no merit. MacPherson J. found that the entire redevelopment was required for the operation of a modern international airport. The new air traffic control tower -- the "brains" of the civil air navigation system -- is so obviously essential to the operation of the Pearson Airport, that I have trouble understanding why Mississauga sued Nav Canada in this litigation. But the rest of the redevelopment project, including the new passenger terminal to replace Terminals 1 and 2, is also a vital or integral ***151** part of the operation of the airport. Indeed, Mississauga did not suggest one building in the redevelopment that was not essential for an international airport with the expected passenger and cargo volume of Pearson Airport.
>
> [55] Therefore, MacPherson J.'s finding that the entire redevelopment was essential for the operation of the airport and his refusal to embark on a building-by-building analysis of whether the Ontario building code regime applied were entirely reasonable and are entitled to deference in this court.

The Vancouver Airport case concerned two contracts for improvements, one for an expansion of the taxiways for aircraft, the other was for the expansion of a holding area for passengers waiting to board an aircraft. Both were clearly integral to the federal aeronautics undertaking and therefore not lienable.

Based on interjurisdictional immunity grounds, then, work done on a runway, the actual terminal building or the control tower, for example, clearly goes to the core of the federal undertaking and therefore does not give rise to a lien, while it is arguable that work done on a Tim Hortons franchise in a terminal building might not go to the core of aeronautics and therefore does give rise to a lien. [133]

4. AUTOMOBILES

4.1 Jurisdiction over Roads and Highways

Highways in Canada, including the Trans Canada Highway and the National Highway System, fall within provincial and territorial jurisdiction. The only exceptions are highways through national parks and a portion of the Alaska Highway, which are managed federally by Parks Canada and Public Works and Government Services Canada, respectively. Provincial and territorial governments are therefore responsible for the planning, design, construction, operation, maintenance and financing of highways within their jurisdiction. [134]

Provinces, in turn, delegate much of the responsibility for planning, funding, construction, and oversight of city highways, local roads, and public rights-of-way such as sidewalks and bikeways to municipalities. Local roads are managed and planned by local authorities across the country, while provinces are responsible for highways and for setting ***152** transportation strategies that balance regional economic and mobility needs with sustainability efforts and regional land-use plans. Municipalities collectively own approximately 7,000 km of highways across Canada (13 percent of the national total), more than 155,000 km of arterial and collector roads (61 percent of the national total), nearly 530,000 km of local roads (89 percent of the national total), and about 21,000 km of lanes and alleys (98 percent of the national total). [135]

4.2 Liening Roads and Highways

At common law, a lien could not be registered against a public street or public bridge. [136] Any estate or interest of a municipality in the lands "could not be made subject to a mechanics' lien in view of the paramount right of the public to passage over such streets. The sale of a street under a mechanics' lien would be contrary to the public interest". [137] In the absence of some provision in the lien legislation extending its application to public streets, therefore, they are not lienable.

4.2.1 Roads and Highways Defined

The common law principle has been codified in many provinces, which now expressly exclude work on public highways from the scope of construction liens. Section 7 of the Alberta Act provides that no lien exists with respect to a public highway or for any work or improvement caused to be done on it by a municipal corporation. Section 1.1 of the British Columbia Act provides that nothing in the Act extends to a highway, as defined by the *Transportation Act*; continuing highway properties, as defined in section 30(1) of the *Coastal Ferry Act*; or a forest service road, as defined in the *Forest Act*.

The Saskatchewan Act does not apply where services or materials are provided in connection with a contract entered into under or pursuant to *The Highways and Transportation Act, 1997* or in connection with the construction or improvement of a street or highway owned by the Crown. [138] The Nova Scotia Act excludes work on any public street or highway or to any work or improvement done or caused to be done ***153** thereon. [139] In Manitoba, the *Builders' Liens Act* does not apply to contracts to which the *The Infrastructure Contracts Disbursement Act* applies, nor in respect of materials supplied under a sub-contract to which that Act applies, which includes contracts for highways, bridges, airstrips, docks and ferry terminals. [140]

Work done on highways in Ontario [141] and New Brunswick [142] does not give rise to a lien that attaches to the land but instead constitutes a charge against the holdback. The Acts of Prince Edward Island and Newfoundland and Labrador require that holdback be maintained on highway projects.

In Ontario [143] and Manitoba, [144] where land has been dedicated to a municipality and where the municipality requests that an improvement be made to the dedicated land by a developer at no expense to the municipality, the municipality is liable to the extent of any deficiency in the developer's holdback.

In jurisdictions where the lien legislation does not define terms like ""highway", "road" or "street" and does not import definitions from other Acts, it has been held that rather than adopt the definition from other legislation like the *Highway Traffic Act* or *Local Improvement Act*, reference must be had to the ordinary dictionary meaning of the words. Courts in Alberta, for

example, have defined "public highway" as "a way over which all members of the public are entitled to pass and repass", and that "an essential characteristic of a highway is that every person should have a right to use it for the appropriate kind of traffic, subject only to any restrictions affecting all passengers alike". [145]

Based on that approach, the British Columbia Court of Appeal held that a light rapid transit system was not a "highway", since there was "nothing in the definition of 'highway' that would compel me to apply that word to something to which it would not be applied in ordinary usage". [146] Similarly, in in *PCL Construction Management Inc. v. Saskatoon (City)*, [147] the court adopted a common sense definition by ***154** concluding that "I am not attracted to the argument that a bridge is not a bridge".

In deciding that the MacDonald Bridge connecting Halifax and Dartmouth was a public street or highway, the court took judicial notice of the facts that it is one of two bridges providing vehicle access across Halifax Harbour; traffic enters directly into the street systems of the two communities from the bridge; it is used by both public and private vehicles including scheduled transit bus routes; there are posted speed limits and electronic traffic signals; and although users are required to pay a toll, the process is essentially automated and available to all drivers. [148] That being the case, no lien rights arose neither against the lands on which the bridge sits nor any other property used or enjoyed in conjunction with the operation of the bridge; including the five parcels located adjacent to the toll plaza in Dartmouth.

4.2.2 Adjoining Lands

Most cases come to the same conclusion with respect to adjoining lands and find that work on streets will not generally support a lien on adjacent building lots. In *George Wimpey Canada Ltd. v. Peelton Hills Ltd.*, [149] work performed on municipal road allowances falling within a subdivision plan was held by the Ontario Court of Appeal not to give rise to a right to a lien on the adjoining lots, notwithstanding the obvious benefit, given the precise wording of the legislation. Similarly, in *Canron Ltd. v. Willen Estates Ltd.*, [150] the court held that since the *Mechanics' Lien Act* specifically excluded the registering of mechanics' liens on highways, the plaintiff could not register against the adjoining lands as the work and improvements were only of indirect benefit. It has been held in Alberta, however, that where work is done under non-lienable roads as part of a single improvement involving adjacent lands, the work done on the non-lienable roads might be included in the lien on the adjacent lands. In *Prairie Roadbuilders Ltd. v. Stettler*, [151] work on sewer pipes under municipal streets in connection with the construction of a sewage lagoon system did not give rise to a lien on the streets but was lienable against the lagoon lands that were part of the system.

***155** *4.2.3 Subsurface Work*

There is also divergent case law on the question of whether work done exclusively under a street is the same for lien purposes as work done on the street. A Nova Scotia court, in *Alderney Consultants (1989) Ltd. v. Halifax (County)*, [152] found that work done wholly within the confines of the public roads, albeit below the surface, was not lienable, since the roads were entirely the property of the provincial Crown and could not be the subject of a lien. An Alberta court, on the other hand, held that work on a sanitary sewer system under a road was not incidental to any road work, did therefore not come within definition of "road", and was therefore lienable. [153]

4.2.4 Work on Future Highways

Finally, it has been held that where the legislation prevents liens on public streets and highways, it prevents liens on work that will result in such streets and highways. In *E Construction Ltd. v. Sprague-Rosser Contracting Co.*, [154] the court found that where a municipal corporation had undertaken construction on lands that it owned, for the purpose of creating a public highway, it did not matter that this was initial construction of a road which was not yet in use, or that no road plan had been registered at land titles. No lien arose from such work.

5. CONCLUSION

Overall, the landscape of Canadian transportation is one of dynamic change and opportunities. The significant investment by all levels of government may result in a decade that is transformative for the sector.

When it comes to liening transportation infrastructure, the case law leads to the following conclusions:

- Where the land sought to be encumbered is owned by His Majesty the King in Right of Canada, provincial lien legislation is inapplicable and no lien attaches.

- The same may be true for liens against the leasehold interest on all PINs owned by the federal Crown.

- A lien against federal undertakings may be possible, but only to the extent that it does not go to the core of the federal undertaking. For example, a lien might attach ***156** where an improvement is made to a coffee shop in an airport terminal, but it will not attach where a runway is paved or terminal gates are built.

- As for provincially owned projects, those Acts that allow for liens against the Crown and in particular against railways and roads generally provide that those liens do not attach to the land, but to the holdback.

- Policy arguments against liens on such provincial projects are unlikely to succeed.

- Much of the work done on such projects, such as work on rolling stock, may not be a lienable supply.

- Most Acts treat municipal projects in this context in the same way they treat provincial projects.

This does not leave contractors and suppliers on federal projects out of remedies. The *Federal Prompt Payment for Construction Work Act* [155] is now in force. The stated purpose of that Act is "to promote the orderly and timely carrying out of construction projects in respect of any federal real property or federal immovable by addressing the non-payment of contractors and subcontractors who perform construction work for the purposes of those projects". The Act therefore addresses many of the issues that provincial lien legislation would address if it applied. To the extent contractors will remain unpaid on such projects, they now have access to adjudication very much like they would have under some provincial lien legislation.

Footnotes

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4 *Ibid.*, p. 6.

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6 < https://www.canada.ca/en/transport-canada/news/2023/10/minister-of-transport-announces-the-launch-of-the-request-for-proposals-for-the-high-frequency-rail-project.html>.

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18 *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, s. 394(2).

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23 *Emma E. Gauthier v. His Majesty the King* (1918), 56 S.C.R. 176 (S.C.C.); *Western Concrete Finishers Ltd. v. Rapid Forming Ltd.* (1985), 39 Sask. R. 264 (Q.B.).

24 *Vancouver International Airport v. Lafarge Canada Inc. (c.o.b. Lafarge Construction Materials)*, 2009 BCSC 961, [2009] B.C.J. No. 1489 (S.C.), affirmed 2011 BCCA 89, leave to appeal refused 2011 CarswellBC 2228, 2011 CarswellBC 2229 (S.C.C.).

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81 *Builders' Lien Act*, R.S.N.S. 1989, c. 277, ss. 3 and 1.

82 With the exception of streets and highways in P.E.I.

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125 This seems to be the conclusion reached by H.J. Kirsh and M.A. Alter, "Liening Airport Lands" (2012) 1 J.C.C.C.L. 95 at 114. See, however, *Western Industrial Contractors Ltd. v. Sarcee Developments Ltd.*, 1979 CarswellAlta 210 (C.A.), where the court found that a lien was valid against Indian reserve land surrendered to the Federal Crown and leased to company wholly owned by band.

126 2011 BCCA 89, leave to appeal refused 2011 CarswellBC 2228, 2011 CarswellBC 2229 (S.C.C.).

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133 Even though some might question the feasibility of a Canadian airport without a Tim Hortons.

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