

Proportionality is a major factor in any Costs Award in a Construction Lien Action

The 2010 decision of Master Polika in *SIPGP NO. 1 INC. v. Eastern Construction* [2010 ONSC 2695], sets out some useful principles when seeking costs. In that case, Master Polika granted judgment in favour of the plaintiff to the extent of \$272,249.77 and fixed costs payable in the action at \$225,000.

In arriving at his decision, the Master made the following comments:

The court's authority to award costs in a lien action is set out in section 86 of the *Construction Lien Act*. An award of costs is in the Court's discretion and may be made on a substantial indemnity basis, subject to the limitation set out in section 86(2) of the *Construction Lien Act*.

Rule 57.01(1) contains a non-exhaustive list of factors which may be considered in awarding costs. Since the list is not mandatory, it does not impinge on the Court's discretion granted under section 86. Accordingly, Rule 57.01(1) is not inconsistent with the *Construction Lien Act* and does not require one to refer to section 67(3).

In comparison, Rule 1.04(1.1) requires the Court make orders that are proportionate to the importance and complexity of the issues and amounts involved. In considering the mandatory wording contained in this Rule, Master Polika found that to the extent Rule 1.01(1.1) is mandatory, it is inconsistent with section 86 of the *Construction Lien Act* and impinges on the Court's discretion granted under section 86. Master Polika goes on to say, however, that "proportionality is, nonetheless, a non-binding factor which can be considered by the court in exercising its discretion as to costs, very much akin, although not alike, the limitation set out in section 86(2)."

The discretion granted to the Court under section 86 allowed the Court in the case to issue a cost award which is almost as great as the Judgment amount, while proportionality under Rule 1.01(1.1) may not have permitted such a grand cost award.