About the Ontario Association of Landscape Architects (OALA)

In 1968, the Ontario Association of Landscape Architects (OALA) was founded. The goal of this self-regulating Association is the improvement, advancement, and promotion of the profession of landscape architecture. The association maintains standards of professional practice and conduct to serve and protect the public interest.

The association administers The Ontario Association of Landscape Architects Act, 1984 which includes responsibility for:

- regulating professional standards
- accreditation for the profession
- maintaining and improving the examining process
- approving educational and professional development standards

The Ontario Association of Landscape Architects Act

Whereas The Ontario Association of Landscape Architects hereby represents that it was incorporated under the laws of Ontario by letters patent dated the 20th day of December, 1968; that the Association is desirous of being continued as the corporation for the purpose of carrying out the objects of the Association and of the Government and discipline of its members; that the Association considers it desirable to grant to full members of the Association the exclusive right to use the designation "Landscape Architect"; and whereas the Association hereby applies for special legislation for such purposes; and whereas it is expedient to grant the application; Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacted Royal Assent on May 29th, 1984.

OALA Mission

To promote, improve and advance the profession of Landscape Architecture and maintain standards of professional practice and conduct consistent with the need to serve and to protect the public interest.

The following comments, as offered, are hopefully to be taken in account during the Expert Review and are specifically responding to issues identified as outlined in the Expert Review of Ontario's Construction Lien Act: Information Package dated July 2015 and provided by Borden Ladner Gervais LLP. The OALA is providing comments for consideration for the following eight (8) issue categories:

1.Lienability:

a. Definition of "Owner" should be expanded or clarified or redefined as "Proponent." In the case of private-public partnership if it is not clear from the complex organization chart, someone near the top needs to be held accountable as the proponent. Including everyone in a lien makes the issue that much more complex and complicated.

- Lien "claimants" need to be better defined as this is lacking in the Act. For example, in the United States consultants can lien a project; it is not clear if consultants can lien in Ontario. "Claimants" needs to be clearly defined.
- Clarity is necessary with respect to type of services that are being provided as well as products, materials, type of materials and supplied by whom.
- Actual physical services that result in appreciable and measurable improvements that enhance the value of the owners land could be further articulated in the Act. Improvements on paper hence master plans or feasibility studies performed by the landscape architect, architect or engineer may not enhance the value of the owner's property until the improvements come to fruition. The consultants should be able to lien a project for design services if they have not been compensated. This can occur on design-build projects where consultants get same treatment as a sub-consultant.
- Price should be clarified to include actual quotation for services or materials. Damages for delay should be expanded to specifically define what can be lienable with respect to an actual schedule. If the contractor has mobilized and is incurring costs beyond the construction schedule then the out of pocket expenses should be included in the lien amount. This should be defined in the Act.
- If price and services or materials are being further defined or expanded upon with the next CLA iteration then improvement needs to be clarified as well. Excessive number of potential lien claimants will result in extendibility or clarification of the definition of improvement with respect to the various types of projects and complex contract arrangements that the Act must now try and speak to.
- Smaller projects regardless of the type should be excluded from the Act and if payment issues arise claimants can go to Small Claims Court. The minimum contract value should be stipulated in the Act defining lien legislation (or a small claims court action).

<u>2. Holdback and Substantial Performance</u>

a. For landscape architectural related work the amount of holdback should be increased to 12%. Stipulate release holdback (10%) after deficiencies have been corrected, i.e., replacement of dead plant material, shortcomings in finish work that does not meet specifications etc. Permit hold on 2% during the maintenance and warranty period to ensure that there is leverage to have the landscape contractor return to fulfill their contractual obligations by correcting deficiencies after the warranty period has ended. Currently the Act provides little incentive to have landscape contractors return to fulfill their contractual obligations by correcting deficiencies after the warranty period has ended.
b. Permitting the 'splitting off' of sensitive work such as landscape related activities should be considered therefore increasing the number of dates for release/early release of some holdbacks.
c. Yes mandatory/automatic release of holdback after expiration of lien rights.
d. Eliminating holdback for finishing work should be carefully considered. This will depend on how long the finishing work will take and if there is another splitting off due to late fall/winter season.
e. Revising the minimum requirement for Substantial Performance sets a bad precedent and creates a challenge for Owners. Once the contractor gets early Substantial Performance Certificate they essentially could be off to other projects and never finish their contractual obligations or drag them out for an extended period of time providing just enough service or materials to not have their lien rights expiry.
f. Further specifics should be included for the Certificate of Substantial Performance that spells out "percentage of completion" or "estimated value of completion," add a 'required' deficiency list for the finishing work requiring correction or adjustment.

g. Not believed to be necessary. It will create more administrative time and paper work. Inform the contractor in the contract documents when they can expect holdbacks to be released and what additional holdbacks will be held during the warranty period.

3. Preservation, Perfection and Expiry of Liens

Generally,

a. Preservation period should be longer to align with payment practices, complex projects, multiple layers of review and administration before getting paid.
c. Introduction of mandatory certification does have possibilities however in landscape architectural-related work Landscape Architects usually deal with the General Contractor's directly.
e. Specific circumstances such as condominiums should be addressed to allow lien claimants either adequate or proper notice of intent to register. Preservation of liens in the context of phased projects should be aligned with phased project dates for release of holdbacks etc.

Perfection

a. Increase the time allowed to perfect a lien to align with payment practices, long term projects, phased projects etc.
b. changing the deadline to perfect a lien could reduce court schedules by proving opportunities to parties to settle prior to perfecting.
c. two years is probably adequate with the given court schedules. In some cases with complex projects, 2 years may be necessary to work through all of the issues.
d. Time limitations in the Act should better align with landscape construction season time periods typical to the Ontario landscape construction industry.

4. Prompt Payment or timely Payments for Construction Work

a) There should be no distinction between public or private sector venues. Bidders would only be attracted to work where there is a prompt payment provision.
b) If all contractual obligations have been fulfilled there is no need to withhold the holdback after the expiration of lien rights.
c) Prompt payment provisions would allow contractors to have continuous and seamless money flow to allow payment to suppliers, subcontractors and financial stability to bid on other projects and not be spread thin with monies held up in litigation or payment delays.
d) Prompt payment provisions need to be adaptable to P3 projects. When milestones have been reached contractors need to be compensated. However many smaller contractors cannot operate waiting for milestones with respect to cash flow. P3 projects need to develop methods to pay on a regular basis over long periods of construction.
e) 'Pay when Paid' and 'Pay if Paid' clauses need to be amended from contracts and defined in the Act. These should not be allowed as many contractors take advantage of this situation ultimately putting undo financial burden to a smaller (sub) contractor.

5. Proof of Financing

a. Yes there should be some aspect of the Act that allows for proof of financing rights to owners, contractors and subcontractors. Prequalification may not address certain issues with contractors

being under financed and being able to adequately pay their subcontractor(s). If the owner pays regularly then there should always be a flow of monies from top to bottom.

- For smaller landscape contractors prequalification will be onerous.
- Surety bonding is an assurance policy and financial safety net for owners if the contractor experiences financial hardship.
- Contractors should be entitled to proof of financing from owners if they have never worked for an owner or if the owner has reputation for not paying contractors or only paying a portion of the invoice.

9. Public-Private Partnerships

a. The Act is completely out of date and out of step with P3 projects.
b. Alignment within the Act needs to take place with the definitions, interpretations, miscellaneous rules to clearly define and list who is the owner, procurement agent, project coordinator, design builder, service provider, lenders and actually provide specific assignments these positions within the organizational chart based on the type of project be it transportation, higher education, public transit etc. Holdbacks, phasing, certifications all need to be revised in the Act.
    - Holdback functions need to be adjusted relative to the specific kinds of work. Underground utilities once installed and tested could 'release' some holdbacks instead of waiting until the project is complete (at times, many months or years) down the road.
    - Landscape architectural installations need to be evaluated immediately after installation, set a holdback schedule, consider warranty period, phased installations, and inspections on a section by section and season by season basis.
    - The Act previously spoke to specific 'splitting off' of sensitive works to establish and issue a Certificate of Substantial Performance however this this needs to return to the Act and implemented with P3 projects. With recognizable milestones prompt payment for services can also take place providing a flow of monies down to the landscape industry, e.g., nurseries, small landscape implementation contractors, etc.

14. Surety Bonds and Default Insurance

a. Undisputed amounts that have not been paid should use all means and methods to resolve these issues such as arbitration, conflict resolution etc. Surety bonds should be used for the non-completing, defaulting contractors.
c. Labour and Material Bonds should be mandatory regardless if they are public or private projects.
e. To expedite the execution of a contract, electronic delivery of surety bonds should be addressed in the Act.
f. Bond claims should not be subject to arbitration; it would appear that the reasons for a bond claim are fairly clear with respect to the definition of default by the prime contractor. Further, adjudication will only delay the progress in completing a project and will trigger liens to be preserved and perfected by subcontractors and suppliers waiting for payment resolution.
g. Owners may take advantage of the 'third-party beneficiary rule' if they are enabled to pay subcontractors and suppliers directly. The surety company would push back if this was tabled as an amendment to the Act.

15. Miscellaneous

a. A separate section should be considered in the Act to deal with or address 'technical irregularities'. A series of definitions would help to determine what irregularities exist and then how the irregularities will be further articulated with precision in the Act for the benefit off all associated with a construction project.

e. The Act should be reviewed and amended as necessary every 5-7 years. Within that time frame the construction industry undergoes numerous changes. With these changes come challenges that are accounted for or speak to new situations within the Act. In 5 years, P3 projects may be replaced with another more complex contract method if that is even possible.

End of Comments