Chapter 13: Summary of Recommendations

The following are our recommendations:

Lienability

1. Part (a) of the definition of "improvement" should be amended to refer to "any alteration or addition to the land and any **capital** repair to the land" (p 16).
2. "Capital repair" should be added as a definition and defined to include all repairs intended to extend the normal economic life or to improve the value and productivity of the land, or building, structure or works on the land, but not including maintenance work performed in order to prevent the normal deterioration of the land or building, structure or works on the land and to maintain them in a normal functional state (p 16).
3. The definition of "improvement" should not be amended to specifically include IT services, materials, equipment and software (p 16).
4. The definition of "owner" should be amended to provide for multiple owners on AFP projects such that Project Co is included as an owner (along with the Crown) and it is Project Co that should be responsible to maintain holdbacks (p 20).
5. The definition of "price" should be amended to include direct out-of-pocket costs of extended duration and exclude damages for delay (p 22).
6. The current definition of "supply of services" is sufficiently broad and need not be amended (p 23).
7. Municipal lands should not be subject to a court-ordered sale, such that lien claims against municipalities should be "given" and not registered, provided that there should be clarity in respect of to whom the lien must be given (p 32).
8. Liens should continue to attach to hospital, university, and school board lands due to the fact that they are private entities. As well, attempting to identify certain "broader public sector" owners would likely cause more confusion than clarity, such that the lands of these entities should continue to be liened by registration (p 32).

Preservation, Perfection and Expiry of Liens

9. The time period for preservation of a lien under section 31 of the *Act* should be extended to 60 calendar days, commencing as currently stipulated by the *Act* (p 38).

10. Termination should be added to the list of events that triggers the commencement of the time limit for preservation of liens under subsections 31(2)(a)(ii), 31(2)(b), 31(3)(a), and 31(3)(b) of the *Act* (p 40).

11. The *Act* should prescribe a mandatory form of Notice of Termination or Abandonment to be published specifying a date upon which a contract has been abandoned or terminated. (p 40).

12. Certificates of completion of subcontract should not be made mandatory (p 42).

13. The time period for perfection under section 36(2) of the *Act* should be increased to 90 days from the last day upon which that lien could have been preserved (p 46).

14. The 2 year time period under section 37 of the *Act* should not be changed (p 48).

15. Section 35 of the *Act*, which imposes penalties for exaggerated claims, should be amended to replace the concept of "grossly inflated" liens with the concept of "wilfully exaggerated" liens, refocussing the threshold at a more sensitive level. As well, the court should be given the discretion to discharge a claim for lien in whole or in part if on a balance of probabilities it is established that the claim is frivolous, vexatious, or an abuse of process (p 50).

16. The provision should further be amended to allow the court to find, where there is wilful exaggeration, that the lien claimant is liable for any damages incurred as a result of the exaggerated claim, including bond premiums, costs, and, where the court considers it just, the lien amount should be reduced by an amount up to the amount of the difference between the wilfully exaggerated amount and the actual amount of the lien claim; provided that a defence of good faith should be available to the lien claimant (p 50).

17. After registration, the common elements in condominium buildings should have a single PIN that is subject to a lien, and the interests of all owners should be subject to this lien (p 54).

18. Notice of lien should be given to the condominium corporation and the unit owners by way of a prescribed form (p 54).

19. Condominium unit owners should be able to post security proportionate to their share of the lien to have the lien vacated (p 54).

20. Section 20(2) should be removed from the *Act* and liens should not be required to be preserved on a lot-by-lot basis (p 57).

21. For improvements to leasehold properties, claims for lien should attach to the interests of the tenant named in the lease and to the interest of the landlord if the landlord funded the improvement through a cash allowance or otherwise required the improvement; provided that the landlord's liability should be limited to an amount equal to any deficiency in the holdback (p 61).

22. Section 39 of the *Act* should be amended to allow lien claimants to obtain from landlords, tenants, and secured lenders all relevant information about the lease, the

lender's security, the funding available from the landlord and lender, and the state of accounts (p 61).

Holdback and Substantial Performance

23. The amount of holdback should remain at the current amount of 10% of the value of the services, materials and equipment actually supplied to the improvement (p 65).
24. Section 2(1) of the *Act* should be amended to provide that a contract is substantially performed when the improvement or a substantial part thereof is ready for use or is being used for the purposes intended and if it is capable of completion at a cost of no more than 3 percent of the first $1,000,000.00 of the contract price, 2 percent of the next $1,000,000.00 of the contract price, and 1 percent of the balance (p 68).
25. Section 2(3) of the *Act* should be amended to provide that "a contract shall be deemed to be completed and services or materials shall be deemed to be last supplied to the improvement when the price of completion, correction of a known defect or last supply is not more than the lesser of (a) 1 percent of the contract price; and (b) $5,000" (p 68).
26. The finishing holdback provisions of the *Act* should remain unchanged (p 71).
27. The *Act* should be amended to provide for the mandatory release of holdback, but **not** the mandatory early release of holdback; that is to say, "may" should be revised to "shall" in sections 26 and 27 of the Act. The owner should be required to publish a notice of non-payment/set-off to interdict the obligation to pay where the owner, in good faith, intends to assert a set-off in relation to the contract (as further provided for in Chapter 8 – Promptness of Payment) (p 77).
28. We recommend that the *Act* should be amended to permit partial release of holdback on either a phased or annual basis, if provided for in the construction contract entered into by the parties, subject to a significant monetary and time-based threshold in the case of annual release (p 85).
29. We also recommend that the *Act* should be amended to allow for the segmentation of holdback for projects involving clearly separable improvements, particularly for AFPs (p 85).
30. We recommend that there be no provision for mandatory early release of holdback for design consultants in respect of services supplied up to the commencement of construction; but the *Act* permit the designation of a design phase for the purposes of phased release of holdback (p 85).
31. We recommend that the *Act* should be amended to allow for deferral agreements to be entered into between owners and contractors provided that such agreements are for the purpose of allowing certification and publication of substantial performance, subject to an appropriate threshold (p 87).
32. The *Act* should not be amended to provide for a statutory deficiency holdback; nor should it be amended to restrict the deficiency holdback provisions that parties may

negotiate between themselves in their contracts (p 89).

33. We recommend that the current scheme should be supplemented by allowing the replacement of cash holdback with a Letter of Credit or a demand-worded Holdback Repayment Bond (p 91).

Summary Procedure

34. The requirement to seek leave of the court to bring motions under section 67(2) should be removed from the *Act*, but, as noted below, construction lien actions should be case managed (p 99).

35. The requirement to seek leave of the court to conduct oral examinations for discovery and examination of documents under section 67(2) should be removed from the *Act*, but, as noted, lien actions should be case managed so that production of documents and examinations for discovery can be appropriately streamlined, applying the principle of proportionality (p 100).

36. The use of discovery plans should be at the discretion of the case management judge (p 100).

37. The requirement to seek leave of the court to bring third party claims under section 56.2 should be removed from the *Act* (p 100).

38. The prohibition of appeals from interlocutory orders under section 71(3) should be amended to allow appeals from interlocutory orders with leave of a judge of the Divisional Court (p 100).

39. The prohibition on joinder of lien claims and trust claims under section 50(2) should be removed from the *Act*, subject to a motion by any party that opposes joinder on the grounds of undue prejudice to other parties (p 102).

40. Lien actions should become subject to case management in all regions (p 107).

41. Regarding small lien claims, including most home renovation claims, of an amount less than $25,000, the *Act* should be revised to require such lien claims to be referred to the Small Claims Court for a report on liability, amounts owing, and the allocation of holdback by a Deputy Judge, with a Superior Court judge retaining ultimate jurisdiction (p 113).

42. Regarding claims between $25,000 and $100,000, the *Act* should be revised to provide for a simplified procedure with limited examinations for discovery and a summary trial procedure (p 113).

Construction Trusts

43. We recommend that the *Act* should be amended to require that a trustee must follow specific statutory requirements in relation to trust fund bookkeeping similar to that applied in the New York Lien Law, including the following (p 148):

- If a trustee deposits trust funds they are to be deposited in the trustee's name;
- The trustee is not required to keep the funds of separate trusts in separate bank accounts or deposits provided that his books and records of account clearly show the allocation to each trust of the funds deposited in the general account;
- The trustee must keep separate books for each trust for which it is trustee (and if funds of separate trusts are in the same bank account, the trustee is to keep a record of such account showing the allocation to each trust of deposits and withdrawals); and
- The books and records of each trust must show specifically articulated particulars with respect to assets receivable, assets payable, trust funds received, trust payments made with trust assets and any transfers made for the purpose of the trust.

44. We recommend the identification of a pilot project for project trust accounts utilizing a representative number of projects in the public sector. Over a period of two years, the selected pilot projects should be evaluated based on appropriate metrics in relation to their effectiveness and cost. After two years, the performance of project trust accounts on the pilot projects should be published and industry consultation conducted regarding their general adoption in the private and public sectors (p 149).
45. We recommend that, in order to adequately protect suppliers of labour and materials from the risk of contractor insolvency on public projects, all public sector projects be required by the *Act* to be surety bonded, adopting the *Miller Act* and *Little Miller Act* approach to the protection of subcontractors and suppliers from the risk of contractor insolvency on public projects (p 151).
46. Accordingly, the Province should enter into a dialogue with the Surety Association of Canada to agree on standard form surety bonds to be incorporated into the *Act* by regulation. As well, such regulations should include a protocol for investigation and payment, as discussed in Chapter 10 –Surety Bonds (p 151).

Promptness of Payment

47. We recommend that a prompt payment regime be legislated in Ontario and that it be applied to both the public and private sectors. Prompt payment should be implemented by creating a statutory scheme to be implied into all construction contracts that do not contain equivalent terms (p 192).
48. We recommend that the prompt payment regime should apply at the level of the owner-general contractor, general contractor-subcontractor, and downwards, and that the legislation provide a mechanism for general contractors to notify subcontractors of non-payment by owners, with reasonable particulars, and to undertake to commence or continue proceedings necessary to enforce payment so as to defer their payment obligations (p 194).

49. We recommend that the trigger for payment should be the delivery of a proper invoice; provided that certification for payment (if there is certification for payment provided in the contract) must follow submission (p 196).

50. We recommend that (p 197):
    - As between owner and general contractor a **28 day** payment period be applied, that is triggered by the submission of a proper invoice.
    - As between general contractor and subcontractor, a further **7 days** from receipt of payment from the owner would be permitted.

51. We recommend that parties be free to contract in respect of payment terms, but that if they fail to do so, monthly payments should be implied (i.e. every 28 days) (p 197).

52. We recommend that payers be permitted to deliver a notice of intention to withhold payment within **7 days** following receipt of a purported proper invoice and that the notice of intention to withhold must set out the quantum of the amount withheld and adequate particulars as to why that amount is being held back. Undisputed amounts should be paid. Also, the right to withhold should relate only to the contract at issue (p 199).

53. We recommend that a payer continue to be able to set off all outstanding debts, claims or damages but that the right of set off not extend to set-offs for debts, claims and damages in relation to other contracts (p 199).

54. Mandatory non-waivable interest should be required to be paid on late payments at a rate of the greater of the pre-judgment interest rate in the *Court of Justice Act* or the contractual rate of interest (p 200).

55. A right of suspension should arise after an adjudication determination has been rendered and a payer has refused or failed to comply with the adjudicator's determination (p 200).

56. We do not recommend that financial disclosure be included in Ontario's prompt payment regime; provided that the *Act* should require disclosure to all subcontractors that they are bidding on a project with a milestone-based payment mechanism (p 201).

Adjudication

57. We recommend that adjudication be implemented as a targeted interim binding dispute resolution method available as a right to parties to construction contracts and subcontractors in both the public and private sectors in Ontario (p 230).

58. In conjunction with our recommendations in Chapter 8 – Promptness of Payment in relation to prompt payment, we recommend that the *Act* allow the parties the freedom of contract to agree on provisions to be included in their contract for both promptness of payment and adjudication so long as such provisions are consistent with the *Act*. Should such provisions not be consistent with the provisions of the *Act*, a statutory default scheme should be implied into the contract (as further discussed below) (p 230).

59. The statutory default scheme should be set out in a regulation to the *Act* (p 230).

60. Any party to a construction contract or subcontract should be given the right to adjudicate disputes arising under that contract or subcontract (p 232).

61. Back-to-back adjudications should be permitted at the owner-general contractor and general contractor-subcontractor levels (p 232).

62. Multi-issue adjudication should be permitted only through consensual contractual arrangements (p 232).

63. We recommend that the Ministries select a first tranche of eminently qualified individuals based in key centres such as Ottawa, Toronto, London and Windsor, with a distinct set of criteria (similar to those set out below) to act as the group of initial adjudicators until the training and qualification system described below is fully implemented (p 233).

64. We recommend that an Ontario adjudicator should (p 233):
    - be a natural person;
    - not be a party to the disputed construction contract and have no legal conflict of interest (or disclose any conflict of interest and obtain the express prior consent of the participating parties);
    - be a member in good standing of a self-governing professional body, such as engineer, architect, accountant, lawyer, or quantity surveyor;
    - have at least 7 years of relevant working experience serving the Ontario construction industry;
    - have successfully completed a standardized Ontario training course and thereafter have received a certificate of authorization to adjudicate from the relevant body governing the Act (i.e. the Ministry or prescribed authorized nominating authority), renewable periodically upon proof of continuing education and a clear record; and
    - not be otherwise disqualified (i.e. by reason of bankruptcy, criminal conviction or for any other prescribed unsuitability).

65. An adjudicator should be nominated after a dispute has arisen, not at the outset of a Project (p 235).

66. An adjudicator should be named in the Notice of Adjudication by the party delivering the notice (p 235).

67. The parties should have two (2) Business Days after delivery of the Notice of Adjudication to agree on an adjudicator, failing which either party would request that the Adjudicator Nominating Authority appoint an adjudicator within five (5) Business Days (p 235).

68. We recommend the creation of a single official Authorized Nominating Authority that will administer the appointments, certification and training of all adjudicators in Ontario to be

administered either by the Ministry of the Attorney General or by a private entity designated by the Ministries as an Adjudicator Nominating Authority (p 235).

69. Adjudicators should have immunity from liability in relation to their decisions and should not be compelled to give evidence in civil proceedings (p 235).

70. We recommend that parties to a construction contract or subcontract be entitled to refer a dispute to adjudication that flows from a proper invoice under a construction contract or subcontract (being a claim for payment under a contract or a subcontract in relation to an improvement) including (p 238):
    - The valuation of work, services, materials and equipment supplied to an improvement and claimed as part of a proper invoice;
    - Other monetary claims made in accordance with the provisions of the construction contract (that had been claimed in a proper invoice), including the change orders and proposed change orders;
    - A claim in relation to any security held by a party under the construction contract;
    - Set offs and deductions (i.e. for deficiencies) against amounts due under a proper invoice as set out in the notice of intention to withhold or otherwise; and
    - Delay issues as they relate to claims for payment.

71. We recommend that for disputes valued at under $25,000, parties can refer such disputes to adjudication or to the small claims court (p 238).

72. If the parties do not agree on an adjudication process that meets the minimum standards of the new Ontario legislation, minimum standards for adjudication set out in a default scheme (under a regulation to the *Act* as noted above) should be implied with respect to: notice of adjudication, appointment of adjudicators, timetables for an adjudication, powers of an adjudicator (including the ability to draw inferences based on conduct of the parties), the adjudicator's duties, allowing an adjudicator to establish a process (with appropriate limitations), and providing that the decision is binding on an interim basis (p 239).

73. In terms of the amount of the adjudicator's fees, the parties should be free to agree on the fees of the adjudicator and if they cannot agree, the ANA should determine the fees of the adjudicator. The general rule should be that the fees of the adjudicator will be apportioned equally (p 241).

74. In terms of the parties' own costs, including legal fees, the general rule should be that each party should bear its own costs (p 241).

75. However, the adjudicator should be given the ability to depart from: 1) an equal apportionment of the adjudicator's fees/expenses; and 2) the principle that each party should bear its own legal fees and costs, **if** the parties have acted in bad faith or there has been frivolous, or vexatious conduct (p 241).

76. We recommend that the decision of an adjudicator should be binding on the parties and they should comply with the decision until either: a) the dispute is finally determined by legal proceedings (including lien proceedings) or arbitration (if provided for under the contract or the parties agree to arbitrate); or b) by agreement by the parties that the decision of the adjudicator is finally binding (p 243).

77. We recommend the adjudication decisions be enforced, if necessary, by way of application to the Superior Court of Justice, in a manner similar to that employed in respect of the awards in domestic arbitrations under the *Arbitration Act, 1991* (i.e. issuing a notice of application, on notice to the person against whom enforcement is sought, attaching an affidavit and the adjudication decision or a certified copy, within two years of the decision) (p 243).

78. We recommend that parties maintain their lien rights such that, if a party wants to have a dispute finally determined through a lien proceeding, they can proceed to preserve and perfect a lien and proceed with a lien action (p 244).

Surety Bonds

79. The *Act* should be amended to require broad form surety bonds to be issued for all public sector projects, the form of such surety bonds should be developed in consultation with the Surety Association of Canada, and once finalized they should become Forms under the *Act* (p 258).

80. The *Act* should be amended to require sureties to pay all undisputed amounts within a reasonable time from the receipt of a payment bond claim (p 258).

81. A Regulation to the *Act* should be promulgated to embody a surety claims handling protocol, and that such surety claims handling protocol be developed in consultation with the Surety Association of Canada (p 258).

82. No change should be made in respect of the third party beneficiary rule, or default insurance. The adjudication issue is addressed in Chapter 9 - Adjudication above (p 258).

Technical Amendments

83. Clarify the Act to confirm that the following irregularities may be cured so long as no prejudice is caused to other parties (p 261).
    - Failure to correctly name the owner and or person to whom materials and services were supplied;
    - Minor errors in the legal description; and
    - Inserting an owner's name in the wrong part of a statement.

84. As the nature of each of these provisions and the intent differs, we recommend no change be made to the Act (Sections 60 and 61) but note that practice directions would

be helpful (to be included in the Practice Directions described in Chapter 12 – Industry Education and Periodic Review) (p 262).

85. We recommend the implementation of separate forms (available electronically and physically). Specifically: one to release a lien, one to discharge a lien or certificate of action, and one to vacate the registration of a claim for lien or certificate of action (p 265).

86. There should be no amendment to add an additional remedy for unpaid electrical contractors and subcontractors that would allow them to seize machinery and equipment after installation (p 266).

87. We recommend that modifications be made to the requirements of section 32(2) of the *Act* to incorporate the legal description, including PINs and specific municipal address(es); and in the case of a lien to be given (i.e. where the lien does not attach to the land), the name and address of the person(s) to whom a claim for lien must be given (p 267).

88. We recommend that no change be made to the section 36(4) sheltering provisions under the *Act* (p 270).

89. The definition of "written notice of a lien" should be amended to provide further particulars as to service and a form of written notice of lien should be added to the regulations (p 272).

90. Section 44 should be amended to provide for the posting of security to vacate a written notice of lien (p 272).

91. The withdrawal of a "written notice of lien" should also be in a prescribed form (p 272).

92. We recommend that section 39 should be amended to clarify what type of information the person making the request is entitled to and, in particular, what constitutes a "state of accounts" under section 39(1)1.iii, and should include: the value of the work done, the amount paid, the amount held back pursuant to the *Act*, the balance owed, and the leasehold information described in Chapter 3 – Lienability (p 274).

93. We recommend that the amount of security that is to be posted to vacate a lien under section 44(1) should be amended to include the total of the full amount claimed as owing in the claim for lien and the lesser of 25% or $250,000 of the amount of the lien claim as security for costs (p 280).

94. We recommend that Letters of Credit with reference to International Commercial Conventions should be accepted as security, provided the Letter of Credit is unconditional, the International Commercial Convention is written into the terms of the credit, and it is accepted by a bank listed under Schedule I of the *Bank Act*, S.C. 1991, c. 46. Sched. 1 operating in Ontario (p 280).

95. We make no recommendations with respect to procedural issues that are outside of our remit (i.e. in relation to the Rules of Civil Procedure), however, we suggest that the Ministries further investigate the procedural and resourcing issues identified that have

caused issues in respect of members of the construction industry gaining access to the courts to vacate a lien; particularly outside of Toronto and Ottawa (p 280).

96. When a mortgagee makes a loan for the purpose of financing both land acquisition and the construction of an improvement, the mortgagee should be required to identify the amount intended for the acquisition of land and the amount intended for the improvement(s) to and/or on the land in mortgage documents. (p 282).

Industry Education and Periodic Review

97. We recommend that the Ministries provide education, awareness and support for industry participants who may wish to access any existing remedies under the *Act* or any of the remedies that are implemented as a result of this Report. In this regard, we recommend the implementation of a practice guide and interpretative bulletins to be provided following the enactment of any amendments to the *Act* (p 284).

98. We recommend that any practice guide and/or interpretation bulletins implemented should be updated periodically on a website designated by the Ministry of the Attorney General (p 284).

99. We recommend that the stakeholders should be proactive in educating and training their constituents on the recommendations from this report that are ultimately adopted by the Ministries and implemented under the *Act*, if any (p 284).

100. We recommend that an independent review of the *Act* to be conducted within 5 years of the enactment of the recommendations of this Report, and every 7 years thereafter (keeping in mind that the pilot project for project bank accounts will be subject to a much shorter review period, as described in Chapter 7 – Construction Trusts) (p 285).