

*Case Name:*

**Carleton v. Beaverton Hotel**

**RE: Randy Carleton et al., and  
Beaverton Hotel et al.**

[2008] O.J. No. 542

164 A.C.W.S. (3d) 703

Court File No. 23745/03

Ontario Superior Court of Justice

**D.S. Ferguson J.**

February 15, 2008.

(12 paras.)

**Counsel:**

Gary Neinstein and Rehan Khalil, for the Plaintiffs.

Martin Forget, for the Defendant, Robert James Davis.

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**ENDORSEMENT**

**1 D.S. FERGUSON J.:**-- These are my reasons on whether the costs ordered on December 20, 2007 should be paid by the plaintiff or his counsel, Mr. Neinstein.

**2** I have considered Mr. Neinstein's written submissions.

**3** I agree with him that I must disregard anything that happened at the pre-trial and I do so.

**4** In my oral reasons awarding costs I considered several factors. Of those listed, 1 and 2 warrant costs paid by the plaintiff. Those in 4, 5 and 6 [relating only to the material considered on the motion] are relevant to whether Mr. Neinstein should pay costs personally.

5 I have already made findings in that earlier endorsement that Mr. Neinstein's conduct has resulted in costs being incurred without reasonable cause, wasted costs and delay. Mr. Neinstein's submissions do not persuade me to change that tentative conclusion.

6 I heard about and read the history of this motion during the hearing of the motion. Mr. Neinstein's history in his written submissions is unsworn evidence which I am not prepared to accept where it conflicts with what was said during the submissions by counsel before me.

7 Consequently, the circumstances warrant costs under Rule 57.07.

8 As noted in Mr. Neinstein's factum, a judge's discretion as to costs is not limited to the authority of Rule 57.07. The judge has inherent jurisdiction to control any abuse of process: *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at p. 135.

9 There can be no doubt that Mr. Neinstein failed in his professional duty. His filing an affidavit on this motion containing many allegations of unprofessional conduct on the part of Mr. Davis' counsel which were either not proved or groundless is a clear breach of Rule 4 of the Law Society's Rules of Professional Conduct:

#### **Courtesy**

**4.01(6)** A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation.

10 In my view that conduct is also an abuse of the court's process.

11 My consideration of costs is not based on the fact that the plaintiff sought to strike the jury notice. It is based on the manner in which that right was pursued by Mr. Neinstein.

12 I make the following orders:

- (a) Mr. Neinstein shall forthwith personally pay the \$10,000 of the \$15,000 costs awarded.
- (b) The plaintiff shall forthwith pay \$5,000 of the \$15,000 costs awarded.
- (c) Mr. Neinstein shall send a copy of this endorsement to his client and file a copy of his covering letter in the court file.

cp/e/qlgxc/qlpwb/qlcam