APPENDIX "B"

CONSTRUCTION LIEN ACT REVIEW: COMMENTS AND RECOMMENDATIONS

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
1.		**LIENABILITY**	
(a)	*Consider the effectiveness of the definitions of "improvement", "materials", "supply of services" and "owner"*	The Act has functioned reasonably well in addressing challenges in the tradition delivery model. However, as the relationships between stakeholders have become more sophisticated over the years, the Act does not adequately address, for example, arrangements between "owners" and services providers who are retained pursuant to master services agreements. Project Management Service Providers ("PMSP") that are retained pursuant to a master services agreement are required to deliver a comprehensive suite of project management services of which "construction" is only one component. Under master service agreements arrangements IO issues a work authorization to PMSP to initiate a specific assignment. Upon receipt of that work authorization, PMSP retains the general contractor, consultants, design professionals and related trades as required to deliver the assignment. Under master service agreements arrangements IO does not retain, for example, the general contractor directly. A revised CLA should: • recognize the use of master service agreements under the traditional delivery model; • recognize the different types of services provided between the stakeholders within the pyramid; • clarify which agreements in the pyramid is a "contract" for the purposes of the CLA; • clarify which stakeholder(s) in the pyramid is/are "owners" for the purposes of the CLA; • clarify how the lien will attach – in cases where the "owner" may not be the ultimate beneficiary of the improvement • clarify the criteria for establishing substantial performance of each of these agreements, where applicable; Considerations for the new definitions of contractor, subcontractor etc as set out in section 9 (AFP) – should similarly be considered, as appropriate in the traditional delivery models and particularly in	For full treatment, see Section 9 below. The CLA's definition of "Owner" does not well-suit the AFP model. It arguably results in there being multiple "Owners", thereby leading to confusion as to who is the "Contractor." If the Authority is taken to be the "Owner", then Project Co is the "Contractor", making the Project Agreement the "Contract" and the Construction Contract the "subcontract" pursuant to the CLA thereby causing issues for substantial performance and interfering with timelines for lien rights given the different requirements in the CLA with respect to the contract and the subcontract. The preferred interpretation of IO and its counterparties is that Project Co is the "owner" and the contract between it and its construction contractor is the "contract" for the purposes of the CLA. A revised CLA should address AFP delivery models and as a potential solution, ensure that Project Co is considered the "Owner" and that the Construction Contract is considered the "Contract" for the purposes of the CLA. This should have the welcomed consequence of subcontractors being "subcontractors" and subcontracts being "subcontracts" for the purposes of the CLA.

[1] As detailed in the information package.

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
		master service agreement arrangements.	
i)	*Consider whether the definition of "owner" should be expanded or clarified*		See section on "Owner" definition in Section 9, below.
ii)	*Consider whether further clarity is required in respect of who can be a lien claimant*		
iii)	*Consider whether further clarity is required in respect of other defined terms, such as "services or materials"*		Further clarity should be provided to specify that repairs conducted during the 30 year maintenance term of an AFP project do not constitute "services or materials" for the purposes of the CLA. This would otherwise have the unintended risk of potentially stretching out the test of substantial performance until after the 30 year maintenance term.
iv)	*Consider lienability related to projects for transportation, railways, universities, colleges and education facilities*		
v)	*Consider whether the "price" that is lienable and/or the definition of "services or materials" should be clarified, including amending the definition of "supply of services" to specifically address the issue of damages for delay*		
vi)	*Consider whether the definition of "improvement" needs to be further extended or whether doing so would extend the application of the Act to an excessive number of potential lien claimants*		Consider a more nuanced "improvement" definition to exclude repairs that are part of regular maintenance over a long-term contract such as a DBFM AFP Project Agreement unless it is the intent such repairs be captured. If that is the intent, consider when "substantial performance" would occur in such a long-term contract.
vii)	*Consider the inclusion and/or exclusion of home renovation and other smaller projects in the context of the Act.*		
2.	**HOLDBACK AND SUBSTANIAL PERFORMANCE**		
(a)	*Consider changing the amount of holdback (from the current 10%)*	The status quo is commercially reasonable. Holdbacks are critical elements of construction contracts that protect the public interest and subcontractors. If the current 10% holdback is reduced, owners, service providers and contractors may impose additional contractual restrictions on sub-contractors, potentially squeezing	Given the structure of the AFP model, the Authority holds back more than 10%. Approximately 60 – 85% is held back until Substantial Completion, with the remainder released incrementally over a 30 year period of time during the maintenance term. Increasing the holdback amount would not substantially interfere

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
		smaller subcontractors out of the market.	with the AFP model. Mandating that no more than a specified amount is permissible to be held back, would directly interfere with the risk-transfer and value for money that is obtained with the AFP model that by virtue of having capital at-risk during the 30 year maintenance term.
(b)	*Consider increasing the number of dates for the release/early release of holdback, for instance on phased projects*	Mandating dates for the early release of holdback is not commercially or administratively efficient for small dollar value, short term contracts and projects even if these projects are phased. A balanced approach considering undue hardship versus administrative burden should be considered. Thresholds and criteria should be established for the types of contracts (for example multi-year) where early release can be applied.	Mandating early release of holdbacks would run counter to the AFP model.
(c)	*Consider making the release of holdback mandatory/automatic after expiration of lien rights, unless there has been early release of holdback*	Mandating the release of holdback immediately upon expiry of lien rights would have an adverse impact on an owners right to set-off. The right to set-off is a critical element of the construction contract that protect the public interest, in the event that there is deficient work. Furthermore making the release of holdback automatic might not be commercially practical as liens could be registered or served against the property after the release of the automatic holdback. Making the release automatic means IO must perform title searches of all of the lands involved in a project, ensure there are no claims for lien, requisition payment of holdback and make payment immediately after the expiration of lien rights. Making payments on such tight deadlines are not practical in the government context, nor is it in the private sector. There are often large sums of money being released and the risk of mistakes is increased when payment is rushed.	The Authority has a right to set-off against defective work or damages caused by the contractor especially given the public interest that is paramount and at stake for Infrastructure Ontario AFP Projects. In the Construction Contract (between Project Co and the Construction Contractor), the Payment Certifier certifies the expiry of the holdback period and that Project Co is entitled to release the Lien Holdbacks by issuing a certificate for the payment of the lien holdback amount. The holdback is due and payable on the later of: i) day following expiration of holdback period stipulated in the CLA; and ii) the second business day following the Payment Commencement Date (which is the second business day after Substantial Completion, as in accordance with the Project Agreement definition). Specifically, the Construction Contract provides that there is no right to early release of holdback. This is a contractual term that has been accurately negotiated, valuated and compensated for between the parties.
i)	*Consider allowing or expressly not allowing the early release of holdback upon posting a holdback release bond or some other defined form of security.*		
(d)	*Consider eliminating the "holdback for finishing work"*	The status quo is commercially reasonable. Alternately, eliminating the holdback for finishing work would be acceptable provided that lien rights or owner liability do not apply to finishing work.	In the Project Agreement, the Authority holds back more than the required finishing holdback which is calculated at 200% of the value of remaining minor deficiencies at the time of Substantial Completion. In the Construction Contract (between Project Co and

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
			the Construction Contractor), on the Substantial Completion Date, the Payment Certifier must set out known deficiencies that must be corrected by the Construction Contractor prior to Final Completion of the construction work and determine the amount of the Contract Price that must be retained by Project Co to cover such deficiencies, being equal to 125% of the estimated cost to repair, replace or correct such deficiencies. This is in excess of the amount that is required to be retained pursuant to the CLA.
(e)	*Consider revising the minimum requirements for substantial performance*	The CLA should be revised to incorporate specific criteria, for determining the substantial performance of consulting, agreements, design and professional service agreements and master services agreements 9as described in section 1 above). Reducing the minimum requirements for substantial performance might result in the release of funds, while there are still substantial defects and deficiencies with the property/project.	The Project Agreement does not anticipate the release of majority funds until Substantial Completion which has a higher threshold that must be satisfied than the test for substantial performance. Substantial Completion is defined as follows on civil projects, for example: "**Substantial Completion**" means the point at which: (i) Highway has been completed in accordance with the Project Agreement; (ii) the Payment Certifier appointed pursuant to Section 15.3(g) of the Project Agreement has certified the substantial performance of the Construction Contract and the related certificate of substantial performance has been published, each in accordance with the CLA; and (iii) all requirements for Substantial Completion described in Schedule 14 - Commissioning, other than in respect of Minor Deficiencies, have been satisfied in respect of Highway as a whole.
(f)	*Consider whether or not to add further specifics to the requirements for a Certificate of Substantial Performance*		
(g)	*Consider introducing a new requirement for a mandatory Certificate of Intention to Release Holdback*	Introducing a new requirement for a mandatory Certificate of Intention to Release Holdback would adversely affect an owners right to set-off. In addition, financial and administrative complications could ensue if the "Certificate of intention to Release Holdback" is issued and following its issuance, a number of liens are registered on the property. In order for the certificate to be effective, it would have to be subject to so many sub-conditions that it would fail to achieve its initial objective (i.e. the early release of funds).	

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
3.	**PRESERVATION, PERFECTION AND EXPIRY OF LIENS**		
I)	***GENERALLY***		
(a)	*Consider whether the mechanics of preservation and perfection require any changes*	The various offices of the Crown where claims for lien must be served needs to be updated. Discussions should be undertaken with Ministries and Agencies to determine relevant list of appropriate offices and officers for service.	
i)	*Consider improving alignment with the Land Registry Act*		
ii)	*Consider termination as a trigger for lien rights expiry*		
(b)	*Consider clarifying the release of liens and consider if there are any alternatives to release and discharge*		
(c)	*Consider the effect of posting security and vacating liens on lien claimants (s. 44 of the Act)*	Propose increasing the amount of security for costs - in light of increasing costs.	
II)	***PRESERVATION***		
(a)	*Consider the length of the preservation period*	The length of the preservation period should be increased to 60 days. This would allow for better alignment with the negotiated invoice review and payment timeline noted in IO/PMSP contracts with the supply chain. With respect to invoice review and payment timelines – invoices submitted by the supply chain are reviewed, approved or rejected within 10 days of receipt. Approved invoices are paid within 45 days of approval.	Consider increasing the length of the preservation period from 45 to 60 days.
(b)	*Consider the impact of written notices of lien*		
i)	*Consider "notice of lien claim" on lenders when no lien is formally preserved. In such cases, the ability to pay funds into court may be hindered and affect project financing*		
ii)	*Consider eliminating "written notices of lien"*	Written notices of lien should not be eliminated. Written notices of lien often alert owners to payment disputes in the supply chain and can allow for early intervention and resolution. A standard form of	

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
		notice of lien should be implemented. This would facilitate certainty, efficient and ease of administration.	
(c)	*Consider the introduction of mandatory certification of subcontract completion rather than the elective option currently provided for under Section 33 of the Act*	Certification of subcontract completion should remain elective. Mandatory certification of subcontract completion will unnecessarily increase the administrative burden in a project. Keeping this elective allows a payment certifier or owner and contractor, to issue a certificate of subcontract completion when it is commercially reasonable to do so.	
(d)	*Consider mechanisms to avoid potential abuse of lien rights*		
i)	*Consider requiring lawyers to endorse construction lien claims, representing that they have inquired into whether the claims asserted are bona fide, or reasonable, or consider having lawyers certify the "reasonable" value of liens*		
ii)	*Consider the introduction of a new requirement for lawyers to sign a statement prior to the preservation of a lien certifying that the lawyer has inquired into and confirmed the reasonable and bona fide amount claimed in the lien*		
(e)	*Consider lien registration issues vis-à-vis specific types of properties*		
i)	*Consider the difficulty in registering and enforcing lien rights in respect of registration under the Condominium Act, 1998, where the lien claimant either has not been given proper notice of the intention to register as required by statute or simply does not lien prior to registration*		
ii)	*Consider addressing concerns in respect of enforcing lien rights arising from renovation or construction work performed to the common elements of an already registered condominium;*		
iii)	*Consider potential improvements in the process for registering liens against leasehold interests and home renovation projects.*		

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
iv)	*Consider the preservation of liens in the context of phased projects.*[2]		
III)	***PERFECTION***		
(a)	*Consider the potential burden that the requirement to perfect within a relatively short time imposes on the court system*	The status quo is recommended. This step is an administrative necessity which is required to identify potential claimants.	
(b)	*Consider any alternatives or changes to the perfection requirements*	The status quo is recommended.	
i)	*Consider changing the deadline to perfect and including mandatory steps to attempt settlement prior to perfection*	The status quo is recommended. Appropriate dispute resolution options and timelines can be addressed and specified by parties in their respective agreements.	
ii)	*Consider adjusting requirements for phased projects*		
(c)	*Consider the length of the perfection period*	The status quo is recommended.	
(d)	*Consider the alignment of time limitations in the Act with payment time periods in the Ontario construction industry*		
IV)	***EXPIRATION UNDER SECTION 37 OF THE ACT***		
(a)	*Consider whether the two year limitation is appropriate*	The status quo is appropriate and commercially reasonable.	
(b)	*Consider improving alignment of the Act with the Limitations Act, 2002, including breach of trust actions*		
V)	***REQUESTS FOR INFORMATION PURSUANT TO SECTION 39 OF THE ACT***		
(a)	*Consider whether further clarity is required in relation to what information is required to be produced in response to a section 39 request for*	The CLA should be revised to clarify what constitutes a "state of accounts" in section 39(1)1.iii.	The Authority occasionally receives s. 39 requests from subcontractors whereby the subcontractor seeks information on the state of accounts between the Authority and the Construction

[2] This issue is discussed in Section 2 above.

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
	information for various participants		Contractor. The Authority responds to these requests by indicating it has no contract with the Construction Contractor. This is indicative of the misalignment between AFP projects and the CLA.
4.	**PROMPT PAYMENT OR TIMELY PAYMENT FOR CONSTRUCTION WORK**		
(a)	*Consider the causes of payment delays and how they can be addressed in the Act or other legislation, including the potential effect of prompt payment provisions on the principle of "freedom of contract"*	Causes for payment delays include the submission of incomplete invoicing including supporting documentation and failure to achieve the standards for payment – both of which delay the timely approval of invoices for payment. Once approved, invoices are paid within the 45 day period following approval (as outlined in the contracts with the supply chain). IO is of the opinion that deference should be given to the negotiated terms of a contract and in particular contractual arrangements regarding the timeline of payments – provided that minimum invoicing and payment criteria are included in the contract.. IO is committed to facilitating the payment of service providers and the supply chain within a commercially reasonable time period that does not compromise IO's ability to complete the due diligence steps required at each phase in the project delivery life cycle. Reflective of this commitment - PMSPs performance is rated against IO established payment standards and timelines (Key Performance Indicators or KPIs). PMSPs who do not achieve minimum standards/KPIs are subject to having a pre-determined percentage of their fees deducted for failure to achieve the standards. It should be noted that recent demands for prompt payment legislation only referred to monthly progress payments and did not acknowledge agreements subject to milestone payments. The payment timelines noted in the various agreements are negotiated terms which reflect the balance between the competing goals mentioned above and suited for the payment framework – whether monthly or milestone.	Mandating prompt payment in AFP, without the Authority having properly assessed the services and work provided by the Contractor, would run counter to the objectives of the AFP model in ensuring adequate risk transfer. The AFP model relies on an extensive system of holdbacks. The AFP model takes no issue with paying promptly upon certification according to the payment schedule to which the sophisticated parties have agreed. Payments in AFP are made on an availability basis, with the Substantial Completion Payment (a large percentage of capital costs ranging from 60 – 85%) paid upon certified completion of a facility and availability payments made, for a DBFM project, over the course of approximately 30 years. Interim payments may also be made prior to the Substantial Completion. Prompt payments, that impose a mandatory statutory payment period, would negatively impact the AFP model and compromise the value for money that is derived from the risk transfer achieved by private financing. The Project Agreement has clear timelines for payment that are consistent with market norms and have been tested and accepted by the industry. The principle of "freedom of contract" should be preserved with respect to AFP Projects and the public interest should be considered paramount given the demonstrable value for money.
i)	*Consider balancing all of the **competing interests** in the industry*	IO and its Project Management Service Providers ("PMSP's") utilize agreements that have provisions, which are agreed to among IO, the PMSP's, and various industry stakeholders. These contracts	The value for money at the heart of the AFP model places the public interest as the primary concern. A value for money assessment takes place prior to a project being assigned as an AFP.

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
		include specific provisions regarding the approval and payment of invoices for progress payments, and have been successfully used on more than 1,000 construction contracts annually for the past six years. It should be noted that IO has engaged industry stakeholders such as industry associations and provided these associations with information about the business and government rationale/drivers for the critical terms specified in these agreements and subsequently negotiate terms and conditions that reflect IO requirements and industry considerations as much as possible. The inclusion of prompt payment provisions in the CLA without regard for the above could undermine these negotiated terms of these contracts and potentially increase the cost of the delivery of projects by IO for the Province.	The value for money assessment is based on a comparison of the net present costs for a project under Traditional Delivery and AFP. A project will not proceed using the AFP model if it cannot demonstrate a public benefit higher than Traditional Delivery. The AFP model enables a competitive bidding process that allows for the market to correct itself. The need to be paid promptly should be balanced with the public interest and value for money that is obtained through the AFP model.
ii)	*Consider the **alignment** of any prompt payment provisions within **the Act** as a whole*	If prompt payments provisions are included in the revised CLA, different approaches should be made for public vs private projects similar to the approach taken in the United States. This would allow for a customized approach to dealing with prompt payment.	In agreement with comments made with respect to Traditional Delivery. If public contracts are not exempt, consider exempting AFP projects. AFP/P3 projects are capable of definition by reference to Project Co's financing obligations. Alternatively, projects above a certain construction cost could be exempted on the basis that they are entered into by sophisticated parties not requiring statutory protection.
iii)	*Consider the possibility of providing for a form of **security** or protection mechanisms for **owners/ lenders** and contractors as payers when legitimate disputes arise related to deficient work, delays and excessive change orders of payee, contractors, subcontractors and suppliers*	If the right to set-off and holdback percentage is not interfered with, there would be no need for additional security for owners/lenders if there is deficient work, delays and excessive change orders.	The AFP model does not allow for the release of majority of capital until Substantial Completion. If the right to set-off is revoked and additional security is required to cover particular delays and deficient work, it would increase bid costs without providing much value in favour of the public interest.
iv)	*Consider the appropriate **remedies** in the event of **breach of payment** terms, such as, for instance, interest and suspension/termination of the work*		The accrual of interest if prompt payment is not made would only increase costs to the public sector given the nature of the AFP model. Suspension and termination of work is also not a commercially viable option given the strict timelines that are in place to achieve milestones and the time and cost it would take to replace contractors. The remedies suggested would come at a cost to the public interest and would not enable better delivery public infrastructure.

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
v)	*Consider whether or not prompt payment provisions should draw a **distinction** between **public sector** and **private sector** payers*	Exceptions for the Crown with regard to the application of prompt payment provisions, should be considered/recommended as such provisions might not be practical or commercially reasonable for government contracts. The Crown may require flexibility to administer payments in some cases and may be required to comply with legislative/regulatory terms. The review of a payment application can sometimes involve a large number of payment certifiers, and as a result it could be difficult to meet contemplated deadlines in proposed prompt payment provisions. Prompt payment provisions might also have an adverse effect on the ability of the Minister of Finance under the Financial Administration Act to set-off any debts owed to the Crown against any debts owing by the Crown. In many of the United States there are exceptions to the application of prompt payment provisions on public projects. This is evident in the legislation of states like: Minnesota, Washington and New York.	An exception should be made specifically for AFP Project Agreements given the difficulty applying prompt payment provisions to the AFP model without compromising the payment structure. The focus should shift towards adherence to the negotiated timelines of the Project as stipulated in the Project Agreement which are capable of being changed. A further consideration should be given to providing exceptions to prompt payment, including but not limited to, defective work, damages caused by Project Co/Contractor, resolution of disputes related to certification of work, and mandatory Authority approval, without which payment cannot be made.
vi)	*Consider whether the **objective** of **prompt payment** provisions is to **prevent** situations of **delayed payment** rather than to **confer** certain **rights and remedies** once the **payment delay** has **already occurred**.*	The frequency and timing of progress payment to a contractor are one of the commonly negotiated provisions of a construction contract. Therefore regardless of the objective of prompt payment provision, if there were mandatory payment periods, it would constitute an unreasonable interference in the negotiation of private contracts. IO's current contracts already have payment timelines depending on the nature of the project and rights and remedies, which are mutually acceptable to both parties if a delay has occurred. IO is of the opinion that deference should be given to the negotiated terms of a contract and in particular contractual arrangements regarding the timeline of payments	The timelines of payment are stipulated clearly in the Project Agreement and the Construction Contract. The Project Agreement provides for the Substantial Completion Payment (two business days after Substantial Completion has been certified achieved) and Monthly Service Payments (that include the remaining capital cost) during the 30 year maintenance term. Occasionally, the Project Agreement features Interim Completion Payments. The methodology to obtain these payments and the timelines associated with it are adequately negotiated between various stakeholders. If the intention of prompt payment is to prevent situations of delayed payment, regard must be had to the timely payments that Infrastructure Ontario continues to make in accordance with the Project Agreement. The Construction Contract, between Project Co and the Contractor, allows for monthly progress payments to be made to the Contractor by Project Co in accordance with a drawdown schedule that is also negotiated between the parties prior to Commercial Close. The Independent Certifier's determination of Substantial Completion is binding on the parties to the Construction Contract.
(b)	*Consider making the **release** of **holdback mandatory/automatic** after the **expiration** of **lien rights***	In the context of IO's master service agreement with PMSPs, IO seeks to make payment immediately upon the satisfaction by the PMSPs of the test-for-release-of-statutory-holdback stipulated in the Act. The PMSP makes payment of holdbacks to contractors on a similar basis. Additional holdbacks and set-offs should be permitted, to the extent they are specified in the contracts between	In the Construction Contract between Project Co and the Contractor, holdbacks are not released until after Substantial Completion of the Project in accordance with the Project Agreement. This interplay between the two agreements ensures that the construction risk is passed down to the party best able to manage it.

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
		the various parties.	The proposed prohibition on additional holdbacks is unduly excessive as additional holdbacks are important elements of regular construction contracts, yet are more critical in the AFP context given the capital value of such projects. Additional holdbacks are a mechanism to ensure performance of pre-existing contractual obligations on the part of Project Co. Furthermore, if additional holdbacks are prohibited, it should be clarified that deferred payments under the AFP model do not constitute holdbacks. This prohibition of holdback or set-off rights will give contractors more legitimacy to build contingencies in their pricing which will increase project costs and create additional requirements for security.
(c)	*Consider the potential **effects** of prompt payment provisions and their alignment with the Act **on industry lenders and sureties***		It is central to the AFP model that Project Co self-finance a significant portion of construction until attainment of Substantial Completion. Any amendments to include prompt payment in Project Agreements would disrupt the stakeholders (e.g., the parties and the lenders) and could lead to disputes and lead to delays on projects or an inability to make draws from the lenders to ensure continuity of project operations. Any difference in payment terms would disrupt the market and add costs and time to Projects. The Project Agreement anticipates compliance with timely payment upon certification in accordance with its terms based on what has been negotiated between the parties. This is different than mandatory progress payments which would not allow the parties the flexibility to choose how to structure their agreements.
(d)	*Consider the applicability and/or **adaptability** of any prompt payment provisions to **different types of contracts***	Prompt payment provisions are inappropriate on smaller-value contracts where the owner and contractor agree that there will be a single payment upon project completion, as for master service agreements subject to milestone payments. Legislating prompt payment requirements for these types of agreements without an assessment of the nature of these arrangements will increase costs to IO, compel a change in the terms of its contracts with the PMSP's and lead to an increase in costs as a result of the added effort to process progress payments where none previously existed. Insofar as payment-at-completion is an essential tool to leverage contractor performance on smaller-value contracts, IO anticipates additional problems with achieving on-time completion for projects. Furthermore, on larger contracts interim or milestone	A large part of the successful delivery of AFP Projects is due to the payment structure that releases capital at specified milestones (e.g. Substantial Completion) only after ensuring that the construction work is delivered in the quality and standard required pursuant to the Project Agreement. If the AFP structure is altered based on prompt payment provisions, it should not be applicable to AFP Projects. Prompt payment provisions would have the effect of undermining the underlying value for money that is achieved through the AFP model without giving credence to the fact that through this model, the public can reap the benefits of having public services delivered on time and on budget.

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
		payments might be more appropriate. As such, IO is of the opinion that prompt payment provisions l with specific deadlines would have an adverse impact on construction projects.	
(e)	*Consider whether "**pay-when-paid**" and/or "**paid-if-paid**" clauses should be made **unenforceable***	"Pay-when-paid" and "pay-if-paid" clauses are to be included at the discretion of the parties to a construction contract.	
5.	**PROOF OF FINANCING**		
(a)	*Consider introducing access to proof of financing rights for owners, contractors and subcontractors*	The Crown/Public bodies should be exempt from any requirement to provide proof of financing. In addition, privately-held organizations/vendors that provide services to IO may not be willing to disclose financial information to contractors and subcontractors as this may negatively affect their market positioning.	
i)	*Consider whether financial pre-qualification may address certain issues with contractors being under financed and being unable to adequately pay their sub-contractors.*		
ii)	*Consider whether such pre-qualification may be overly onerous on certain contractors and subcontractors.*		
iii)	*Consider whether the surety bonding process may eliminate the need for financial prequalification*		
iv)	*Consider whether contractors should be entitled to proof of financing from owners*	A right to financial information is currently available under the CLA. The information to which Contractors are entitled to should not be invasive and go beyond the scope currently allowed for under the CLA. The Crown may not want to provide this kind of information, which could include confidential Treasury Board information, to private contractors.	

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
6.	**TRUST PROVISIONS**		
(a)	*Review and consider either eliminating or clarifying and strengthening the requirements of the trust provisions in the Act*		
(b)	*Consider introducing a mandatory holdback trust account or a mandatory project bank account*	IO does not support the requirement for mandatory holdback trust accounts for Crown projects.	
i)	*Consider whether or not a mandatory holdback trust account or a project bank account requirement should be limited to contracts with a price greater than a specified amount*		IO does not recommend mandatory holdback trust accounts for the Project Agreement, as the Authority should not be construed as the "Owner" for the purposes of the CLA, as outlined in Section 9 (below). As an alternative, it is recommended that Project Co be subject to a mandatory holdback trust account as the "Owner" for the purposes of the CLA at the Construction Contract level.
(c)	*Consider the effectiveness of the trust provisions, the remedies and the actual chances of recovery they afford creditor contractors, subcontractors and suppliers, including in the context of bankruptcy of a debtor owner, contractor or subcontractor*		In the recent case of *Iona Contractors Ltd. v. Guarantee Company of North America*, 2015 ABCA 240, the disputed holdback funds were not found to be the property of the bankrupt Contractor given the creation of a trust by the CLA equivalent in Alberta (the *Builders' Lien Act*). These funds were paid out to the surety in place of the subcontractor, but were otherwise, for the benefit of the subcontractor. If the intention is to protect the beneficiaries (e.g. subcontractors) from the bankruptcy of an Owner/Contractor, the funds in question may be held back in a separate trust account at the Project Co level with the relevant subcontractor(s) as beneficiaries. This would enable the CLA trust to be better positioned in a bankruptcy proceeding as it would be more likely to meet the common-law requirements of a trust (i.e. certainty of intention, object and subject-matter).
7.	**INTERRELATIONSHIP WITH INSOLVENCY LEGISLATION**		
(a)	*Consider conflicts between the Act and either the Bankruptcy and Insolvency Act, RSC, 1985 ("BIA"), c. B-3 or the CCAA*		
(b)	*Consider any potential statutory mechanism to regulate stay proceedings in the face of*		

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
	registered liens		
(c)	*Consider Canada Revenue Agency's super priority*		
8.	**PRIORITIES**		
(a)	*Consider whether or not any amendments are necessary to clarify the rights intended to be conferred upon lien claimants and/or mortgagees*		
(b)	*Consider whether or not a new obligation should be imposed on mortgagees to expressly identify, as a pre-condition to registration, whether the mortgage is intended to finance the acquisition of the property or construction on the property (or both)*		
9.	**PUBLIC-PRIVATE PARTNERSHIPS ("PPP")**		
(a)	*Consider the application of the Act in relation to such projects*		The concept of PPPs/Alternative Financing and Procurement ("AFP") was not taken into account when the CLA was enacted in 1983. The AFP model has Project Co situated between the Authority and the Contractor. Project Co is not recognized by the CLA, which assumes a traditional structure of an Owner hiring a General Contractor directly. Accordingly, in the case of an amended CLA, the AFP contractual frameworks must be addressed to ensure clarity and consistency with the principles behind the CLA. "Contract" in Section 1(1) of the CLA means the contract between the Owner and the Contractor. This risks the consequence of treating the Project Agreement between the Authority and Project Co as the "Contract" when, in fact, the Project Agreement is more akin to a development agreement than a construction contract. In an AFP project, the construction contract should be the "Contract" for purposes of substantial performance. Analogous to this is the case where, pursuant to a commercial lease, a tenant requests a contractor to offer its work and services and the "contract" for the purposes of the CLA is agreement between the tenant and the contractor. Arguably, the commercial lease itself would not

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
			normally be considered the "contract" for the purposes of the CLA. "Subcontract" in Section 1(1) of the CLA means any agreement between the Contractor and a Subcontractor relating to the supply of services or materials to the improvement. This risks the consequence of treating the Construction Contract between Project Co and the Construction Contractor as the subcontract, thereby making the Construction Contractor under the Project Agreement a Subcontractor. This is problematic for the following reasons, among others: 1. The fact that the Project Agreement covers a maintenance term of approximately 30 years, is not taken into account by the CLA. As the CLA requires certification of substantial performance of the Contract before the holdback can be released, holdbacks could be delayed during the maintenance term by Project Co retaining holdbacks until the last minor deficiency or repair has been corrected if the Project Agreement is taken to be the "Contract" for the purposes of the CLA. The Construction Contract is best positioned to be the "contract" pursuant to the CLA in light of the fact that in a DBFM project, Capital is remaining to be paid over the cause of approximately 30 years. 2. In the Subcontract, holdbacks are released when the Subcontract is certified complete (sections 25, 33 of the CLA), placing a higher threshold on the Construction Contract between Project Co and the Construction Contractor before holdbacks can be released thereby potentially stranding significant funds at the Project Co level, which would decrease the value for money of AFP projects. This would contradict the policy objective of ensuring those at the lower end of the construction pyramid get paid expeditiously. Discussion Points 1. The CLA could instead require certification of "substantial performance of construction under the "construction contract", thereby excluding regular maintenance that, for a DBFM project, occurs over a 30 year term. 2. The definition of "improvement", which includes repairs, under

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
			the CLA, could have an exception for AFP projects whereby maintenance services supplied under the 30 year maintenance term would not be captured for the purposes of the CLA. 3. Exempt contracts above a specified monetary value (e.g., $50 million) from parts of the CLA. 4. Allow for the progressive release of holdbacks to Subcontractors, especially if the CLA is not clarified so as to ensure the contract between Project Co and the Construction Contractor is the "contract."
(b)	*Consider aligning the definitions and structure of the Act with the PPP projects delivery system*		
i)	*Consider generally what parts of the Act are and are not well-aligned in relation to the PPP project delivery model and what unique features of the PPP model need to be addressed with reference to the Act.*		The parts of the CLA that are not well-aligned are set out below with potential recommendations as to how to resolve the issue. **1. Definition of "Owner" as it currently stands has consequences for AFP Project Agreements, as outlined in section (a) above.** Section 1(1), CLA Definition: "Owner" means any person, including the Crown, having an interest in a premises at whose request and, (a) upon whose credit, or (b) on whose behalf, or (c) with whose privity or consent, or (d) for whose direct benefit, an improvement is made to the premises but does not include a home buyer <u>Discussion Points</u> 1. Consider refining the definition of "Owner" to allow parties to deem an "owner" and ensure there is one "owner" per "improvement". 2. Consider refining the definition of "Owner" to allow parties to allow an agent on behalf of the Owner, which directly contracts

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
			with the Contractor, to be the proper "Owner" for the purposes of the CLA. 3. Consider limiting the definition of "Owner" to only one "Owner" that directly requests the improvement from the Contractor. For example: "there shall only be one Owner with respect to any given improvement, and the owner is the one who directly requests the improvement from the [General] Contractor." 4. Consider clarifying that the definition of "Owner" with respect to AFP projects means the special purpose vehicle that has taken responsibility for an improvement. Further clarify that this special purpose vehicle has the capability to request the work and services from a Contractor. Parallel to the definition of "Owner" is the definition of "Contract" which should be limited to one Contract with respect to any improvement. Further, consider clarifying that where there is a master agreement that covers the same improvement (i.e. the Project Agreement covering construction) and other obligations (i.e. maintenance), it shall not constitute the "Contract". 5. Consider the flexibility of potentially allowing liens on Authority (e.g. Hospitals and not Crown itself) property while allowing Authority to delegate "Owner" responsibilities to Project Co. 6. Consider prohibiting liens against Authority property but ensure that funds withheld by Authority for Project Co constitute trust funds with the beneficiary being contractors. 7. Consider whether Project Co meets the CLA's "owner" definition given that Project Co is granted an interest to the premises by way of its license to the site. **2. Definition of "Contractor", which means a person contracting with or employed directly by the Owner or an agent of the Owner to supply services or materials to an improvement.** <u>Discussion Points</u> 1. Consider clarifying that for AFP contracts, a Contractor must be the party contracted to perform the work to complete the improvement that is requested to provide the actual improvement and contracts with Subcontractors to supply services or materials to

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
			an improvement. 2. Consider excluding from the definition of Contractor, special purpose vehicles that are capitalized by debt and equity with the main function of contracting with other Construction Contractors and operational/facility managers. In other words, treat Project Co as the "Owner", at least for certain purposes of the CLA. **3. Definition of "Subcontractor" makes the GC/Construction Contractor in P3s the Subcontractor.** Section 1(1) CLA definition: "Subcontractor" means a person not contracting with or employed directly by the owner or an agent of the owner but who supplies services or materials to the improvement under an agreement with the contractor or under the contractor with another subcontractor <u>Discussion Points</u> 1. Consider limiting this definition by stating that the subcontractor must only provide services to a Contractor whose business is primarily construction. The intent behind this limitation is to ensure that Project Co, whose business would include financing, construction and maintenance under a Project Agreement, could be treated as the "owner" for at least some purposes of the CLA. This would have an effect on those below the construction pyramid and therefore, the Contractor under a Project Agreement would not be considered a Subcontractor either. **4. Issue of Subcontractors' ability to Lien Owner property (i.e. Project Co)** If Project Co is accepted as the Owner, the issue of how a lien would attach to Owner property must be examined. <u>Discussion Points</u> 1. Consider allowing Project Co to be deemed as an Owner for the purposes of fulfilling Owner obligations under the CLA, with the

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
			real property of the Authority remaining subject to liens. 2. Consider modifying Section 15 ("When a lien arises") to include a subsection specific to AFP projects, stating to the effect that where the Owner is Project Co, the lien arises with respect to the real property interest owned by the Authority. 3. Consider adding a new subsection (4) to Section 16 to effectively state that the Contractor must lien against Project Co's cash flows and not the underlying property of the municipality, hospital, or other quasi-public property owner. Add within this new subsection the right of the Owner (i.e. the Authority) to be notified of such claims for lien with ultimate liability resting with Project Co as it was responsible for the improvement and in fact requested it. 4. Consider not allowing liens to be registered when a subcontractor has recourse to other performance security, such as a labour and material bond.
ii)	*Consider how the PPP model works in the context of phasing of projects. Specifically, consider how holdback functions with respect to the complex PPP framework.*[3]		AFP projects have a range of holdbacks, some are those captured by Part IV of the CLA and others are in addition to CLA obligations. The Legislative Holdback includes those holdbacks that are required to be maintained for the purposes of the CLA. There is also a Minor Deficiencies Holdback which is usually retained at the time of Substantial Completion and is calculated at 200% of the estimated amount required to complete and rectify the remaining deficiencies at that time. There may also be Phase-related Minor Deficiency holdbacks that are retained with respect to work that is remaining to be done with respect to a particular phase in the AFP project. These are withheld from payments owed to Project Co and are retained at 200% of the estimated amount required to complete and rectify the remaining Phase-related minor deficiencies. The release of each of these holdbacks is also governed by the terms set out in the Project Agreement which are not before the Substantial Completion Date. Some AFP projects consist of phases and may have corresponding interim payments made with respect to such phases. Interim payments made at particular phases of a project are subject to their own holdbacks which are valued at 200% of the estimated minor

[3] The concept of phasing is also considered in Section 2.

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
			deficiencies that are remaining for that particular phase.
iii)	*Consider whether there should be specific definitions that apply to PPP projects*		<u>Potential Discussion Points:</u> Recommendations with respect to definitions have been addressed in (b)(i) above. Other potential points of discussion: 1. Consider a separate section for AFP projects could potentially clarify that a modified definition of "Owner" applies. The "Owner" in this case would be Project Co/ the special purpose vehicle that is responsible for retaining a Construction contractor for a particular improvement and has other maintenance obligations. 2. Consider a modified definition of "Contractor" to mean that for the purposes of the CLA, the "Contractor" must be one whose primary business is construction, which would result in Project Co being construed as the "Owner", at least for some purposes of the CLA. 3. Consider clarifying the definition of "Payment Certifier" for the purposes of AFP contracts, for example, so as to at least allow Project Co to act as agent for the Authority of the improvement.
iv)	*Consider prompt payment in the context of PPP projects.*[4]		Payments in AFP are made on an availability basis, with the Substantial Completion payment (a large percentage of capital costs) paid upon certified completion of a facility and availability payments made, for a DBFM project, over the course of approximately 30 years. Interim payments may also be made prior to the Substantial Completion for some projects. Any consideration of prompt payment must allow for availability style payments in an AFP/P3 model. Prompt payments, that impose a mandatory statutory payment period, would negatively impact the AFP model and compromise the value for money that is derived from the risk transfer achieved with private financing. The Project Agreement has clear timelines

[4] This issue is also considered in Section 4.

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
			for payment which are consistent with market norms and have been tested and accepted by the industry. The one day timeline to pay value of CLA holdbacks and the 10 day timeframe to disapprove a payment application (as was proposed in the proposed Prompt Payment Act) is not practical given the demands on government and the private sector, especially as approval processes within public entities take additional time given the detailed review and certification that is required for large complex infrastructure projects. Interest on overdue payments would conflict with the Financial Administration Act wherein the Treasury Board has the power to authorize payment of interest on overdue amounts owed by ministries. It should be noted that interest may not be payable without such authority and amendments may have to be made to existing practices and legislation. The implications of this should be considered further. <u>Discussion Points</u> 1. Consider allowing parties to contract out of prompt payment provisions. 2. Consider adopting a modified version of prompt payments which in effect ensures that Monthly Service Payments ("MSP") are made promptly over the 30 year maintenance term without affecting the payment structure during the Construction Term, if prompt payment is applicable to MSP. 3. Consider allowing for common-law and contractual rights of set-off. 4. Consider giving deference to the parties and market conditions, including the contractual terms as agreed between the parties to ensure that the value for money in delivering AFP projects is maintained. For further details, see Section 4 above.
v)	*Consider issues relating to substantial performance and certification as they relate to PPP projects*		Substantial Performance is not the same as the higher threshold that is required for Substantial Completion under the Project Agreement. Substantial performance under the Construction Contract forms a part of the requirement in achieving Substantial Completion under the Project Agreement. Given the current CLA

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
			definitions, substantial performance under a Project Agreement arguably might not occur until the near end of the 30 year maintenance term (due to long-term periodic maintenance obligations) if the Project Agreement is taken to be the "contract". Section 33 of the CLA also has a negative impact on subcontractors as they may have to wait until the end of the Construction Term (2-3 years)/Final Completion of the Works as subcontracts are to be fully performed before holdback release.
vi)	*Consider alternative dispute mechanisms as they relate to PPP projects.*[5]		The parties in an AFP project pursuant to the Project Agreement are required to refer to a third party, the Independent Certifier, for certification services and matters that fall under its mandate, such as issues arising with respect to delays, design, certification of substantial completion, amongst others. Requiring the parties to forego this contractual agreement in favor of mandatory mediation may disrupt the market and the agreed upon norms in resolving disputes. The Project Agreement has a schedule of fifteen (15) pages that addresses a Dispute Resolution Procedure and provides a detailed mechanism in resolving disputes expeditiously. Please refer to Section 12 for further information.
10.	**NON-WAIVER**		
(a)	*Consider allowing waiver of lien provisions*	IO would support a waiver of lien provisions for: • smaller dollar value projects - the cost to administer holdback on smaller projects can outweigh the benefits to owners. • multi-year master services agreements for project management services provided the service provider retains contractors to provide the design and construction component of the services	
11.	**BIDDER EXCLUSION PROVISIONS**		
(a)	*Consider regulating bidder exclusion provisions*	IO reserved the right to not award a contract to any person one who has been/is engaged in litigation against IO or has a previous history of poor performance on Io projects. Regulating bidder	

[5] This issue is also considered in Section 13.

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
		exclusion provisions would adversely impact IO's freedom to enter into contract with parties that are procured in accordance with government standards and industry best practices.	
	Consider limitations on the use of exclusion provisions by specific legislation, regulation, policies or guidelines		
	Consider the use of exclusion provisions in various domestic and international jurisdictions		
12.	**ALTERNATIVE DISPUTE RESOLUTION**		
(a)	*Consider the effectiveness of available procedures and remedies*	The use of a statute to force mandatory mediation, or dispute resolution is inappropriate. This is more appropriately addressed through the terms of a contract. Deference should be given to the dispute resolution provisions in the contract.	In agreement with comments from Traditional Delivery. Statutory adjudication in the UK does not apply to Private Finance Initiatives ("PFIs")/PPP projects. The contract between the special purpose vehicle and the contractor is subject to statutory adjudication. Similarly, it is recommended that the AFP Project Agreement be exempt from any statutory adjudication or mediation. The Project Agreement has a schedule that outlines the Dispute Resolution Procedure in detail to deal with disputes that occur through the lifeline of the project. The procedure allows for the escalation of issues to the appropriate party such as, the Independent Certifier, whom is familiar with the project from inception and adjudicators, where relevant. For more information on the Dispute Resolution Procedure, please refer to the sample Project Agreement provided in our cover letter.
i)	*Consider adding clarifying language or methodology to address the complexity of construction disputes (multi-party disputes with many parties in proximity, and no privity of contract in many cases)*		It is recommended that disputes that arise between Project Co and the Contractor be dealt with at that level and in accordance with the Construction Contract that is agreed between the parties. The Project Agreement has its own mechanism for dispute resolution, the purpose being to resolve disputes between the Authority and Project Co. Lien claimants have a pre-existing solution under the CLA which is to register their liens which would then require Project Co to vacate/discharge the lien in accordance with the

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
			Project Agreement, which treats such claims for lien as an Encumbrance to the Site. Accordingly, the Authority should not be expected to resolve issues between Project Co and the Construction Contractor and those at the lower end of the construction pyramid (e.g. subcontractor disputes).
ii)	*Consider the expense of pursuing legislated procedures and seeking legislated remedies*		Sophisticated parties (e.g. those that have executed a contract for $50M or more) should be allowed to choose which mechanism will resolve their particular dispute the most cost-efficient manner
iii)	*Consider the timing of available procedures and remedies vis-à-vis the progress of the project, particularly with respect to phased projects.*[6]		
iv)	*Consider clarifying the process for coordinating and scheduling interlocutory proceedings*		
v)	*Consider dispute resolution as it relates to preventing the holdup of cash flow during construction disputes*	The work should be ongoing despite the commencement of dispute resolution procedures.	Disputes should be dealt with expeditiously. The current AFP Dispute Resolution Procedure provides for the early escalation of issues and provides options to pursue various mechanisms. There is also an Independent Certifier, a neutral third party that is jointly appointed by the parties to resolve issues related to construction delays and compensation related thereof. This assists the parties in having a familiar party resolve issues while the project proceeds and milestones continue to be met without putting a halt to the timeline of the project. This is directly tied to the release of cash flow given the large amounts of funds released at interim payment periods (where specified) or Substantial Completion, for example.
vi)	*Consider issues with consultants (e.g. mechanisms to avoid perceived bias or unfairness in consultant determinations or expert evaluations.)*		The Project Agreement states that adjudicators, experts, arbitrators and mediators are all agreed upon by the parties; there is no imposition of them by any single party.
vii)	*Consider requirements that would effectively improve the uptake of ADR methods including mediations, dispute review boards and arbitration.*		There should be consideration given as to the types of disputes that would be better resolved through ADR and potentially placing a monetary threshold for those disputes that must/can be litigated.

[6] Phased projects are discussed further in Section 2.

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
viii)	*Consider enhancing harmonizing dispute resolution mechanisms with the domestic surety bonding and insurance industries (particularly as the methods espoused by such entities add further contractual rights and remedies that overlap the judicial process of the Act)*		
ix)	*Consider issues regarding monies being captured and redistributed to secured creditors on the insolvent debtor's reorganization under the CCAA;*		
x)	*Consider access to justice issues for small to medium size businesses who undertake contracting work or supply materials and services associated therewith*		
xii)	*Consider clarifying who holds disputed funds until such time as a dispute is finally resolved;*		There are no progress payments in AFP. Payments are tied to successful completion of specified outcomes. Funds are held at the Authority level until payment is to be made. The large portion of payment, being the Substantial Completion Payment, is triggered by the certification of Substantial Completion by the Independent Certifier which is binding on the parties.
xiii)	*Consider dispute resolution regarding small lien claims (under $50,000) and lack of inexpensive/quick alternative dispute resolution (similar to small claims court)*		
xiv)	*Consider issues of delay and inflexibility in lien litigation*		
(b)	*Consider introducing an adjudication mechanism for construction disputes in Ontario*	The mandatory inclusion of adjudication mechanisms would be inappropriate as they are expensive and sometimes fail to lead to a resolution. Deference should be given to the negotiated terms of a contract with regard to the inclusion of adjudication provisions.	Sophisticated parties should have the option of choosing such adjudication as a mechanism to resolve disputes. Currently, Project Agreements allow for the parties to jointly appoint a single adjudicator. The adjudicator must be familiar with the construction, operation and management of the facility that is being constructed and must resolve disputes in accordance with the United Kingdom Construction Industry Council's Model Adjudication Procedure: Fourth Edition, subject to express modifications that are specified in the Dispute Resolution Procedure Schedule of the Project Agreement.
i)	*Consider providing for adjudication of set-offs*		

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
ii)	*Consider providing for adjudication of progress payment claims*		
iii)	*Consider providing for adjudication of performance bond claims*		
(c)	*Consider providing for mandatory mediation of lien actions*		Sophisticated parties should be free to choose which dispute mechanism works best for them given their particular surrounding circumstances. Enforcing mandatory mediation may only increase time if what is really needed is a more adversarial approach to the issues at hand.
(d)	*Consider providing for an arbitration mechanism for construction disputes in Ontario*		Arbitration mechanism is accounted for in the Dispute Resolution Procedure Schedule of the Project Agreement. The Dispute Resolution Procedure stipulates the kinds of disputes that may be arbitrated or litigated: i) if the amount awarded by an expert or adjudicator pursuant to the Dispute Resolution Procedure is more than $500K in the aggregate, ii) the dispute involves non-monetary material and significant issues to a party, or iii) a notice of dispute has been issued with respect to the certain Independent Certifier decisions. After particular mechanisms to resolve disputes have been exhausted, the parties may mutually refer the dispute to arbitration in accordance with the Arbitration Act, 1991 (Ontario) and the relevant section in the Dispute Resolution Procedure.
i)	*Consider providing the courts of Ontario with the jurisdiction to consolidate multiple arbitrations relating to the same project*		The parties should be given deference in deciding which issues they wish to consolidate into a single arbitration.
ii)	*Consider providing further clarity to court intervention in arbitral proceedings, particularly with respect to providing a stay of court actions in favour of arbitration, as well as mechanisms for joinder and third party intervention*		Court intervention should only be warranted where there is a lack of enforceability of the binding decisions/determinations of alternative dispute resolution providers. Court should provide a stay of court actions in favour of the agreed upon mechanism of dispute resolution between the parties. There is a risk of duplicating issues and differing decisions leading to confusion and waste of court resources and the parties resources.

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
iii)	*Consider the effectiveness of the current arbitration model*		
(e)	*Consider requiring Dispute Review Boards for certain types of projects*		Where issues are based on credibility, it might be useful to have such DRBs but sophisticated parties should be able to set their own terms based on their specific commercial needs and allocation of particular risks.
13.	**SUMMARY PROCEDURE**		
(a)	*Consider whether or not any changes need to be made in respect of the "summary" nature of proceedings under the Act*		
(b)	*Consider how the efficiency of the procedure can be improved*		
(c)	*Consider amendments to the procedural provisions of the Act*	The status quo in recommended	
i)	*Consider eliminating or amending subsection 67(2) to permit some interlocutory steps such as discoveries, affidavits of documents and appeals from interlocutory orders in a lien action*		
ii)	*Consider eliminating subsection 50(2) which prohibits the joinder of trust claims and lien claims*		
14.	**SURETY BOND AND DEFAULT INSURANCE**		
(a)	*Consider requiring labour and material payment bond sureties to promptly pay undisputed amounts*	IO is in favour of requiring labour and material payment bond sureties to promptly pay undisputed amounts.	
(b)	*Consider the potential for requiring labour and material payment bond payees to complete their subcontracts if in the best interests of the project*	IO supports this approach provided that it is the owner, who determines what is in the best interests of the project.	
(c)	*Consider mandatory labour and material payment bonding of all public projects*	Mandating the requirement for labour and material payment bonds on all constitutes a one-size-fits-all approach which is not commercially prudent particularly for smaller dollar value projects.	
(d)	*Consider requirements in respect of the*		

SECTION NO.	ISSUE(S)[1]	COMMENT(S): TRADITIONAL DELIVERY MODEL	COMMENT(S): AFP DELIVERY MODEL
	adjusting of bond claims		
(e)	*Consider providing for the electronic delivery of surety bonds*	IO supports electronic delivery of surety bonds provided measures are implemented to mitigate against the delivery of fraudulent bonds.	
(f)	*Consider whether bond claims should be subject to adjudication*	Bond claims should be subject to adjudication.	
(g)	*Consider whether changes to the third party beneficiary rule are appropriate in order to enable payment by owners directly to subcontractors and suppliers*		
(h)	*Consider whether the Act requires any revisions in light of the existence of contractor and subcontractor default insurance*		
15.	**MISCELLANOUS**		
(a)	*Consider providing for greater precision in setting out the technical irregularities that can be cured under the Act*		
(b)	*Consider the use of letters of credit with international commercial conventions in their terms*	IO is open to accepting letters of credit with international commercial conventions in their terms provided they are accepted by the major Canadian banks.	
(c)	*Consider utilizing security for costs to award interest*		
(d)	*Consider clarifying the application of liens to subdivision lots*		
(e)	*Consider instituting a periodic review of the Act on a go forward basis*	IO is in favour of periodic reviews of the CLA.	