CITATION: *Boily v. Carleton Condominium Corporation 145*, 2013 ONSC 1467
COURT FILE NO.: 11-51640
DATE: 2013/03/08

ONTARIO

SUPERIOR COURT OF JUSTICE

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BETWEEN:	)	
DANIELLE BOILY, JUAN ESCUDERO, LISA BACKA-DEMERS, KANTA MARWAH, DOUG CUMMINGS and RICHARD MAUREL	)	Rodrigue Escayola, for the Applicants (Moving Parties)
Applicants (Moving Parties)	)	
– and –	)	
CARLETON CONDOMINIUM CORPORATION 145, DAN LITCHINSKY, AVIS MILLER, JEAN-GUY BOURGEOIS and CAROL SMALE	)	John Peart, for the Respondents (Respondents)
Respondents	)	
	)	**HEARD:** January 16, 2013 (Ottawa)

REASONS FOR DECISION

BEAUDOIN J.

The Nature of the Motion

[1] The Applicants seek the following reliefs:

1. An order settling the terms of my order of June 29, 2011;

2. An order finding the Respondents in contempt of the 2012 Endorsement;

3. An order enjoining the Respondents to comply with that order;

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4. An order enjoining the Respondents to return the courtyard landscape of Carleton Condominium Corporation 145 ("CCC 145") to the configuration and appearance in place prior to the 2011 repairs to CCC 145's garage as particularized in the Notice of Motion;

5. An order personally imposing onto the individual Defendants the costs of returning CCC 145's courtyard to the 2011 configuration and the costs "thrown away" for work that is not in compliance with the order of June 29, 2011; and

6. Costs of the motion to be imposed on the individual Respondents.

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[2] The Respondents maintain that the motion for contempt must fail for four reasons:

1. The Applicants did not take out an order in this matter, and contempt is only available as a remedy to "enforce an order";

2. Even if the Endorsement in this matter can be treated as an order, the Endorsement does not clearly and unequivocally identify the acts required;

3. The Respondents did not deliberately or willfully violate the Endorsement; and

4. Differences in the exterior of the condominium with respect to the traffic circle, address plate, and type of vegetation are the result of events outside of the control of the Respondents.

[3] The Respondents maintain that, throughout, they have acted with the intention of complying with the Endorsement, and in good faith reliance upon professional advice. If the Respondents have not complied with the intent of the Endorsement, they seek very specific directions about the steps they are required to take to correct the situation (or, put another way, to purge their contempt) and avoid any future disputes.

Background

[4] CCC 145 was created on June 1, 1978. It was part of a complex created by Urbanetics Ltd. and consists of a 13-storey residential split wing tower with 142 residential condominium units. Below the tower and its common elements is a 9-storey split level underground garage. In 2007, it became apparent that the garage required extensive repairs. This work was carried out in 2010 and 2011. The cost of the repairs amounted to $2,036,043.84. The landscape of the condominium complex of CCC 145 was comprised of multi-level planters and walls, including

trapezoidal-shaped planters on Queen, Albert and Bay Streets and these were adorned with a variety of mature trees, shrubs and flowers.

[5] In early 2011, the Corporation's Board of Director ("the Board") advised the owners that it would demolish this landscape as part of a plan to repair the parking garage located underneath it. The repairs to the garage were extensive. The Board also advised of its intention to reinstate a significantly different landscape design known as the "Artistic Design". This new design involved more parking spaces, significantly less vegetation, the removal and replacement of the traffic circle, the removal of the peripheral trapezoidal-shaped planters, the removal and replacement of the address sign and the replacement of the multi-toned red and brown brick of the courtyard walls with grey limestone veneer. This design also provided for the permanent removal of the multi-level planters on Queen, Bay and Albert Streets. It extended to the entire podium area above the garage.

[6] Some of the owners, including the Applicants, were of the view that these modifications constituted a "substantial change" to the common elements, requiring the approval of 66 2/3 percent of the condominium's owners, pursuant to s. 97(4) of the *Condominium Act 1998,* S.O. 1998, c. 19 ("the *Act*"). The Respondents took the position that these modifications were limited to maintenance, not requiring any owners' approval. In their factum, the Respondents now appear to concede that these modifications were "significant."

[7] The Applicants then requisitioned a Special Owners Meeting to submit the Board's plan to a 66 2/3 percent vote. However, the Respondents denied this requisition and refused to provide the Applicants with a list of registered owners, which they required to organize this Special Meeting. The Respondents then called their own Special Owners Meeting to submit the landscape configuration of the podium to a simple majority vote and advised that it would commence demolition the following day, regardless of the outcome of the vote.

[8] The Applicants brought an urgent motion on June 22, 2011, and I granted injunction stopping the Respondents from holding their owners meeting and from making any alterations to the podium until further order. The balance of the Application to determine whether the changes to the podium constituted a "substantial change" was adjourned to the following week.

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Immediately following this motion, the parties reached a settlement whereby the Owners Meeting was permitted to proceed subject to the question of the Artistic Design being submitted to a 66 2/3 percent vote. This agreement was formalized in Minutes of Settlement.

[9] The vote took place. The Board's Artistic Design did not obtain the required support. Following the vote, the Respondents took the position that there was no agreement. They sought to continue with the Application and sought to maintain the Artistic Design on a simple majority vote. The Applicants then brought a Motion to Enforce the Minutes of Settlement.

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[10] On June 29, 2011, I ruled in favour of the Applicants and enforced the Minutes of Settlement as follows:

> [1] On June 22nd, the Applicants hereby obtained an interim injunction stopping the Respondent Corporation from holding a meeting that evening and enjoining the Corporation from making any alterations to the Courtyard landscape of CCC 145 until further order of the court, subject to an agreement of the parties. The issue with these proceedings was whether the proposed changes to the Courtyard constituted a substantial change to the common elements and were thereby subject to a 66 2/3% vote of the owners. Immediately following the hearing, the parties, through their counsel negotiated an agreement and counsel executed Minutes of Settlement of the behalf of the parties. The meeting did proceed as agreed to and the Board did not obtain the 66 2/3% support for its proposed alterations. This meant that the Courtyard would retain its current configuration and appearance.
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> ...
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> [4] I am satisfied that there was an agreement and it should be enforced. The meeting took place and the contentious issue to be decided was framed by the Chair himself in accordance with the Minutes of the Meeting that the Board itself relies on. At page 4, the Minutes reflect that the Chair explained the purpose of the meeting and gave the Board's proposal and the Alternative as "the alternative is to restore the podium and planters but cannot replace the brick, only the closest match, with existing parking and planters to remain the same." He repeated at page 8 "The vote is either for the new landscaping per the designs or to keep the original plans. We have 86 votes in favour and 31 against; a 60.5% vote — insufficient for the Board's motion to carry.
>
> [5] Rule 49.09 allows for the motion. Dissatisfaction with the terms of a settlement or the result will not affect the enforceability of a settlement. The terms of the settlement are clear. The meeting was to go ahead – it did. The Board's proposed design was to be submitted to a vote – it did. The Board's design required a 66 2/3% of vote – it did NOT obtain that result. The Board is required to reinstate the Courtyard as it existed after the repairs to the garage. There is no uncertainty. The Applicants will now be prejudiced if the

settlement is not enforced; they gave up their injunction, their right to have a vote on the removal of the Board and other relief that they sought in their application. All of the owners would be affected as all these issues will have to be re-litigated and the repairs to the garage will be further delayed. Repairs can proceed with a clear sense of what has to be done to the Courtyard once the garage repairs are complete.

[6] If the parties require supplemental reasons, they are to contact me.

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The Reconstruction Work Commences

[11] It is not seriously disputed that the Respondents have reconstructed the podium with elements that significantly differ from the configuration and appearance in place prior to the 2011 work. In August 2011, Danielle Boily ("Ms. Boily"), one of the Applicants, wrote to the Board on September 1 and 14, 2011, to remind them of their obligation to comply with the Decision and to reinstate the podium's prior configuration and appearance. Mr. Litchinsky relies on this letter to argue that there was some confusion as to what was to be done. Nevertheless, he admitted in cross-examination that the Respondents neither communicated with the Applicants nor with their solicitor to either seek clarification or reach a resolution of a potential disagreement. Further, the Board did not seek any direction from the Court despite the express invitation contained in the order to do so and the fact that a disagreement did exist regarding what needed to be done. At the time of Ms. Boily's letter, none of the elements, such as the vegetation, the traffic circle, the address sign, the planters and the interlock pavement, had been reinstated.

[12] When the work on the podium resumed in the spring of 2012, the Respondents deviated from the prior configuration and appearance by restoring a different address sign, a different traffic circle and installing a lamp post in the courtyard. On May 1, 2012, and on a number of occasions thereafter, the Applicants communicated their objection to the Respondents. Nevertheless, the Respondents continued to install interlock pavement where none existed before; they did not reinstall the three vegetation levels on the surrounding streets; and they significantly changed the quantity and kind of vegetation, implementing 12 very small stand-alone rectangular planters in place of the 13 significantly larger trapezoidal-shaped concrete planters.

[13] Numerous photographs were filed as exhibits. While it is obvious that new planting materials cannot be expected to replace the mature vegetation that existed prior to the reconstruction, the following changes are evident:

The traffic circle

The prior traffic circle consisted of seven modular hexagonal-shaped concrete planters, made of exposed aggregate concrete. The new traffic circle is different in terms of shape, size and colour and its facade consists of limestone veneer. A lamp post was installed in the center of the courtyard where none ever existed before. The Artistic Design (defeated at the June 22, 2011 meeting) provided for the replacement of the hexagonal-shaped traffic circle with a round one, covered with lime stone veneer, similar to what has been installed.

The removal of trapezoidal-shaped planters and significant reduction of the vegetation

The previous configuration presented three distinct transitional levels of vegetation around the property (at street level, in trapezoidal-shaped planters and in the brick planters). The former trapezoidal-shaped peripheral concrete planters had been replaced with different, much smaller rectangular standalone planters. They are different in shape and size and hold significantly less vegetation. There is no longer any vegetation at the street level, and there is significantly more interlock pavement on Queen and Albert Streets. These changes are the most dramatic in terms of the appearance of the courtyard and podium. The vegetation differs substantially in colour, shape, quantity, size and species from the prior design. This new configuration resembles the Artistic Design previously promoted by the Board.

The address sign

The prior address sign was a copper-on-black metal and glass neon sign that sat above the brick wall. It was featured in the Corporation's letterhead. The new sign is a white-on-black sandstone sign that is embedded into the brick wall. This was also an element of the Artistic Design.

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Next Steps

[14] The Applicants then sought to take out an order formalizing my decision. The Respondents refused to approve the draft Order stating that, "they could not approve the draft Order as it was 'impossible' for the Condominium Corporation to 'reinstate the courtyard landscape of [CCC 145] to the configuration and appearance that existed prior to the commencement of the repairs to the garage once such repairs have been completed." As such, the Respondents acknowledged the significance of the changes.

The Law of Contempt

[15] The purpose of finding individuals in contempt lies in our society's desire to uphold the rule of law. As the Supreme Court of Canada in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, held, at para. 50:

> The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.

Further, Blair J in *Surgeoner v. Surgeoner* (1991), 6 C.P.C. (3d) 318 (O.C.J.), at para. 5, stated that: "No society which believes in a system of even-handed justice can permit its members to ignore, disobey, or defy its laws and its courts' orders at their whim because in their own particular view it is right to do so." Curtis J. in *Peers v. Poupore*, 2012 ONCJ 306 (O.C.J.), also affirmed that: "A society which countenances such conduct is a society tottering on the precipice of disorder and injustice."

[16] The Ontario Court of Appeal in *Prescott-Russell Services for Children and Adults v. G. (N.)* (2006), 82 O.R. (3d) 686 (C.A.) established a three pronged test to establish contempt: "First, the order that was breached must state clearly and unequivocally what should and should not be done. Secondly, the party who disobeys the order must do so deliberately and wilfully. Thirdly, the evidence must show contempt beyond a reasonable doubt."

Is the Order clear and unequivocal?

[17] At para. 5 of my Endorsement, I wrote: "The Board is required to reinstate the courtyard as it existed after the repairs to the garage. There is no uncertainty."

[18] The Respondents argue that a formal order (as opposed to an endorsement) is required to find someone in contempt. In this case, the only reason why there is no formal order is because the Respondents have refused to approve the draft order submitted to them by the Applicants. Rule 59.01 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that "An order is effective from the date on which it is made, unless it provides otherwise." The fact that Rule 59.03(1) provides that: "Any party affected by an order may prepare a draft of the formal order…for approval of its form," demonstrates that an order exists from the moment the decision is pronounced, without the requirement of having it executed, entered or issued.

[19] I note the following passage from Jeffrey Miller, *The Law of Contempt in Canada* (Toronto: Carswell, 1997), at p. 88:

> Insofar, as the goal of contempt law is to protect the rule of law, technical or nice distinctions as to what constitutes an order usually will not excuse disobedience. For example, even though a judgment does not take effect until it is signed one can be in contempt by acting contrary to that judgment after it is pronounced never mind that it has yet to be executed. The test, again, is whether acts contrary to the judgment would tend to obstruct the course of the justice.

[20] On this point, the Respondents offer two decisions in support of their position which are distinguishable. In *Zadegan v. Zadegan* (2003), 49 C.P.C. (5th) 174 (Sup. Ct.), the motions judge did find one party in contempt, despite the absence of a formal court order. The ruling in *Parker v. Agricultural Credit Corp. of Saskatchewan*, 2000 SKQB 25, 188 Sask. R. 290, turns on a particular requirement of the Saskatchewan *Rules of Civil Procedure*.

[21] The Respondents allege that they understood that the Endorsement applies only to the inside of the courtyard (as opposed to the entire podium) and only to hard landscape (as opposed to the vegetation). They now rely on an Oxford English Dictionary definition of "courtyard". According to the Respondents, they could do whatever they wanted on the outside of the

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courtyard walls, could choose whatever address sign they liked, did not have to reinstate any of the vegetation, and did not have to reinstate the peripheral trapezoidal planters.

[22] Although my Endorsement refers to the "courtyard," it was clear that the dispute encompassed the entire *podium*, including the vegetation, and not just the interior courtyard. That was why there was an issue of whether the proposed reinstatement plan constituted a "substantial change." The record of the proceedings reveals that the parties never made any distinction between the podium and the courtyard in the Minutes of Settlement, during the Owners Meeting leading to the owners' vote, or in their submissions to me on June 29, 2011.

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[23] The Notice to Owners pertaining to the June 22, 2011 Special Owners Meeting provided the owners with two options, both contemplating the reinstatement of the entire podium area above the garage:

> The Notice to Owners also explained how the podium would be reinstated depending on the outcome of the vote:
>
> (12) A majority vote in favor of the proposed Artistic Landscape Design *podium* reinstatement plans will result in the Corporation proceeding with the podium reinstatement plan proposed by Artistic Landscape Design at an estimated cost is of $220,000, excluding soft landscaping.
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> (13) A majority vote against the proposed Artistic Landscape Design *podium* reinstatement plan will result in the Corporation proceeding with reinstatement of the retaining walls, hard and soft landscaping elements, roadways with a brick cladding, selected to match the existing brick as closely as is commercially reasonable in the exiting configuration after the underground garage roof repairs have been completed. The cost of reinstatement of the current configuration and matching materials is estimated to costs $395,000, excluding soft landscaping.

[24] The proxy for the vote on the proposed podium reinstatement plan provided the owners with the same two options. At the Special Owners Meeting of June 22, 2011, the Board's President, Dan Litchinsky ("Chair"), acting on behalf of the Corporation, framed the issue to be voted on as follows:

> Chair: … The purpose of the meeting is to discuss the proposed renovation of the *podium*, including water-proofing planters, removing brick and replacing all according to the plan from February [the Artistic Design]. Also to cut back a portion of the front planter and replace it with three parking spaces plus one parking space within the podium and a traffic circle with planter. The contract cost is 877.
>
> The alternative is to restore the *podium* and planters but cannot replace the matching brick, only the closest match, with existing parking and planters to remain the same.
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> …
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> Chair: It is clear that the choice is either to restore the *podium* or choose the artistic landscape design.

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[25] In cross-examination, the Respondent, Dan Litchinsky, Director and President of CCC 145, admitted that, save and except a modification to the access ramp and the use of the closest matching brick (since the original brick was unavailable), only two options were presented: all of the Artistic Design or all of the existing configuration. He further admitted that there was never any discussion on the vote differentiating the inner courtyard *versus* the outer courtyard.

[26] In a newsletter to the owners, dated September 7, 2011, the Board confirmed the purpose and outcome of the Owners Meeting, as well as the meaning of the Court's decision, namely, that the existing configuration would be reinstalled.

[27] The Respondents cannot be allowed to circumvent the Endorsement through their restrictive interpretation. As Lauwers J. stated in *Sweda Farms Ltd. (c.o.b. Best Choice Eggs) v. Ontario Egg Producers*, 2011 ONSC 3650, at paras. 21 and 34:

> The order "must state clearly and unequivocally what should and should not be done." It must be directive and not simply permissive. In terms of compliance, the alleged contemnor must have knowledge of the nature of the terms of the order, and, once having knowledge, must obey the order in letter and spirit with every diligence. A person who is subject to an order should not be permitted to "finesse" it or to "hide behind a restrictive and literal interpretation to circumvent the order and make a mockery of it and of the administration of justice."
>
> …

> The need to interpret the words of the order is obvious, since the words of any written instrument take their meaning from their context and those words, properly understood in context, can well reveal a latent ambiguity (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141). In contractual interpretation, the court must consider the context or "factual matrix" within which the contract operates (*Salah v. Timothy's Coffees of the World Inc.* (2010), 74 B.L.R. (4th) 161, [2010] O.J. No. 4336 (C.A.) at para. 16 per Winkler C.J.O.; *Leitch Gold Mines Ltd. et al. v. Texas Gulf Sulphur Co. (Incorporated) et al.* (1969), 3 D.L.R. (3d) 161, [1969] 1 O.R. 469 (H.C.) per Gale C.J.O.); a significant difference should not exist between the approach that the court takes in interpreting a contract and the approach the court takes in interpreting legislation (*River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743 (H.L.) per Lord Blackburn at pp. 763-65; *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, [1996] S.C.J. No. 101 at para. 41 (QL) per L'Heureux-Dubé J., dissenting on other grounds). In my view, these principles apply to the interpretation of court orders, with necessary modifications.

[28] The court in *Power v. Jackman*, 2008 NSSC 389, 278 N.S.R. (2d) 31 (N.S.S.C. Fam. Div.), stated, at para. 17, citing Mossip J. in *Royal Bank v. 1542563 Ontario Inc.*, 2006 CarswellOnt 5761 (Sup. Ct.), at para. 4, that when interpreting a court's decision, the following principles must be applied:

> a) A broad and liberal interpretation is to be used to achieve the objective of the court in making the order;
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> b) The language must be construed according to its ordinary meaning and not in some unnatural or obscure sense;
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> c) A certain flexibility must be available in recognition of the fact that life is not static; developments beyond the contemplation of the parties often arise;
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> d) The court must examine the context in which the order was issued, evaluate the order in accordance with the circumstances of the case, and question whether the acts or omissions could reasonably have been contemplated to fall under the terms of the order; and
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> e) A party cannot hide behind a restrictive and literal interpretation to circumvent the order and make a mockery out of the administration of justice.

[29] My Endorsement must be interpreted in the context in which it was rendered: the litigation pertained to the hard and soft landscape of the entire podium. In cross-examination, Mr. Litchinsky admitted that, prior to the vote, there was never any discussion with the owners

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seeking to differentiate the inner courtyard (*versus* the outer courtyard), or parceling out the soft landscaping. Even if the Respondents truly believed that the Endorsement allowed them to alter features outside the inner courtyard, it was apparent to them in September 2011 that the Applicants did not share this same interpretation.

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[30] My Decision specifically invited the parties to contact me, "if the parties required supplemental reasons." The Respondents had more than enough time to make this inquiry before the reinstatement work had taken place.

[31] The parties' obligations pursuant to the Decision were clear and unequivocal: submit the podium configuration to a vote and, absent a 2/3 vote in support of the Artistic Design, the podium was to remain in its prior configuration and appearance. The Respondents lost that vote and tried to avoid the enforcement of the Minutes of Settlement. Having lost that decision when I addressed the issue of costs on February 24, 2012, the parties made no distinctions between the inner courtyard and the podium. The Respondent Board knew what it had to do.

Did the Respondents deliberately and wilfully breach the order?

[32] The Moving Party does not need to prove that the alleged contemnor intended to specifically disobey the order. All that must be demonstrated is that they intended to do an act which was prohibited by the court. In this case, did the Respondents intend to reconstruct the podium the way they did? The court in *Sweda Farms Ltd.*, stated, at para. 22:

> The alleged contemnor's conduct must objectively breach the order. There is also a mental or subjective element, often expressed in the formula that the disobedience must be deliberate and wilful (*Prescott-Russell Services for Children and Adults, supra* note 5 at para. 27), or wilfully blind, indifferent or reckless (*Wheels Holdco Inc. v. NFM Investments Corp.* 2011 ONSC 1739, [2011] O.J. No. 1476 at paras. 24-25 per Roberts J.; *Canadian Private Copying Collective v. Fuzion Technology Corp.* (2009), 77 C.P.R. (4th) 1, [2009] F.C.J. No. 1044 at para. 63). Actionable disobedience includes the deliberate failure of a person to make inquiries in circumstances where suspicion is or should be aroused (*Wheels Holdco Inc.*, *ibid.* at para. 25; *Neger v. Erez* (2001), 16 C.P.C. (5th) 275, [2001] O.J. No. 4142 at paras. 23-27 (S.C.) per C. Campbell J., aff'd (2005), 7 C.P.C. (6th) 135 (Ont. C.A.).). Further, "[i]f a party feels that the injunction is over-broad, its recourse is to apply to have the terms narrowed or made more explicit, not to resort to self-help by ignoring some or all of the term

(Jeffrey Miller, *The Law of Contempt in Canada* (Toronto: Carswell, 1997) at p. 93).

The failure to reinstate the podium was not one born of inadvertence or accidental. The evidence before me clearly demonstrates that the Board was making the decisions about how the podium landscape was to be reinstated. For instance, even though the Respondents' engineer advised that no traffic circle should be reinstated in the courtyard, the Board decided anyway to install one, and a different one in terms of size, location, shape and color. Mr. Litchinsky swore that, "[t]he Board felt that the turning circle *façade* would be better faced in limestone," despite the fact that, "[a]n aggregate concrete *façade* similar to what existed on the old turning circle could also have been installed but the Board did not feel that esthetically an aggregate concrete *façade* would enhance the courtyard" (Litchinsky Affidavit of Oct. 2012, at para. 40(c)). The Board was making conscious decisions about how the podium landscape was to be reinstated and that this was different.

[33] With respect to the trapezoidal-shaped peripheral planters, Mr. Litchinsky swore that, "[t]he Condominium Board determined that … the new planters should not be buried within the common elements at street level as the trapezoidal planters were but should be placed on the surface of the common elements and be of such a size to be more manageable" (Litchinsky Affidavit of Oct. 2012 at para. 40(c)). The Respondents also recognized that trapezoidal-shaped planters were available in custom form, but they considered them to be too expensive. The reinstatement plan in the original configuration was always known to be more expensive.

[34] With respect to the vegetation, Mr. Litchinsky testified that, "[t]he plantings that were chosen by the Condominium Board to both promote the condominium's architectural highlights as well as to eliminate some of the security issues."

[35] Finally, with respect to the address sign, the Respondents provided conflicting explanations as to why they chose not to reinstate it, at times stating that the sign was irreparably damaged, that it was difficult to maintain or that it offered poor visibility for emergency vehicles. What remained consistent is that the Respondents could have reinstated the address sign but they took it upon themselves not to. They felt the prior sign was too expensive and offered poor visibility and were of the view that the new sign was, "an upgrade from the copper/neon sign."

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[36] The evidence of Chris Teron and Leoplodo Marti-Aguilar was offered as expert evidence by the moving parties and their evidence is uncontradicted. Mr. Teron has a degree in architecture and was personally involved in the last stages and development of the condominium complex in the 1970's. Mr. Marti-Aguilar is a landscape architect with over 30 years experience. Both gave evidence that had the Board wanted to, they could have reinstated the traffic circle, the address sign, the peripheral trapezoidal-shaped planters, and the vegetation to the pre-demolition configuration and appearance, while also ensuring the waterproofing of the garage. In cross-examination of Mr. Teron and Mr. Marti-Aguilar, not a single question was asked on their actual opinion. Their evidence is untouched and uncontradicted.

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[37] The Respondents have attempted to justify their breach of the Endorsement by raising the existence of a municipal by-law, the "accidental" destruction of the address sign and, the fact that the prior traffic circle was a "temporary structure."

[38] The Respondents state that they had to replace the traffic circle since it did not comply with the municipal by-law, yet the new traffic circle is still non-compliant. The Respondents admitted that the address sign and traffic circle could have been replaced despite their destruction had the Board chosen to do so. While the Respondents allege the prior traffic circle, in place for nearly 25 years, was a temporary structure, Robert Osler, the former Board's president in place at the time the traffic circle was implemented in 1986, confirmed that the prior structure was never presented or meant to be a temporary structure.

[39] In *Sussex Group Ltd. v. 3933938 Canada Inc. (c.o.b. Global Export Consulting)*, [2003] O.J. No. 2906, at paras. 53-55 (Sup. Ct.), the court summarized the unavailable defenses to an alleged contemnor as follows:

> It is not a defence to an allegation of contempt that it is impossible for the contemnor to purge his contempt or to comply with the court order where such impossibility is the result of the contemnor's own conduct. *Manis v. Manis* (2001), 55 O.R. (3d) 758 (C.A.).
>
> It is not a defence to argue that an order is wrong or ineffective in law.
>
> It is no defence that the court order is incorrect, null, or under appeal, and thus "ineffective". The order stands, and commands respect in all its aspects, until it is

> reversed on appeal "or an equally effective order [is] secured to the effect that it need not be obeyed."

[40] The courts have also rejected the defense of necessity as there is an "alternative course of applying to set aside or to vary the court orders. Absent urgent risk of serious harm, one [is] obliged to take alternative measures to breaking the law" (Jeffrey Miller, *The Law of Contempt in Canada* (Toronto: Carswell, 1997), at 96-97). There was no such urgent risk of serious harm which could have justified the Respondent acting unilaterally as they did. If any of these concerns existed they should have been raised in the context of a motion for direction as soon as such concerns had surfaced. Wolder J. in *Garley v. Gabai-Maiato*, 2006 ONCJ 28 (O.C.J.), at para. 14, affirmed:

> It is not open to the [Respondents] to claim [they] should be excused from the performance of [their] obligations because of difficulty that [they] encountered but did not assert directly by seeking a stay of judgment or diligently pursuing an appeal. To permit the [Respondents] to decide whether or not to obey a court [decision] depending on whether [they] perceive it appropriate or convenient, is to permit an improper collateral attack on a valid and binding judgment of the court.

The Respondents should have returned to the Court for further direction as my Endorsement invited them to do. I conclude that the Respondents breached the order wilfully and deliberately.

Does the evidence demonstrate contempt beyond a reasonable doubt?

[41] The evidence establishes beyond a reasonable doubt that the reinstatement of the podium contravenes the Decision. The differences are most evident in four of the podium's elements: (1) the traffic circle, (2) the address sign, (3) the peripheral concrete planters, and (4) the vegetation.

[42] In this case, the evidence of breach is strong and is in fact admitted by the Respondents. Mr. Litchinsky admitted that the traffic circle, the address sign, the concrete planters and grade level soil, and the vegetation and plantings are now of a different size, shape, colour, material, kind and/or location. Even the Respondents' engineer lists some of the disparities between the two designs.

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Remedies for Contempt

[43] The Superior Court's authority to punish for contempt lies within the court's inherent jurisdiction to control its own process. The range of remedies available to the court is very broad. Rule 60.11(5) sets out that, in disposing of a motion for contempt, a judge may order that the person in contempt:

a) be imprisoned for such period and on such terms as are just;

b) be imprisoned if the person fails to comply with a term of the order;

c) pay a fine;

d) do or refrain from doing an act;

e) pay such costs as are just; and

f) comply with any other order that the judge considers necessary.

[44] On the issue of the liability of directors in cases of contempt, Rule 60.11(6) explicitly provides that: "Where a corporation is in contempt, the judge may also make an order under subrule (5) against any officer or director of the corporation and may grant leave to issue a writ of sequestration under rule 60.09 against his or her property."

[45] In this case, the Moving Party submits that the Corporation could not act on its own. The individual Respondents were the ones whose actions and decisions resulted in a breach of the Decision. Therefore, the Moving Party respectfully submits that the individual Respondents must be personally found in contempt. The Respondents did not seek any directions from the Court, nor did they consult the Applicants or their lawyer.

[46] Cumming J. in *Sussex Group Ltd.* stated, at paras. 56-57, that: "If a directing mind of a corporation prevents the corporation from complying with the order, the person(s) comprising the directing mind is also guilty of contempt. … Any director or officer who affects the breach of the order, or who fails to do anything that caused the breach, may be held in contempt of court."

[47] The Respondents acknowledge the effect of Rule 60.11(6). They argue that there are additional defenses available in the *Condominium Act* for directors of a condominium

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corporation, specifically in sections 37, 97 and 17 of that *Act*. While the *Act* also requires every director to exercise his or her duties of office in good faith, section 37(3)(b) of the *Act* states:

> A director shall not be found liable for a breach of a duty mentioned in subsection (1) if the breach arises as a result of the director's relying in good faith upon,
>
> > (b) a report or opinion of a lawyer, public accountant, engineer, appraiser or other person whose profession lends credibility to the report or opinion.

[48] I conclude that the Respondents acted neither honestly and in good faith, nor as a reasonably prudent person. In the spring of 2011, the parties disagreed as to whether the proposed Artistic Design constituted a substantial change requiring a 66 2/3 percent vote from the owners. When faced with an injunction that stopped them from proceeding with their meeting and from demolishing the podium, the Respondents entered into Minutes of Settlement by way of which they would submit the question of the reinstatement of the entire podium to a 66 2/3 percent vote of approval by the owners. When the Respondents lost the vote, they immediately denied there was an agreement forcing the Applicants to bring a motion to enforce the Minutes of Settlement. The Respondents lost that motion and I ordered that the vote to reinstate the existing podium be respected. When, according to the Respondents themselves, it became apparent that the parties disagreed as to what needed to be reinstated, the Respondents chose not to communicate with the Applicants or with their lawyer, nor to seek directions from the court despite my invitation to do so. The Respondents adopted a narrow and self-serving interpretation of my order and chose to reinstate elements that they preferred, despite the decision of this Court. This was admitted in cross-examinations.

[49] As for the reliance on the engineer's report, the Respondents retained professional engineers (Keller Engineering and Associates) and landscapers (Garden Creations of Ottawa Ltd.) to provide advice with regard to the restoration of the courtyard and the podium and the vegetation to be installed therein. While Keller Engineering offered an opinion that, "water penetration appeared to originate from the planters on the podium deck and on the projections on the north and south elevations," I have not been provided with any opinion by them that the podium could not be restored to its original appearance. The only evidence on this point from Mr. Litchinsky is that Keller advised that any new (trapezoidal-shaped) planters outside the

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courtyard wall should be at least one foot away from the wall to allow for air circulation. On behalf of the Applicants, Mr. Teron notes that the former peripheral planters did not have a backing and, as such, the soil they contained rested against the brick veneer of the wall and that moisture found in the soil could have contributed to the deterioration of the brick. He concluded that peripheral planters could have been properly reinstalled without jeopardizing the waterproof membrane on top of the podium.

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[50] The Respondents also rely on s. 97(2)(b) of the *Act*, which provides:

> A corporation may, by resolution of the board and without notice to the owners, make an addition, alteration or improvement to the common elements, a change in the assets of the corporation or a change in a service that the corporation provides to the owners if,
>
> (b) in the opinion of the board, it is necessary to make the addition, alteration, improvement or change to ensure the safety or security of persons using the property or assets of the corporation or to prevent imminent damage to the property or assets.

[51] As for the issues of safety and security, the Applicants note that eight affiants (including past Board members and presidents of the Board), unequivocally deny having ever heard of the corporation having a problem with homeless individuals camping in the vegetation. The Respondents' anecdotal evidence of a lack of proper lighting in the courtyard, belief that the prior address sign was difficult to see and that homeless individuals would be found asleep in the vegetation is insufficient to justify their breach. Moreover, none of these issues were raised at the Special Owners Meeting before the vote, or at any of the hearings before me on June 22 and 29, 2011, nor did the Respondents bring these issues to my attention or seek direction from the Court.

[52] The Respondents also rely on s. 17(1) of the *Act*, which provides: "The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners."

[53] The Respondents rely on case law that provides that in the absence of unreasonableness, deference should be paid to the decisions of the Board charged with the responsibility of balancing the private and communal interests of the unit owners. A condominium Board is

presumed to be operating in good faith and in furtherance of its statutory duties (*York Condominium Cop. No. 382 v. Dvorchik*, [1997] O.J. No. 378 (Ont. C.A.), at para. 5).

[54] As for the deference due to the Board of Directors, I accept the Applicant's argument that this deference is limited to their decisions to adopt by-laws or rules that are neither unreasonable nor inconsistent with the *Act*. Appellate authority has rejected the Respondents' argument seeking to extend deference to other Board decisions. Unlike the adoption of rules and by-laws, the Board's decision not to comply with a court decision "is not within the Corporation's exclusive area of responsibility" (*York Condominium Corp .No. 382*; *Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan* (2001), 43 R.P.R. (3d) 78 (Sup. Ct.); *Metro Toronto Condominium Corp. No. 545 v. Stein* (2006), 212 O.A.C. 100 (Ont. C.A.), at para. 49).

[55] This is a Motion for Contempt and no deference should be granted to a Board's decision to contravene a court order. To grant the deference sought by the Respondents would be to allow Boards to disregard court orders, regulations and legislation.

[56] If the Respondents are not held accountable for their contempt, the result would be to impose on all of the owners, through their common element fees, all of the costs of the work to be redone. Section 37(1) of the *Act* is of limited application. Directors of a Condominium Board of Directors can be held personally liable for their actions when they do not act honestly or in good faith, or when they fail to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. I have already concluded that the Directors did not act in good faith and by taking a narrow and self-serving view of the court's order, and by failing to seek advice from their counsel or further direction from the court before going ahead with their reinstatement plan, the Directors did not exercise the care, diligence and skill of a reasonable person.

[57] For all the above reasons, I grant the following relief:

a) The Respondents are found to be in contempt of my order of June 29, 2011;

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b) Thee Respondents are ordered to return the courtyard and podium landscape of CCC 145 to the configuration and appearance in place prior to the 2011 demolition, and in particular, without limiting the generality of the foregoing:

i) Remove the lamp post presently erected in the traffic circle, where none existed before;

ii) Remove the round, grey limestone veneered traffic circle presently in place in the courtyard;

iii) Reinstate the seven central modular hexagonal-shaped planters, made of aggregate concrete, as they existed prior to the 2011 demolition;

iv) Remove the engraved address plate, where none existed before;

v) Reinstate the custom-made, illuminated, metal address sign as it existed prior to the 2011 demolition;

vi) Reinstate the peripheral trapezoidal-shaped planters in the same shape, size and material as they existed prior to the 2011 demolition; and,

vii) Reinstate the three-levelled vegetation, using the same kind, species, size and quantity on multiple level, including the grade-level vegetation which has now been replaced with interlocking pavement, as it existed prior to the 2011 demolition.

c) The individual Respondents shall personally bear the additional costs, including material and labor of returning CCC 145's podium landscape to the 2011 configuration.

[58] The parties may make brief submissions as to costs within 20 days of the release of my decision.

Mr. Justice Robert N. Beaudoin

Released: March 8, 2013

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CITATION: *Boily v. Carleton Condominium Corporation 145*, 2013 ONSC 1467
COURT FILE NO.: 11-51640
DATE: 2013-03-08

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DANIELLE BOILY, JUAN ESCUDERO, LISA BACKA-DEMERS, KANTA MARWAH, DOUG CUMMINGS and RICHARD MAUREL

Applicants (Moving Parties)

– and –

CARLETON CONDOMINIUM CORPORATION 145, DAN LITCHINSKY, AVIS MILLER, JEAN-GUY BOURGEOIS and CAROL SMALE

Respondents (Respondents)

REASONS FOR DECISION

Beaudoin J.

Released: March 8, 2013