

**CITATION:** York University v. Markicevic and Brown, 2016 ONSC 3718  
**COURT FILE NO.:** CV-12-9758-00CL  
**DATE:** 20160606

**ONTARIO**

**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**BETWEEN:**

York University )  
 ) *William C. McDowell, Nadia Campion and*  
 ) *Brian Kolenda, for the Plaintiff*  
 Plaintiff )  
 )  
 )  
 - and - )  
 )  
 )  
 Michael Markicevic, Janet Fleming, Mima ) *Lincoln Caylor and Nathan Shaheen, for the*  
 Veronica Markicevic, Aleeyah Apparel Inc., ) *Defendants Michael Markicevic, Janet*  
 operating as A-Tech Construction and ) *Fleming and Mima Veronica Markicevic*  
 Design Inc., Aleeyah Inc., AFC Inc. )  
 operating as Arsenal Facility Consulting )  
 Inc., Toronto Engineering Company, ) *Phil Brown, self-represented*  
 Guga's International, Canadian & American )  
 Concrete Renovation & Drain-Layer Ltd., )  
 Roman Ritacca, Luigi Lato, Phil Brown, )  
 Riaz Jadavji, Helen Saoulli Georgiou, Vasos )  
 Georgiou, George Saoulli, Georgia Saoulli, )  
 Guram Sekhniashvili, Gia Sekhniashvili, )  
 John Doe #1, John Doe #2, John Doe #3, )  
 Jane Doe #1, Jane Doe #2 and Jane Doe #3, )  
 )  
 Defendants )  
 )  
 ) **HEARD:** April 6, 7, 8, 11-15, 18, 21, 22,  
 ) 25-29, May 2, 3, 9-12, 24-26, 2016

**REASONS FOR JUDGMENT**

**Conway J.**

[1] Campus Services and Business Operations (“**CSBO**”) is the department at York University (“**York**”) responsible for, among other things, the planning, maintenance and operation of all physical facilities at York.

[2] From 2007 to 2010, Michael Markicevic (“**Mr. Markicevic**”) was the Assistant Vice-President CSBO, occupying the most senior position in the department. Phil Brown (“**Mr. Brown**”) was the Director of Maintenance and reported directly to Mr. Markicevic.

[3] In late January 2010, a “**Whistleblower**” came forward with allegations that Mr. Markicevic had misappropriated York resources for his personal residence. On February 1, 2010, pursuant to a negotiated severance agreement, Mr. Markicevic’s employment at York was terminated without cause. Mr. Brown’s employment was terminated in April 2010.

[4] York conducted an investigation into the allegations, first internally and then through Navigant Consulting (“**Navigant**”). Navigant’s report was released in May 2011. The investigation revealed that numerous fraudulent schemes had occurred within CSBO.

[5] In January 2012, York brought this claim against Mr. Markicevic, Mr. Brown and others, alleging that they had conspired in carrying out various schemes to defraud York. York has since discontinued the action against certain defendants and has noted others in default.<sup>1</sup> The trial proceeded only against Mr. Markicevic, Janet Fleming (“**Ms. Fleming**”), their daughter Mima Markicevic (“**Mima**”), and Mr. Brown.

[6] York alleges that Mr. Markicevic was the mastermind of two fraudulent schemes that he perpetrated through his subordinates, including Mr. Brown. York further alleges that Mr. Markicevic used York employees to work on his residences in Collingwood and Vaughan, at York’s expense. York alleges that Mr. Markicevic fraudulently conveyed his interests in those properties to Ms. Fleming and Mima. York alleges that Mr. Brown participated in one of the fraudulent schemes and that he used his university credit card (Pcard) to make expenditures for non-York purposes.

[7] Both Mr. Markicevic and Mr. Brown deny these allegations. They maintain that they did not engage in any fraudulent schemes and did not benefit from the use of any York resources. They state that they have been falsely implicated by other York employees seeking to advance their own interests.

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<sup>1</sup> The action was discontinued against AFC Inc. operating as Arsenal Facility Consulting Inc., Luigi Lato, Helen Saoulli Georgiou, Vasos Georgiou, George Saoulli and Georgia Saoulli. The defendants Riaz Jadavji, Gia Sekhniashvili, Aleeyah Apparel Inc., operating as A-Tech Construction and Design Inc., and Aleeyah Inc. have been noted in default. York is not seeking relief at trial as against Toronto Engineering Company, Guga’s International, Roman Ritacca, Guram Sekhniashvili and Canadian & American Concrete Renovation & Drain-Layer Ltd.

[8] For the reasons that follow, I reject those denials. I find that Mr. Markicevic and Mr. Brown engaged in the fraudulent activities and, in so doing, breached their fiduciary duties as senior employees of York. I grant York the relief set out below.

### **Mr. Markicevic and Mr. Brown – Positions at CSBO**

[9] Mr. Markicevic started working at York in October 2004 as Director of Security, Parking and Transportation. He was successful and progressed to become Assistant Vice-President of CSBO in February 2006.

[10] In March 2007, there was an organizational restructuring within the Finance and Administration Division at York. The Department of Facilities Services and the CSBO Department merged and continued as CSBO. Mr. Markicevic was appointed the Assistant Vice-President (“**AVP**”) of the merged entity and had the most senior position in CSBO. He reported directly to Gary Brewer, the Vice-President Finance and Administration at York (“**Mr. Brewer**”). Mr. Markicevic’s annual salary as AVP of CSBO was \$185,000 with a performance bonus of up to 20%.

[11] As AVP of CSBO, Mr. Markicevic had an annual operating budget of \$120 million and a special capital budget of approximately \$100 million. He was responsible for 1,000 employees and had at least 14 direct reports, one of which was Director of Maintenance. Shortly after Mr. Markicevic became AVP, he sought out Mr. Brown to fill that position. As Director of Maintenance, Mr. Brown had a budget of approximately \$10 million and was responsible for 65 employees.

[12] Mr. Markicevic and Mr. Brown had worked together in the past and at one point had lived together. Mr. Markicevic was aware that Mr. Brown had a gambling problem and past financial difficulties. Neither Mr. Markicevic nor Mr. Brown disclosed this information to York.<sup>2</sup>

[13] On July 23, 2007, six weeks after Mr. Brown arrived at York, Mr. Markicevic sent an email to Stephen Jacobson, Director, Financial Services, CSBO (“**Mr. Jacobson**”) advising that Mr. Brown “does not require my signature/authority when signing invoices that fall within his signing authority”. The signing authority for all CSBO Directors on invoices was \$50,000. Ordinarily Mr. Markicevic required that he co-sign all contractor invoices. He waived that requirement only for Mr. Brown’s Maintenance department, with the effect that Mr. Brown had sole signing authority for all contractor invoices up to \$50,000.<sup>3</sup>

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<sup>2</sup> Mr. Brown testified that he disclosed his gambling issues to York when he was hired. There is no credible evidence that he did so. Mr. Brewer and Mr. Jacobson both testified that they were not told of any gambling issues and Norm Ahmet (the only person Mr. Brown said he told directly) is now deceased.

<sup>3</sup> This change to Mr. Brown’s signing authority for contractor invoices is clear from Mr. Markicevic’s email to Mr. Jacobson of July 23, 2007, Mr. Jacobson’s evidence at trial and Mr. Jacobson’s email of July 31, 2007 re “Signing Authority – Current Status”.

[14] As AVP of CSBO, Mr. Markicevic had a demanding and blunt management style. Mr. Brewer admired his strong work ethic and leadership. However, from the perspective of his subordinates (many of whom testified at trial), Mr. Markicevic operated a tyrannical regime and ruled through fear and intimidation.

### **Procurement and Payment at York**

[15] In order to understand the alleged fraudulent schemes, a brief description of the procurement and payment processes at York is required.

[16] Any use of external contractors at York had to comply with the policies of York's Procurement Services Department ("**Procurement**"). York's procurement policy and procedure at the time required that:

- goods and services generally be purchased from "preferred suppliers";
- if no "preferred supplier" arrangement existed:
  - (i) for purchases under \$10,000, departments had to determine fair market value and use the university's Pcard whenever possible;
  - (ii) between \$10,000 and \$50,000, departments had to solicit quotations from three or more suppliers, complete purchase requisitions and forward these materials to Procurement for a purchase order to be issued;
  - (iii) between \$50,000 and \$100,000, departments were to consult with Procurement as to the best acquisition method;
- purchases of goods or services over \$100,000 would be publicly tendered, unless otherwise exempted;
- In the case of emergency or where a "sole/single source certification" was otherwise justified, the AVP of CSBO had the authority to acquire goods or services over \$100,000 without regard to the policy, and the director of the affected area had the authority up to \$100,000, subject to notification and approval of Procurement.

[17] As can be seen, if no preferred supplier existed, the degree of Procurement's involvement depended on the amount of the purchase from the external contractor, with purchases under \$10,000 attracting the least amount of scrutiny. Further, in the case of an emergency or another situation that justified using a "sole/single source certification", the competitive bid/tender process could be bypassed.

[18] On the payment end, the procedure at CSBO required that all contractor invoices be sent to Mr. Jacobson's department for approval. His group checked that the appropriate signatures were on the invoices and sent them to York's accounts payable department for payment.

### **The False Invoicing Scheme – the “A-Tech Scheme”**

[19] York alleges that between 2007 and 2009, Mr. Markicevic devised a scheme to falsely invoice York for work that was not actually done at the university. York alleges that he implemented this scheme through his subordinates Mr. Brown and Jack McCann (“**Mr. McCann**”).

#### Evidence of Jack McCann

[20] Mr. McCann was a carpenter at York. He worked in the Maintenance department within CSBO. He was also President of Canadian Union of Public Employees Local 1356, the union for York tradespersons, and was a forceful advocate for his union members. He and Mr. Markicevic interacted regularly on management/union issues and socialized from time to time outside of work.

[21] Mr. McCann testified that in 2007, he and Mr. Markicevic were doing some preliminary work to develop an anti-harassment training program for union employees. The program was being designed and conducted in-house. Mr. McCann testified that Mr. Markicevic told him to find someone to issue invoices for this training program so that he could get paid for it. According to Mr. McCann, Mr. Markicevic said “Gary Brewer doesn't work for free. Why should we work for free?”

[22] Mr. McCann went to his long-time acquaintance Riaz Jadavji (“**Mr. Jadavji**”). Mr. Jadavji owned a number of clothing stores. Mr. McCann and his father had done construction work on these stores over the years. Mr. McCann testified that he approached Mr. Jadavji and told him that his boss wanted to issue invoices to York for the training program. The proposal was that the three of them (Mr. McCann, Mr. Markicevic and Mr. Jadavji) would split the proceeds, one-third each.

[23] Mr. Jadavji agreed to do it. He created two invoices in the name of his company Aleeyah Inc. and used the description of work and invoice amount provided by Mr. Markicevic. Each invoice was for less than \$10,000. The invoices were addressed to the AVP of CSBO and Mr. Markicevic approved them for payment. On July 12, 2007, York issued a combined cheque to Aleeyah Inc. for the two invoices in the amount of \$17,600 plus HST.<sup>4</sup>

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<sup>4</sup> Mr. Markicevic testified that he approved these invoices thinking that they were for a CUPE consultant that was being hired for the program. There is nothing in the evidence to support any such understanding. As noted, the program was being designed and conducted in-house.

[24] Mr. McCann testified that when Mr. Jadavji received payment of the Aleeyah invoices, he laundered the money through his clothing store and gave two thirds of the funds to Mr. McCann. Mr. McCann took the money to Mr. Markicevic and gave it all to him. Mr. Markicevic split the money and gave Mr. McCann half of it. Mr. McCann testified that he was embarrassed and did not want to keep his share. Mr. Markicevic threw Mr. McCann's share on the floor and threatened to call security and say that Mr. McCann was bribing him for union business if he did not take the money. Mr. McCann took it.

[25] According to Mr. McCann, the scheme continued to develop. Mr. Markicevic told Mr. McCann to tell Mr. Jadavji to open a business under the name "A-Tech", so they could bill York for fictitious work. A-Tech would invoice York, Mr. Markicevic would sign off on the invoice, and the three of them would split the money. Mr. Jadavji would receive an extra \$1,000 per month as rent for maintaining a fictitious corporate presence and phone/fax number for A-Tech.

[26] On August 15, 2007, Mr. Jadavji registered the name "A-Tech Construction & Design" as a business name for Aleeyah Apparel Inc. Shortly thereafter, on August 23, 2007, the first A-Tech invoice was issued to York.

[27] From August 23, 2007 until June 29, 2009, a total of 30 invoices were issued to York in the name of A-Tech Construction & Design Inc. in the aggregate amount of \$357,383.50 plus HST. Mr. McCann testified that the description of the work on each invoice was provided by Mr. Markicevic. Many of the invoices were for "emergency repairs" or related to safety matters.

[28] Mr. Markicevic and/or Mr. Brown approved payment of the invoices. Mr. Brown signed 21 of the invoices in his name alone, consistent with the special signing authority that Mr. Markicevic had given Mr. Brown for contractor invoices. Mr. Markicevic co-signed eight of the invoices.<sup>5</sup>

[29] None of the work covered by those invoices was ever performed at York.<sup>6</sup>

Evidence of Mr. Markicevic and Mr. Brown

[30] Mr. Markicevic testified that he had nothing to do with the A-Tech scheme. He admits that he signed various A-Tech invoices and contractor documents but testified that he was unaware that it was part of a false invoicing scheme. He testified that in his position he approved an enormous volume of invoices each week, did not familiarize himself with the name of the contractor on the invoice, and relied on his direct reports to ensure that the invoices were proper, the supporting documentation was attached, and the associated work was done. He testified that

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<sup>5</sup> Mr. Markicevic submits that the fact that he signed any of the A-Tech invoices, including two for under \$10,000, is evidence that he was not part of the scheme. I reject that submission. I note that six of the eight invoices Mr. Markicevic signed refer to "emergency repairs" and would have assisted in justifying a sole source certification for A-Tech.

<sup>6</sup> Mr. Markicevic concedes that none of the work was done. Mr. Brown suggested in his testimony that some of the work may have been done for Glendon College. There is nothing in the record to support his evidence.

he did not become aware that there were any issues about A-Tech as a York external contractor until the summer of 2009 when Procurement started questioning the entire history of the A-Tech invoices.

[31] Mr. Brown also testified that he knew nothing of the A-Tech scheme. He testified that while he signed the A-Tech invoices, they were directed to him by Dani Ierullo (“**Mr. Ierullo**”), Director of Operations at CSBO. Mr. Brown testified that Mr. Ierullo’s Planning and Renovations Department (“**Planning**”) did work for Mr. Brown’s Maintenance department from time to time when he “lacked horsepower”. Mr. Brown testified that anything he did in relation to A-Tech was on behalf of Mr. Ierullo. While Mr. Markicevic denies any knowledge of the A-Tech scheme, he also suggests that Mr. Ierullo may have been behind it.

### Analysis and Factual Findings

[32] Mr. Markicevic argues that the only evidence that ties him to the A-Tech scheme is the testimony of Mr. McCann. He notes that there is no evidence from Mr. Jadavji to corroborate Mr. McCann’s testimony.<sup>7</sup> He argues that Mr. McCann is an interested and unsavoury witness, and lacks credibility. I have considered the issues with respect to Mr. McCann’s credibility, and have treated his evidence with caution.

[33] Mr. McCann went on medical disability for depression and anxiety shortly after Mr. Markicevic left York in early 2010, and did not return. He is no longer employed by York. Mr. McCann met with Navigant in September 2011.<sup>8</sup> He expected to be questioned about doing work on Mr. Markicevic’s house.<sup>9</sup> When he was confronted with questions about A-Tech, he told Navigant that he had never heard of A-Tech. He told Navigant that he had introduced Mr. Jadavji to Mr. Markicevic at a dinner but did not know if anything had come of it. It is clear that when faced with the investigator’s questions, Mr. McCann tried to extricate himself from his involvement with the A-Tech scheme and to distance himself from Mr. Markicevic and Mr. Jadavji.

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<sup>7</sup> The evidence of York’s investigators is that they were unable to locate or contact Mr. Jadavji, despite their efforts to do so. Mr. Markicevic also argues that the available bank records do not tie any payments to Mr. Markicevic. Since the allegation is that all money went to Mr. Markicevic in the form of laundered cash, the evidence of the banking records is of little assistance.

<sup>8</sup> This was after the date of the Navigant report in May 2011. Mr. McCann did not enter into a settlement agreement with York or repay any monies. While the evidence is not entirely clear on the reasons for this, I note that Mr. McCann had been on disability for a lengthy period by the time the investigators discovered the A-Tech scheme and Mr. McCann’s role in it.

<sup>9</sup> Mr. McCann brought York work orders with him to the interview to explain where he charged his time when working on Mr. Markicevic’s houses. He admitted on cross-examination that these might not have been the exact work orders but rather were samples of the types of work orders he would have charged his time to. This is consistent with the evidence that Mr. Correia’s and Mr. Figueiredo’s work at Mr. Markicevic’s houses was charged to York work orders.

[34] Mr. McCann subsequently admitted his role in the A-Tech scheme and agreed to cooperate with York. At trial, Mr. McCann admitted that what he told Navigant about A-Tech was a lie. He admitted that he was embarrassed about his role in the A-Tech scheme and that he was testifying at trial (against the advice of his doctor) to obtain closure. He testified that he had nothing to gain from testifying against Mr. Markicevic in this trial.

[35] At trial, Mr. McCann's testimony was straightforward and balanced. He admitted when he was mistaken or confused about certain documents or events.<sup>10</sup> He admitted when he did not know certain details (such as the exact amounts he received out of the A-Tech scheme).

[36] On the other hand, the testimony of Mr. Markicevic and Mr. Brown was long-winded and self-serving. They refused to admit the obvious. They contradicted the clear documentary evidence. They adapted their testimony to support their version of events.

[37] In considering the credibility of Mr. McCann, on the one hand, and Mr. Markicevic and Mr. Brown, on the other hand, I have examined the following evidence:

1. Involvement of Mr. Markicevic and Mr. Brown in processing A-Tech Invoices:  
The record is replete with evidence of Mr. Markicevic's and Mr. Brown's active involvement getting A-Tech invoices processed and paid between August 2007 and August 2009. For example:

- After Mr. Markicevic approved the first A-Tech invoice dated August 23, 2007, he personally called Renata Faverin, York's Director of Procurement ("Ms. Faverin") to request single source approval for A-Tech. He followed up with a memo to her about A-Tech the same day. He and Mr. Brown subsequently signed a single source certification for A-Tech and Procurement issued a purchase order on September 6, 2007. Mr. Brown's name was listed on the purchase order in the "ship to" address;
- Mr. Markicevic signed an A-Tech invoice dated October 24, 2007. Mr. Brown signed it on October 30, 2007. On November 7, 2007, Mr. Markicevic personally called Ms. Faverin to ensure that the A-Tech invoice would be paid;

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<sup>10</sup> For example, he admitted that an email that he sent to Mr. Markicevic on December 2007 with respect to corporate names, which he originally thought was about the incorporation of A-Tech, might have related to the opening of a Tim Hortons at the university. Nonetheless, the evidence is clear that the A-Tech business name was registered by Aleeyah in August 2007, just before the first invoice was issued, and is consistent with Mr. McCann's evidence about the beginning of the A-Tech scheme. Mr. McCann also admitted that he could not recall if a list of materials that Mr. Markicevic sent him in January 2009 related to Mr. Markicevic's basement but testified that materials for Mr. Markicevic's house were picked up on more than one occasion. In any event, there is evidence that the renovations at 124 Woodville continued into 2009.

- Mr. Markicevic and Mr. Brown came up with fictitious work descriptions to put on A-Tech invoices – for example, removal of asbestos at the Burton Auditorium. Mr. Markicevic and Mr. Brown approved this invoice dated March 11, 2008. Mr. Markicevic wrote to Ms. Faverin on March 13, 2008 stating that this work was an emergency and he approved a sole source certification for the invoice;<sup>11</sup>
- Mr. Brown had extensive email correspondence with Ray Rodrigues of Procurement in 2008 seeking approvals so that A-Tech invoices could be processed. He also sought to have A-Tech put on the preferred supplier list. In an email dated October 14, 2008, Mr. Brown told Mr. Rodrigues “We were quite pleased with the work A-Tech did”. That email chain was forwarded to Mr. Markicevic;
- In the fall of 2008, Procurement pressured Mr. Brown to put the A-Tech work out to tender and Mr. Brown agreed to do so. Procurement agreed to issue a final purchase order for A-Tech on November 6, 2008 and Mr. Brown approved five A-Tech invoices the next day. Mr. Brown then cancelled the tender in January 2009 but continued to process A-Tech invoices in 2009 without a purchase order. This ultimately led Ms. Faverin to conduct a review of the history of A-Tech invoices in July 2009;
- When the last A-Tech invoice was issued on June 29, 2009, Mr. Markicevic called Ms. Faverin about signing off on the paperwork so that the invoice could be paid;
- Both Mr. Markicevic and Mr. Brown met with Ms. Faverin in the summer of 2009 to address Procurement’s increasing suspicions about A-Tech. No more invoices were issued after that time and the scheme was shut down.

In light of this evidence, the testimony of Mr. Markicevic and Mr. Brown in which they seek to distance themselves from A-Tech is simply not credible.

2. The Flood in January 2008: There was a flood in Mr. Markicevic’s house in Collingwood in January 2008. At Mr. Markicevic’s direction, Mr. McCann and a crew of York employees came to assist in cleaning up the next day. Mr. Markicevic asked Mr. McCann to prepare an invoice so he could be reimbursed for the work from his insurance company. Mr. McCann sent him an A-Tech invoice in the amount of \$2,887 for the cleanup work. Mr. Markicevic also asked

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<sup>11</sup> Mr. Markicevic and Mr. Brown were aware of an inspection done at the Burton Auditorium in February/March 2008. However, no asbestos health and safety issues were identified and no asbestos remediation work was done at the Burton Auditorium at that time.

Mr. McCann to prepare a quote for repair work to be done to the house after the flood. Mr. McCann sent Mr. Markicevic a quote from A-Tech for \$27,745. Mr. Markicevic forwarded the quote to his insurance company in February 2008 and received a cheque payable to him and A-Tech for the repair work.

Mr. Markicevic admits that he knew of A-Tech and its connection to Mr. McCann at the time of the flood but testified that he did not realize that A-Tech was a York external contractor until the summer of 2009. His testimony is not credible in light of the fact that: (i) on August 23, 2007 and October 24, 2007, prior to the flood, Mr. Markicevic had signed two A-Tech invoices for “emergency work” at York and had approved a sole source certification for A-Tech; and (ii) on March 13, 2008, six weeks after forwarding the A-Tech invoices to his insurance company, he approved three more A-Tech invoices for payment by York.

3. The Circle Draw: On July 21, 2009, at the time that Procurement was scrutinizing the A-Tech invoices, Mr. Markicevic sent an email to Mr. McCann entitled “Circle Draw” and attached an excel spreadsheet. The spreadsheet has a column that lists the amount of five recent A-Tech invoices<sup>12</sup> as well as columns splitting those amounts between three recipients. It also refers to rent payments of \$1,000 per month.

Mr. McCann testified that Mr. Markicevic created this spreadsheet to keep track of amounts owing as part of the A-Tech scheme and that Mr. Markicevic had expressed concerns that he was not receiving his “cut”. Mr. Markicevic testified that he created this spreadsheet to assist Mr. McCann with his family’s business venture outside of York. Mr. Markicevic testified that he had no idea how the spreadsheet was emailed from his account to Mr. McCann but speculated on several ways that it could have occurred.

Mr. Markicevic’s evidence is not credible. It is abundantly clear that the spreadsheet corresponds to Mr. McCann’s evidence about the A-Tech scheme and the cash split as between him, Mr. Markicevic and Mr. Jadavji (including the amount for rent). It is also clear that Mr. Markicevic emailed it to Mr. McCann in July 2009 at the same time Procurement was questioning the A-Tech invoices and that he had been keeping track of how much was owed to him under the scheme.

4. No Evidence that Dani Ierullo was involved in the A-Tech scheme: There is no credible evidence to support Mr. Brown’s testimony (or Mr. Markicevic’s theory) that Mr. Ierullo was involved in the A-Tech scheme. Mr. Ierullo is not copied on

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<sup>12</sup> Three of the invoices were combined into one number. There was no purchase order for those invoices and they had been allocated to work orders created by Mr. Brown’s assistant.

or referred to in any correspondence with respect to A-Tech.<sup>13</sup> He did not sign any of the A-Tech invoices. Mr. Ierullo (who admitted to participating in kickback schemes at York, as set out below) testified that he had no involvement with A-Tech – his testimony was unchallenged in cross-examination. Mr. McCann (who admitted to participating in the A-Tech scheme) testified that Mr. Ierullo was not involved – his evidence was unchallenged in cross-examination.<sup>14</sup> There is no evidence that Mr. Ierullo and Mr. McCann colluded together on the A-Tech scheme.

Further, the evidence of Mr. Jacobson and Ron Ogata (Manager in the Planning department) is that if the Planning department had been doing work for Maintenance, the individuals in Planning would have been able to sign off on all contractor invoices. There would have been no need to have Mr. Brown sign any of the A-Tech invoices.

[38] Considering all of the evidence, I find that Mr. McCann’s version is the more credible one. I find, on a balance of probabilities, that Mr. Markicevic orchestrated the A-Tech scheme and that Mr. Brown actively and knowingly participated in the A-Tech scheme. Mr. McCann acted as the liaison to relay information for Mr. Jadavji to include in the A-Tech invoices. Mr. Markicevic and/or Mr. Brown approved the invoices and dealt with Procurement to ensure that the invoices were processed. Mr. McCann obtained the cash from Mr. Jadavji and delivered Mr. Markicevic’s share to him.

[39] I find that York paid \$357,383.50 plus HST for the false A-Tech invoices and \$17,600 plus HST for the false Aleeyah invoices.

### **The Kickback Scheme – the “CAC Scheme”**

[40] York alleges that Mr. Markicevic created a scheme to charge York inflated costs for drain repair work required in its Keele Campus Student Services Parking Garage (the “**Student Garage**”). York alleges that the difference between the actual cost of the repair work and the amount charged to York (the “**Delta**”) was kicked back to Mr. Markicevic in various ways, including cash payments and work done on his residence in Vaughan. York alleges that Mr. Markicevic implemented the CAC scheme through his subordinate Mr. Ierullo.

### **Evidence of Mr. Ierullo, Mr. Ritacca, Mr. Brewer and Ms. Faverin**

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<sup>13</sup> There is a reference in an email of August 13, 2009 from Mr. Brown to Mr. Markicevic stating that Mr. Ierullo was present when sealed bids (including A-Tech) were opened. Both Mr. Brown and Mr. Markicevic testified that this never occurred.

<sup>14</sup> Mr. Brown and Mr. Markicevic rely on the evidence of a meeting with Ms. Faverin in the summer of 2009 in which A-Tech was discussed. It is not clear when that meeting occurred and whether Mr. Ierullo was present at that meeting. It is entirely inconclusive. Even if Mr. Ierullo was at such a meeting, I find that it was an attempt to try to create evidence to implicate Mr. Ierullo in the A-Tech scheme.

[41] As noted above, Mr. Ierullo was the Director of Operations at CSBO. He reported directly to Mr. Markicevic.

[42] Mr. Ierullo testified that in early 2009, the Parking Operations Manager at York told him that there was a problem with the drains in the Student Garage. Mr. Ierullo understood that approximately 96 of the drains needed to be replaced and the surrounding concrete repaired.

[43] Mr. Ierullo raised the drain issue with Mr. Markicevic. According to Mr. Ierullo, Mr. Markicevic instructed him to find someone who would be prepared to “take care” of them through a kickback or compensation scheme. Mr. Markicevic told Mr. Ierullo to find the contractor and leave the approvals to him.

[44] Mr. Ierullo testified that on two previous occasions, he and Mr. Markicevic had made extra cash through kickback schemes.<sup>15</sup> He testified that Mr. Markicevic complained that if he had been in the private sector, he would have been compensated for the savings he generated for York.

[45] Mr. Ierullo testified that he approached Roman Ritacca (“**Mr. Ritacca**”) who was doing a concrete repair job as a subcontractor in the York parking garage. Ritacca was the owner of Canadian & American Concrete Renovation & Drain-Layer Ltd. (“**CAC**”), a small contracting company. Mr. Ierullo asked Mr. Ritacca if he would be interested in doing a large drain repair project for York. Ritacca testified that he was excited to do such a large project and felt that it would get him on the inside track with York. He quoted Mr. Ierullo a cost of \$3,500 per drain, plus an additional \$500 for the epoxy coating, for a total approximate cost of \$350-400,000 (excluding the cost of the drains).

[46] Mr. Ierullo relayed the quote to Mr. Markicevic. According to Mr. Ierullo, Mr. Markicevic dictated an email to send to Mr. Brewer to get the project approved. The email described the project as an emergency and identified CAC as having specialized expertise in doing this type of work. Mr. Ierullo typed the dictated email and sent it to Mr. Markicevic on January 9, 2009. Mr. Markicevic modified the wording of the email slightly and forwarded it to Mr. Brewer an hour later. Ms. Faverin of Procurement was copied on the email.

[47] Mr. Ierullo testified that before sending the email to Mr. Brewer, Mr. Markicevic added a line to the text of the email Mr. Ierullo had drafted, stating that the anticipated cost of the drain

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<sup>15</sup> Mr. Ierullo testified that one time, at Mr. Markicevic’s direction, he required a York contractor to pay \$15,000 to process payment of his invoice, and gave Mr. Markicevic \$11,000 of that amount. Another time, at Mr. Markicevic’s direction, Mr. Ierullo set up a company in the name of his wife (SBH Consulting Ltd.) to purchase confined space equipment that York required. SBH inflated the price charged to York and Mr. Ierullo split the excess with Mr. Markicevic. Mr. Ierullo explained that the SBH invoices were signed by Mr. Brown as they were put through Mr. Brown’s cost centre, at Mr. Markicevic’s direction. Given the lack of any other evidence tying Mr. Ierullo to the A-Tech scheme, I do not accept the submission that Mr. Brown’s payment of the SBH invoices in this manner is evidence that Mr. Ierullo was involved in the A-Tech scheme.

project would be between \$650,000 and \$700,000. That was close to double the total cost that Mr. Ritacca had quoted.

[48] Mr. Brewer testified that Mr. Markicevic had called him to say that there was a significant issue with the drains in the Student Garage. Mr. Markicevic said it was urgent that the repairs be done as there were safety concerns. Mr. Markicevic followed up with two emails to Mr. Brewer to that effect on January 9, 2009.

[49] Ms. Faverin testified that Mr. Markicevic called her on January 9, 2009 and told her that he had investigated a qualified contractor to perform the work and had conducted a reasonability analysis with respect to the cost of the project.

[50] Mr. Brewer's evidence is that he relied on Mr. Markicevic's representation that this was an emergency and approved the drain project at a cost of up to \$750,000 (the extra \$50,000 was a cushion).

[51] Mr. Ierullo prepared a contract for signature between York and CAC, and inserted a cost per drain of \$6,800 (approximately \$650,000 divided by 96 drains). Mr. Ritacca testified that when he saw that figure, which was almost double the per drain cost that he had quoted, he asked Mr. Ierullo how he was supposed to get the difference back to Mr. Ierullo. Mr. Ierullo responded that he did not need to worry, that they would figure it out, and CAC would get lots of work from York.

[52] Mr. Markicevic signed the CAC contract on February 4, 2009. He sent Mr. Brewer various documents including a purchase requisition and a sole source certification. Mr. Brewer signed the contract and other documents.

[53] Mr. Ritacca started the drain work in February 2009. He replaced only four or five drains initially and then had to stop work due to the cold weather. Mr. Ritacca resumed work in May for a brief period. The project was not completed until the summer of 2009. However, CAC continued to issue invoices to York even when the work had stopped. Mr. Ierullo prepared the invoices in CAC's name, signed them and brought them to Mr. Markicevic. Mr. Markicevic and Mr. Ierullo discussed the actual work that had been completed and how they would extract funds from the Delta. Mr. Markicevic approved the invoices and put his signature and stamp on them.

[54] Ultimately, only 52 drains were replaced. Mr. Ierullo testified that Mr. Markicevic directed him to have CAC continue to invoice York for the full contract amount. The total invoiced amount for the CAC project was \$731,115.

[55] Mr. Ierullo testified that while the drain work was on hold, he directed Mr. Ritacca to go to Mr. Markicevic's house in Vaughan, as Mr. Markicevic wanted a concrete pad in his yard. Mr. Ritacca testified that although he did not discuss the matter directly with Mr. Markicevic, he understood that he was doing the work as part of the Delta.

[56] According to Mr. Ritacca, Mr. Markicevic was very involved in the work being done at his house and expanded the scope of the work significantly. The additional work included replacing the existing asphalt driveway with a new patterned concrete driveway; replacing a flight of steps at the side of the house; excavating and installing a long curving walkway on the side of the house; extensive landscaping; installing large stones for which he had to rent equipment; and installing an elevated patio and poured-concrete patio at the back of the house. Mr. Markicevic was demanding, insisted that Mr. Ritacca purchase top of the line materials and required him to rip out and re-do some of the concrete work. He told Mr. Ritacca to make sure he did the same quality of work that he did at York. Mr. Ritacca testified that Mr. Markicevic told him “Make sure it’s perfect because you know who I am, you know who I am, I’m going to come right after you, eh, Roman.”

[57] Mr. Ritacca testified that he purchased all of the materials for the job, including a hot tub that Mr. Markicevic selected for \$8,500. Mr. Ritacca and his team of up to five workers spent at least a month at Mr. Markicevic’s house. At one point Mr. Ritacca delivered a hand written outline to show Mr. Ierullo how much of the Delta had been used up. He estimated that it was \$65,000. Mr. Ritacca testified that much of the additional work required by Mr. Markicevic was done after that point. He subsequently prepared a detailed breakdown and description of the materials and labour for the work done on Mr. Markicevic’s house. The total was approximately \$122,000. Mr. Ritacca testified that he was not paid anything for his labour and materials and that he understood that all of his work was being paid out of the Delta.<sup>16</sup>

[58] Mr. Ierullo testified that in addition to the work on Mr. Markicevic’s house, he and Mr. Markicevic figured out other ways to share the Delta. One was through the supply of the drains. Mr. Ierullo incorporated a company (DCH Consulting Ltd.) to supply the drains to CAC at an inflated price. He split the excess with Mr. Markicevic. Mr. Ierullo testified that he also received cash from Mr. Ritacca on five occasions. He split all of this cash with Mr. Markicevic, with the larger share going to Mr. Markicevic.

#### Mr. Markicevic’s Evidence

[59] Mr. Markicevic testified that he had nothing to do with the CAC scheme. He knew that the drains in the Student Garage had to be replaced. He had received reports prepared by an independent engineering firm with respect to the work required to repair the drains. He testified

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<sup>16</sup> After Mr. Ritacca finished working at Mr. Markicevic’s house, he was directed to do work for other York employees, including Mr. McCann and Luis Figueiredo. There is conflicting evidence about whether Mr. Ierullo or Mr. Markicevic directed him to do that work. Mr. McCann and Mr. Figueiredo testified that they paid Mr. Ierullo cash for the work. Mr. Ierullo testified that he was not aware of any other exchange of funds but was not challenged in cross-examination on this point. Mr. Markicevic argues that this conflict in the evidence impacts Mr. Ierullo’s credibility. I consider this a minor gap in the evidence that does not go to Mr. Ierullo’s credibility on the central issue of whether Mr. Ritacca was providing his services as part of the Delta. There is no evidence that Mr. Ritacca received payment for his work on Mr. McCann’s and Mr. Figueiredo’s driveways other than through the CAC contract.

that he directed Mr. Ierullo to find an external contractor to do the drain work and had no discussions with Mr. Ritacca about the project.

[60] Mr. Markicevic acknowledges that he signed the CAC contract and obtained Mr. Brewer's approval for the project. He acknowledges that he signed the CAC invoices. However, he testified that he relied on Mr. Ierullo with respect to all matters concerning the drain project, including the pricing of the contract.

[61] Mr. Markicevic testified that he did not know Mr. Ritacca before he arrived to work on his house. According to Mr. Markicevic, Mr. Ierullo owed him money for the purchase of some cars and a boat, and was providing Mr. Ritacca's services to discharge this debt. Mr. Markicevic understood that Mr. Ritacca was connected to a business operated by Mr. Ierullo's father.

[62] Mr. Markicevic testified that the value of Mr. Ritacca's work was closer to \$25,000. Mr. Markicevic testified (as did Ms. Fleming and Mima) that they did much of the planting work at the house themselves.

[63] Mr. Markicevic's position is that the CAC scheme was perpetrated by Mr. Ierullo and Mr. Ritacca without his knowledge or participation and that he received no benefit from the CAC scheme.

#### Analysis and Factual Findings

[64] Mr. Markicevic argues that Mr. Ierullo and Mr. Ritacca are not credible witnesses and that their evidence cannot be relied on to implicate him in the CAC scheme. He argues that they are unsavoury and interested witnesses.

[65] I have considered the credibility of Mr. Ierullo and Mr. Ritacca. Both were admitted participants in the CAC scheme. Mr. Ierullo admitted to participating in other kickback schemes that are not the subject of this trial. Both agreed to co-operate with York and to testify in this trial. I have approached their testimony with caution.

[66] Mr. Ierullo has repaid York close to \$300,000 (including repayment of his severance) and has incurred legal fees of over \$100,000.<sup>17</sup> He is no longer employed at York – his employment was terminated in April 2010. Mr. Ritacca has lost his business. He has agreed to repay \$50,000 to York. He has not completed that payment and expects to do so by September.

[67] At trial, both Mr. Ierullo and Mr. Ritacca apologized to York for the harm they caused. They both admit that what they did was wrong. Mr. Ierullo admits there is no good explanation for his conduct. Mr. Ritacca admits that he made a mistake.

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<sup>17</sup> Mr Ierullo's evidence is that he received \$286,624 from the various schemes, although is unclear exactly how much of that was for the CAC scheme.

[68] Mr. Markicevic suggests that Mr. Ierullo is not credible because he met with his “co-conspirators” in the other kickback schemes before he spoke to the Navigant investigators. He suggests that they all agreed to falsely implicate Mr. Markicevic. There is no evidentiary basis for that suggestion.<sup>18</sup>

[69] At trial, the testimony of Mr. Ierullo and Mr. Ritacca was clear, detailed and straightforward. They were largely unchallenged on cross-examination.<sup>19</sup> As noted above, Mr. Markicevic’s testimony was evasive and self-serving.

[70] In considering the credibility of Mr. Ierullo and Mr. Ritacca, on the one hand, and Mr. Markicevic, on the other hand, I have examined the following:

1. Mr Markicevic added the Pricing to the Email to Mr. Brewer: In his January 9, 2009 email to Mr. Brewer and Ms. Faverin, Mr. Markicevic stated that the anticipated cost of the project was \$650-700,000. That line about the pricing was not in the draft email that Mr. Ierullo sent to Mr. Markicevic an hour before. I find that Mr. Markicevic added the pricing of \$650-700,000 and that he did so in order to inflate the price over what Mr. Ritacca had quoted, thereby creating the Delta.
2. Markicevic’s Involvement in Approval of the Drain Scheme: Mr. Markicevic actively called and wrote emails to Mr. Brewer and Ms. Faverin to get the project approved. He represented to Mr. Brewer that CAC had “significant expertise relative to this type of specialized work”. He told Ms. Faverin that he had “investigated a qualified contractor” to do the work and that he had done a “reasonability analysis” as to cost. I find that Mr. Markicevic took these steps to get the project approved as an emergency so that the usual Procurement rules would not apply and CAC could be hired for the drain project on a sole source certification.
3. Mr. Markicevic’s Approval of CAC Invoices: By July 2009, Mr. Markicevic had approved CAC invoices for 80% of the contract price when only 20% of the work had been done. It is not credible that Mr. Markicevic (who required his subordinates to conduct site visits and provide photographs before he approved an

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<sup>18</sup> There was a meeting between Mr. Ierullo and the defendants Luigi Lato and Vasos Georgiou at the Miller Tavern in which there was a discussion whether they should lie about what they had done (and various ways to do that) or to come clean and tell the truth. Mr. Ierullo testified that he would not go along with the suggestion of lying and directed them all to tell the truth. Mr. Markicevic also points out that Mr. Ierullo spoke with his other co-conspirators but did not contact Mr. Markicevic before speaking to Navigant. If Mr. Markicevic was directing him in the CAC scheme it is understandable that Mr. Ierullo may not have wanted to contact him.

<sup>19</sup> Mr. Ritacca admitted that he did not like Mr. Markicevic. I do not accept Mr. Markicevic’s submission that Mr. Ritacca falsely implicated him in the CAC scheme for that reason. There is also nothing to support Mr. Markicevic’s suggestion that Mr. Ritacca’s evidence is somehow less credible because Mr. Lato is his brother-in-law.

invoice) would have approved invoices for over \$536,000 when such a small amount of the project had been completed.<sup>20</sup>

4. Mr. Ritacca's Work at Mr. Markicevic's House: Mr. Markicevic's evidence that he had no idea that Mr. Ritacca was doing work for York is not credible, nor is his explanation that Mr. Ritacca (who he understood was associated with Mr. Ierullo's father) was there to discharge a debt owed by Mr. Ierullo to Mr. Markicevic. There is no evidence that Mr. Ritacca had anything to do with Mr. Ierullo's father. Mr. Ierullo testified that his father wound down his business in the mid-2000s and ceased operating in 2007/8. Further, Mr. Markicevic's testimony about the amount of Mr. Ierullo's debt to him was vague and inconsistent. He testified that he relied on Mr. Ierullo to keep track of his own debt to Mr. Markicevic. He then testified that he kept track of how Mr. Ritacca's work (which kept expanding) was to be credited against that unquantified debt.<sup>21</sup> There is no evidentiary support for his claim that he was keeping track of the value of Mr. Ritacca's work.<sup>22</sup>
5. Mr. Ritacca's Knowledge: While Mr. Ritacca admits that no one told him so explicitly, he testified that he knew that he was being paid for his work on Mr. Markicevic's house from the Delta. This makes sense. He knew that the cost of the CAC contract was almost double the amount he had quoted to Mr. Ierullo. Mr. Ritacca was doing work at the house of the AVP of the department for which he was doing the drain project. He was not being paid from any other source. It was reasonable for him to have concluded that the work he was doing on Mr. Markicevic's residence was being paid out of the Delta.

[71] Considering all of the evidence, I find the version of events described by Mr. Ierullo and Mr. Ritacca is the more credible one. I find, on a balance of probabilities, that Mr. Markicevic orchestrated the CAC scheme. Mr. Ierullo acted as the liaison in dealing with Mr. Ritacca and receiving the kickback funds. The Delta was shared with Mr. Markicevic through various means, including cash and the extensive work performed by Mr. Ritacca at Mr. Markicevic's residence.

[72] York's evidence, set out in the Navigant report, is that the fair market cost of replacing the 52 drains would have been \$175,000, based on a cost of \$3,365 per drain (approximately the

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<sup>20</sup> Invoices totalling \$310,000 were charged in three invoices between February and April 2009. An additional invoice was issued for \$168,210 on May 31, 2009 and one for \$85,050 on June 30, 2009.

<sup>21</sup> Mr. Ierullo testified that he had purchased three cars from Mr. Markicevic through trade-in arrangements with a car dealer, as well as a boat. He was far more specific about the price and how he paid Mr. Markicevic and/or the dealers for these purchases.

<sup>22</sup> Mr. Markicevic relied on a handwritten document to evidence his calculations. There is nothing in this handwritten document that connects it to any debt owed by Mr. Ierullo to Mr. Markicevic.

same per drain cost quoted by Mr. Ritacca). York's evidence is that its overpayment for the drain project was \$515,461.<sup>23</sup>

### **The Residence Improvement Scheme**

[73] York alleges that Mr. Markicevic used York tradespeople to do work at his houses during regular working hours, at York's expense.

#### **211 Osprey, Collingwood ("211 Osprey")**

[74] As mentioned, Mr. Markicevic had a flood at 211 Osprey in January 2008. It is undisputed that Mr. McCann and a crew of York employees came the next day to move furniture out of the basement. They drove up in a York truck during working hours. The tradespeople included Humberto Correia ("**Mr. Correia**"), a York painter, and Luigi Figueiredo ("**Mr. Figueiredo**"), a York electrician, both of whom testified at trial.

[75] Each of Mr. Correia and Mr. Figueiredo testified that after the flood, they went to 211 Osprey to do repair work on the basement. Mr. Correia testified that Mr. Brown told him that he was going to be working at the Glendon campus and that the necessary arrangements would be made with his zone supervisor Blair Price ("**Mr. Price**"). Mr. Correia testified that he was subsequently called into Mr. Markicevic's office and told that in fact he would be going to 211 Osprey, not Glendon. Mr. Price testified that Mr. Brown told him that Mr. Correia was going to be working at Glendon. Mr. Brown directed Mr. Price to prepare a work order for mould and paint removal at Glendon and to charge Mr. Correia's time for those days to that work order.<sup>24</sup>

[76] Mr. Correia testified that he went to 211 Osprey on a daily basis for almost 30 days during regular working hours. He supervised and helped a bricklayer who was repairing damage to the basement and also helped out with tiling work. The photographs of 211 Osprey show that much of the basement consists of brick walls, brick columns and a brick bar. Mr. Markicevic came to inspect the work while Mr. Correia was there. Mr. Correia testified that Mr. Markicevic did not pay him for any of this work, although he offered to pay for his gas expense (Mr. Correia did not accept).

[77] Mr. Figueiredo testified that he went to 211 Osprey on five or six occasions after the flood to do electrical work, including wiring for a backup generator and installation of pot lights. He testified that he charged his time for his work on Mr. Markicevic's residences to two open work orders at York and that Mr. Markicevic did not pay him anything.

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<sup>23</sup> This calculation gives credit for the \$14,739 York paid DCH for the cost of the drains. It also includes an invoice for \$8,900 that York paid directly to SBH for services rendered in the Student Garage, which is properly included as part of the CAC scheme.

<sup>24</sup> Mr. Price also testified that he filled in Mr. Correia's daily time sheets to charge against this work order since Mr. Correia was not coming into York (Mr. Price understood he was at Glendon). Mr. Correia testified that he went directly to and from his house in Barrie to 211 Osprey and did not go to the York campus on those days.

[78] Mr. McCann testified that he went to 211 Osprey with a crew to move furniture after the flood. He testified that, with travel time, he would have spent seven or eight hours at 211 Osprey. He also testified that he assisted in finishing the basement after the flood. He testified that he filled out his time sheets at York and that Mr. Markicevic did not pay him anything.

[79] York's evidence is that it paid approximately \$10,000 for the work done by York employees at 211 Osprey.

124 Woodville, Vaughan ("124 Woodville")

[80] Mr. Markicevic purchased 124 Woodville as a "new build" directly from the builder. When he got possession of the house, the basement was in an unfinished state.

[81] Mr. Correia testified that he did a significant amount of work at 124 Woodville in 2008 and 2009. He testified that, among other things, he repainted the whole house (as Mr. Markicevic was not happy with the builder's paint job) and did some plastering work in the basement.<sup>25</sup> He testified that he charged his time sheets for those days to work orders provided by Mr. Price, which referred to work at York Hall Main (Glendon) and Winters College (Keele). The evidence of both Mr. Correia and Mr. Price is that none of the work reflected on those work orders was done at York.

[82] Mr. Correia testified that Mr. Markicevic came to 124 Woodville to instruct him from time to time. He testified that on one occasion, Mr. Price called Mr. Correia on his cell phone when he was at 124 Woodville. Mr. Markicevic took the cell phone and told Mr. Price to leave Mr. Correia alone. Mr. Price also testified about this incident.

[83] Mr. Price testified that he complained to Mr. Brown and Steve Sicluna, a supervisor at CSBO, about Mr. Correia's absences from York. He testified that Mr. Brown told him to "just leave it be". Mr. Sicluna testified that he raised the issue with Mr. Brown who, after talking to Mr. Markicevic, advised that if any tradespeople were not at work, Mr. Price would receive a phone call and otherwise the matter should not be taken any further.

[84] Mr. Correia testified that he saw Mr. Figueiredo and Mr. McCann at 124 Woodville performing electrical and carpentry work, respectively. He also saw York trucks on site at 124 Woodville, including a "boom truck" used by York electricians.

[85] Mr. Figueiredo testified that he also went to 124 Woodville during regular working hours and did a significant amount of electrical and wiring work in the basement, as well as wiring for

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<sup>25</sup> When Mr. Correia first spoke to Navigant he told them he had done touchups at 124 Woodville. At trial he testified that he first went to the house because Mr. Markicevic had asked him to do touch ups but then directed him to repaint the whole house. When challenged on cross-examination he testified that he had not wanted to make a big deal about it when he first spoke to Navigant. At trial he explained that he was first asked to do touch-ups but then Mr. Markicevic wanted him to repaint the whole house because he was dissatisfied with the builder's paint job (specifically, the builder only did one coat, the finish was rough). I accept Mr. Correia's explanation.

the outside hot tub. He testified that he saw York trucks used for Mr. Markicevic's residences on several occasions. At one point he complained to Mr. Markicevic that his boss wanted him to be at work and Mr. Markicevic replied "Get this straight, I'm your F-ing boss." He also testified that Mr. Markicevic used to threaten to contract out all custodial and maintenance services, which would have resulted in the loss of 200 jobs.

[86] Pat Quinn, Mr. Figueiredo's zone supervisor ("**Mr. Quinn**"), testified that Mr. Brown would call to tell him when Mr. Figueiredo would not be at York because he was at Mr. Markicevic's house.

[87] Mr. McCann testified that he also did a significant amount of work at 124 Woodville, including drywalling, stonework, and constructing a snack bar in the basement.<sup>26</sup> He testified that he worked at 124 Woodville over the course of a few months, during regular working hours, although he could not recall the precise number of hours he spent. He testified that on one occasion he, Mr. Brown and Mr. Figueiredo picked up materials for Mr. Markicevic's basement using a York truck.

[88] Each of Mr. Correia, Mr. Figueiredo and Mr. McCann testified that Mr. Markicevic did not pay them for their work at 124 Woodville and that it was all charged to York. York's evidence is that it paid approximately \$13,000 for the work done by its employees at 124 Woodville.

#### Mr. Markicevic's Evidence

[89] Mr. Markicevic admitted that he knew that Mr. Figueiredo was paid by York for his work on the flood at 211 Osprey. He also admitted that he knew a York truck was used that day. He admitted that he did not reimburse York for its employee's time.

[90] Mr. Markicevic testified that while he knew Mr. McCann, Mr. Correia and Mr. Figueiredo did some work at his houses, it was minimal. He testified that he was capable of doing all of this work himself and there would have been no need for him to use the York tradespeople.

[91] Mr. Markicevic testified that he understood that any work done by York tradespeople at his houses was on non-York time, such as designated lunch breaks or after a York shift. He testified that he paid them for their work – he gave \$1,000 to Mr. Correia, \$700 to Mr. Figueiredo and \$1,000 and a convection oven to Mr. McCann. Mr. Markicevic testified that he did not know that they were also charging York for their time.

[92] Mr. Markicevic submits that there was no way of tracking exactly where the tradespeople were based on their work orders and time sheets. He suggests that they may have been charging

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<sup>26</sup> Mr. McCann identified a photo of him taken on October 17, 2008 that shows him covered in dust from sanding the ceiling at 124 Woodville, wearing his York uniform.

York for work done elsewhere and falsely implicating him in in order to preserve their jobs at York.

Analysis and Factual Findings

[93] In considering the evidence of the York tradespeople and supervisors, on the one hand, and Mr. Markicevic's evidence, on the other hand, I prefer the evidence of the York witnesses.

[94] Mr. Correia, Mr. Figueiredo and Mr. McCann were consistent about the significant amount of work they did at Mr. Markicevic's houses during York time. They were consistent about being told to charge their time to York and not receiving any payment from Mr. Markicevic. Mr. Markicevic's evidence that he paid them a total of \$2,700 (plus a convection oven) for all of the work they did on his houses is simply not credible.

[95] Mr. Price, Mr. Sicluna and Mr. Quinn were consistent about being directed by Mr. Brown to send tradespeople to work at Mr. Markicevic's houses and being told by Mr. Markicevic and Mr. Brown not to challenge those directions.

[96] The York witnesses' testimony is consistent with the fact that when Mr. Markicevic obtained possession of 124 Woodville, the basement was unfinished and the outside was not landscaped. It is consistent with Mr. Ritacca's evidence that he saw Mr. McCann working in the basement at 124 Woodville. It is consistent with Mr. Markicevic using Mr. Ritacca to do extensive concrete and landscaping work at York's expense. I reject Mr. Markicevic's evidence that he did virtually of these extensive renovations at 124 Woodville himself. I also reject his evidence that York employees travelled to and from 124 Woodville (a half hour of travel time) to work on his house during their lunch breaks.

[97] I also find no evidentiary support for the suggestion that the York tradespeople were working elsewhere and falsely implicating Mr. Markicevic to save their jobs at York.

[98] I find, on a balance of probabilities, that Mr. Correia, Mr. Figueiredo and Mr. McCann did the work they described at Mr. Markicevic's houses during regular work hours. I further find that they were paid for their time by York and not by Mr. Markicevic. I find that York paid \$10,000 for the work done at 112 Osprey and \$13,000 for the work done at 124 Woodville.

[99] Given that these funds went directly towards the improvement of 112 Osprey and 124 Woodville, and in light of my finding below that Mr. Markicevic's use of York tradespeople was a breach of his fiduciary duty, York is entitled to a declaration that it has a constructive trust in those properties to the extent of those expenditures.<sup>27</sup>

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<sup>27</sup> *Kerr v. Barranow*, [2011] S.C.J. No. 10, at paras 50-52; Peter Maddaugh and John McCamus, *The Law of Restitution*, Looseleaf ed. (Aurora: Canada Law Book, 2004-) at 5.200, page 5-8.

### **Mr. Brown's Pcard**

[100] Shortly after Mr. Brown arrived at York, Mr. Markicevic directed that a Pcard be issued to him. Pcards are credit cards that are to be used for university-related purposes.

[101] Over his three years at York, Mr. Brown charged \$200,000 to his Pcard. York has identified \$46,262 of Mr. Brown's purchases for which York received no value. Those include purchases for flooring, home furnishings, marble and tiles, and miscellaneous holiday and weekend purchases. The uncontradicted evidence is that there were no work orders or labour charges associated with those purchases, the materials were not entered into York's inventory tracking system, and the materials were not observed on York's campuses.

[102] In addition to his own Pcard, Mr. Brown used Pcards belonging to two of his subordinates. Mr. Quinn testified that in November 2009 Mr. Brown asked if he could use Mr. Quinn's Pcard because he had maxed out on his own Pcard and needed to buy materials for Mr. Markicevic. Mr. Brown's explanation that he was just "testing" Mr. Quinn makes no sense. Mr. Brown used the Pcard to make several purchases at Home Depot on November 12, 2009 for tiles and other materials. This was the same time that work was being done on Mr. Markicevic's basement bathroom at 124 Woodville. It is clear that Mr. Brown was using Mr. Quinn's Pcard to purchase supplies for Mr. Markicevic's bathroom renovation.

[103] Mr. Brown also used his assistant's Pcard to purchase materials from Home Depot in May 2009. He admits that no work was performed at York with these materials.

[104] Mr. Brown's evidence that he never used his Pcard to make purchases for non-York purposes is self-serving and contradicts the documentary evidence. I find that Mr. Brown made \$46,262 worth of purchases on his and his subordinates' Pcards for non-York purposes.

[105] Navigant identified two additional purchases by Mr. Brown from Rona for a total of \$14,979. These were charged to York work orders for which no work was performed. I find that those purchases were also made for non-York purposes.

### **Liability for A-Tech Scheme, CAC Scheme, Residence Improvement Scheme, and Pcard Use**

[106] The tort of deceit or fraud has four elements:

- a false representation made by the defendant;
- some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
- the false representation caused the plaintiff to act; and

- the plaintiff's actions resulted in a loss.<sup>28</sup>

[107] With respect to the A-Tech scheme, Mr. Markicevic and Mr. Brown knowingly made false representations to York when they approved the A-Tech invoices for payment. York then paid the A-Tech invoices, resulting in a loss to York.

[108] With respect to the CAC scheme, Mr. Markicevic knowingly made false representations to York when he signed the inflated contract and approved the CAC invoices for payment. York then paid the inflated cost for the drain project, resulting in a loss to York.

[109] With respect to the Residence Improvement scheme, Mr. Markicevic knowingly made false representations to York when he arranged for employees to work at his residences through work orders and time sheets that did not accurately reflect where the employees' time was spent. York then paid the employees for their work on his residences, resulting in a loss to York.

[110] With respect to the Pcard purchases, Mr. Brown knowingly made false representations to York when he used his Pcard for purchases that were for non-York purposes. York then paid for those Pcard purchases, resulting in a loss to York.

[111] Mr. Markicevic and Mr. Brown concede that they were fiduciaries of York. As fiduciaries, they had a duty to act only in the best interests of York. There is no question that: (i) by participating in the A-Tech scheme, Mr. Markicevic and Mr. Brown breached their fiduciary duty to act only in York's best interest; (ii) by participating in the CAC scheme, Mr. Markicevic breached his fiduciary duty to act only in York's best interest; (iii) by having York employees work on his personal residences at York's expense, Mr. Markicevic breached his fiduciary duty to act only in York's best interest; and (iv) by using Pcards for non-York purposes, Mr. Brown breached his fiduciary duty to act only in York's best interest.

### **Fraudulent Conveyances**

[112] York alleges that Mr. Markicevic conveyed his interest in 211 Osprey to Ms. Fleming and his interest in 124 Woodville to Mima contrary to the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "*Act*").

#### **Mr. Markicevic and Ms. Fleming's Living Arrangements**

[113] Mr. Markicevic and Ms. Fleming testified that they started dating in 1989 and she became pregnant with Mima. Ms. Fleming moved into 211 Osprey with Mr. Markicevic and his mother. They testified that their romantic relationship ended early on but they continued to live together (keeping separate quarters) and to raise Mima together as a "bird's nest family".

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<sup>28</sup> *Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014] 1 S.C.R. 126 at para. 21.

[114] Mr. Markicevic and Ms. Fleming testified that they decided to purchase 211 Osprey from his mother in 1999. Ms. Fleming testified that she contributed \$140,000 to the purchase price but title was taken in Mr. Markicevic's name alone. They testified that they had an understanding that he would transfer title into Ms. Fleming's name some time in the future to recognize Ms. Fleming's extensive work and maintenance on the house and her work in raising Mima. They refer to this as the "**Oral Agreement**".

[115] Mima is now an adult and is studying overseas. Mr. Markicevic and Ms. Fleming testified that they continue to live together at 124 Woodville but maintain separate living quarters.

#### 124 Woodville

[116] On June 10, 2007, shortly after Mr. Markicevic was promoted to AVP of CSBO, he signed an agreement of purchase and sale ("**APS**") for 124 Woodville. The purchase price was \$600,000. 124 Woodville is approximately a 15 minute drive from York.

[117] Mr. Markicevic and Ms. Fleming testified that they decided to purchase 124 Woodville for Mima to give her a "head start" in life. Mima was 17 years old at the time. They also testified that they decided to purchase 124 Woodville because Mima was going to be attending the University of Toronto after high school and that it would be a convenient location for her. I note that when the APS was signed, Mima was still in Grade 11 and had not yet applied to university.

[118] Mr. Markicevic signed the APS in his name alone. He instructed his lawyer Mr. McLellan to tell the vendor that title would be taken on closing in the name "Michael Markicevic". The closing was originally scheduled for December 2007. The closing was extended several times. Mr. McLellan, on Mr. Markicevic's instructions, repeatedly told the vendor that title would be taken in Mr. Markicevic's name.

[119] In April 2008, Mr. Markicevic's instructions changed. He told Mr. McLellan that title would now be taken in Mima's name. Mr. Markicevic admitted on cross-examination that he delayed the closing until after Mima's 18<sup>th</sup> birthday on April 20, 2008. The closing took place on April 25, 2008. Title to 124 Woodville was registered in Mima's name. Mima contributed \$5,000 to the purchase price. Ms. Fleming paid \$95,000 and Mr. Markicevic paid the balance from a TD line of credit secured against 211 Osprey.

#### 211 Osprey

[120] Mr. Markicevic transferred 211 Osprey to Ms. Fleming on July 5, 2010. Both he and Ms. Fleming testified that this transfer was made pursuant to the Oral Agreement. They testified that in return for the transfer, Ms. Fleming also agreed not to seek child or spousal support from Mr. Markicevic.

[121] Mr. Markicevic and Ms. Fleming testified that in 2007, they had retained Mr. McLellan to transfer 211 Osprey to Ms. Fleming. Their evidence is that Mima was getting older and they decided that it was the appropriate time for them to formalize their affairs by transferring 211 Osprey to Ms. Fleming pursuant to the long standing Oral Agreement.

[122] Mr. McLellan testified at trial. He testified that in 2007 Mr. Markicevic and Ms. Fleming retained him to prepare a separation agreement and to transfer 211 Osprey to Ms. Fleming.<sup>29</sup> He testified about his file notes. There is no reference to an Oral Agreement or any long standing agreement. Rather, Mr. McLellan's notes state that Mr. Markicevic "is going to transfer to her the residence they live in which is worth more than \$800,000.00 for \$385,000.00 and he is to take a mortgage back for \$350,000.00 and there is a property he is buying in the city that is to go in his name alone as he wants to create two principal residences."<sup>30</sup>

[123] Mr. Markicevic and Ms. Fleming did not proceed with the transfer of 211 Osprey in 2007. Mr. Markicevic kept title to 211 Osprey in his name. He took out a \$495,000 TD line of credit secured against 211 Osprey and used that financing to close the purchase of 124 Woodville.

[124] In July 2010, Mr. Markicevic transferred 211 Osprey to Ms. Fleming. They testified that the consideration for this transfer was the Oral Agreement and that this was consistent with the transfer that they had planned to do back in 2007.

[125] I reject their evidence, for several reasons. First, there is nothing in Mr. McLellan's file (or oral testimony) to support their version that the 2007 transfer was to be made pursuant to an Oral Agreement or that the separation agreement was in any way tied to an earlier Oral Agreement. Second, there is nothing in the 2010 documents stating that the transfer was made pursuant to Oral Agreement (and I note that there was no separation agreement signed at the time of the 2010 transfer). Third, the land transfer tax affidavit for the transfer of 211 Osprey states that the consideration was the assumption of a mortgage for \$495,000 (in fact, this was not true, since Mr. Markicevic had used his severance from York to pay off the TD line of credit prior to the transfer).

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<sup>29</sup> Mr. Markicevic and Ms. Fleming both previously gave evidence stating that they had retained Mr. McLellan in 2007 to prepare a separation agreement. At trial, they denied retaining him to prepare a separation agreement. Their evidence is not credible. Mr. McLellan's testimony and the contents of his file make it clear that they retained him in 2007 to prepare a separation agreement.

<sup>30</sup> There appear to be several reasons that Mr. Markicevic and Ms. Fleming wanted to have a separation agreement in place, none of which have anything to do with an Oral Agreement. Mr. McLellan's evidence was that with a separation agreement between former spouses, the transfer would enable them to create two principal residences and would eliminate the requirement to pay land transfer tax. A further reason for the separation agreement would have been to satisfy one of the financing conditions from ING Direct under its mortgage commitment for 124 Woodville. Mr. Markicevic ended up not proceeding with ING and instead used the financing from the letter of credit secured on 112 Osprey.

[126] Mr. Markicevic and Ms. Fleming also testified that part of the consideration for the transfer of 112 Osprey was her agreement not to seek child or spousal support from Mr. Markicevic. There is nothing in writing to that effect. Ms. Fleming admitted at trial that there is nothing to prevent her from pursuing Mr. Markicevic for support. Mr. Markicevic also admitted that Mr. Fleming never requested support from him and that he did not believe that she would ever pursue him for financial support.

[127] I find, on a balance of probabilities, that there was no consideration for the 2010 transfer of 112 Osprey to Ms. Fleming.

#### Analysis and Factual Findings

[128] Section 2 of the *Act* provides:

Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such other persons and their assigns.

[129] The voiding of a transfer as fraudulent pursuant to s. 2 requires:

- a “conveyance” of property;
- an “intent” to defeat; and
- a “creditor or other” towards whom that intent is directed.<sup>31</sup>

[130] Fraudulent intent must usually be inferred from the surrounding circumstances. The court looks at various suspicious circumstances surrounding the transfer of property, or “badges of fraud”, that will assist in determining whether a transferor was fraudulent. The badges of fraud include:

- the donor continued in possession and continued to use the property as his own;
- the transfer was made in the face of threatened legal proceedings;
- the transfer documents contained false statements as to consideration;
- the consideration is grossly inadequate;
- a close relationship exists between parties to the conveyance.<sup>32</sup>

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<sup>31</sup> *Indcondo Building Corp v. Sloan*, 2014 ONSC 4018 at para. 44, aff'd 2015 ONCA 752 (“*Indcondo*”).

[131] Transfers made to close family members should be closely scrutinized and, as a matter of prudence, the court should require “corroborative evidence of the *bona fides* of the transaction.”<sup>33</sup>

[132] Although the primary burden of proving the case remains with the plaintiff, the existence of one or more of the traditional “badges of fraud” may give rise to an inference of intent to defraud in the absence of an explanation from the defendant. In such circumstances, there is an evidentiary onus on the defence to adduce evidence showing an absence of fraudulent intent.<sup>34</sup>

[133] With respect to the conveyance of 124 Woodville into Mima’s name in April 2008, the following badges of fraud exist:

- Mr. Markicevic purchased the house shortly after he was appointed AVP of the newly merged CSBO. The property was located close to his place of work. He signed the APS in his name and advised the vendor on numerous occasions that he would be taking title in his own name. He only changed and directed that title be put into Mima’s name 10 months after the APS was signed, shortly before closing;
- The transfer was from father to daughter;
- Mima contributed minimal consideration – only \$5,000 – for the property;
- Mr. Markicevic has lived at 124 Woodville almost continuously since the purchase in 2008 and has treated the property as his own.<sup>35</sup> Mima has mostly lived away while she pursues her education. Mr. Markicevic has not paid any rent to Mima. There is no evidence that Mima has paid or contributed to any expenses for the property;
- The transfer occurred in April 2008. By that point, Mr. Markicevic was in the midst of defrauding York. He had been conducting the A-Tech false invoicing scheme for eight months. He had arranged to have York employees work at 211 Osprey following the flood, at York’s expense. By the time of the transfer to Mima, Mr. Markicevic was indebted to York for the monies he had taken and the resources he had used. He was well aware that York was a creditor and had a claim against him.

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<sup>32</sup> *Indcondo* at paras. 50, 52.

<sup>33</sup> *Indcondo* at para. 56.

<sup>34</sup> *Indcondo* at para 55.

<sup>35</sup> The transfer into Mima’s name also gave Mr. Markicevic the advantage of creating a principal residence in her name, even though he was living in and treating the house as his own.

[134] The explanation from Mr. Markicevic and Ms. Fleming that they bought the house for Mima to give her a head start in life is not credible. It conflicts with the clear documentary evidence that shows Mr. Markicevic purchased the house and always intended to take title to 124 Woodville in his name. It was only once the closing was delayed to coincide with Mima's 18<sup>th</sup> birthday that he saw an opportunity to put it in her name.

[135] I find that Mr. Markicevic transferred 124 Woodville to Mima with the intent of defeating his creditors.

[136] With respect to the transfer of 211 Osprey to Ms. Fleming in July 2010, the following badges of fraud exist:

- Mr. Markicevic was well aware that York was investigating fraudulent activity on his part, as can be seen from his correspondence to Mr. Brewer on February 1, 2010 (in which he referred to York's accusations of theft and illegal acts) and his emails in April 2010 to Mr. Brewer and others (in which he referred to York's ongoing investigation);<sup>36</sup>
- The transfer was made in the context of a close family relationship between Mr. Markicevic and Ms. Fleming. They had lived in the same house for years (and continue to do so) and had raised their daughter together;
- The land transfer tax affidavit inaccurately stated that the consideration for the transfer was Ms. Fleming's assumption of the TD line of credit when that line of credit had already been repaid;
- There was no other consideration for the transfer. I have already rejected Mr. Markicevic and Ms. Fleming's explanation that the transfer was in consideration of the "Oral Agreement" and the waiver of support.

[137] I find that Mr. Markicevic transferred 112 Osprey to Ms. Fleming with the intent of defeating his creditors.

[138] According to s. 3 of the *Act*, a conveyance will not be void pursuant to s. 2 if it is made "*upon good consideration and in good faith to a person not having at the time of the conveyance...notice or knowledge of the intent set forth in that section*" (my emphasis added). Since I have concluded that the conveyances of both 124 Woodville and 112 Osprey were not made for good consideration, s. 3 does not apply to either transaction.

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<sup>36</sup> Ms. Fleming testified at trial that she was only aware of allegations against Mr. Markicevic with respect to hardwood flooring. She contradicted earlier evidence in which she had acknowledged that she was aware of "fraud" allegations against him. On April 25, 2010, Mr. Markicevic forwarded an email to Ms. Fleming in which he complained about the "unsubstantiated, destructive witch-hunt" against him. I find that Ms. Fleming was well aware that Mr. Markicevic was being investigated for fraud at the time 211 Osprey was transferred to her in July 2010.

[139] I find, on a balance of probabilities, that the transfers of 124 Woodville and 112 Osprey to Mima and Ms. Fleming, respectively, are void as fraudulent conveyances.

### **Rescission of Severance Agreement**

[140] York seeks to rescind the severance agreement that it entered into with Mr. Markicevic on February 1, 2010 (the “**Severance Agreement**”). Pursuant to the Severance Agreement, York terminated Mr. Markicevic without cause and paid him 36 months’ gross salary (\$696,166). The Severance Agreement also contains a full and final mutual release (the “**Release**”).

[141] Shortly before the Severance Agreement was signed, Mr. Markicevic had heard rumours that York union tradespeople were working at his houses. He actively denied the rumours. He sent a letter to Mr. McCann on January 27, 2010 telling him to stop spreading false rumours. He sent a copy of that letter to Mr. Brewer the same day. On January 28, 2010, he sent a letter to the President of York (Dr. Shoukri), Mr. Brewer and York’s General Counsel (Harriet Lewis – “**Ms. Lewis**”) denying the rumours.

[142] On January 29, 2010, the Whistleblower went on the record and met with Ms. Lewis. She and Mr. Brewer met with Mr. Markicevic that day. They relayed the Whistleblower’s allegations that Mr. Markicevic had misappropriated door locks, hardwood flooring and paint for his residences. Mr. Markicevic vehemently denied the allegations and offered to take Mr. Brewer and Ms. Lewis to his house to prove that the allegations were false. They declined. Mr. Markicevic followed up with an email to Ms. Lewis and Mr. Brewer denying that he had misappropriated any materials from York.

[143] Mr. Brewer testified that he did not believe the allegations and firmly believed in Mr. Markicevic’s integrity. However, after discussion with the President and Ms. Lewis, they decided that since the allegations had been made, they were required to conduct an investigation. They also decided that Mr. Markicevic could not be AVP of CSBO during the investigation and that his employment had to be terminated without cause. Mr. Brewer and Mr. Markicevic negotiated and signed the Severance Agreement over the course of the day on February 1, 2010. Mr. Brewer testified that Mr. Markicevic was given a significant severance payment because York realized that his future employability could be affected by the investigation. Mr. Brewer also agreed to provide Mr. Markicevic a positive letter of reference.

[144] As a fiduciary, Mr. Markicevic had a positive obligation to disclose the full extent of his fraudulent activity before he entered into the Severance Agreement. He did quite the opposite. He failed to disclose these activities and actively denied that he had done anything improper. This intentional and material non-disclosure itself entitles York to set aside the Severance Agreement.<sup>37</sup>

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<sup>37</sup> See *Imperial Parking Canada Corp. v. Anderson*, 2015 BCSC 2221, at paras. 235-247.

[145] Further, when one party has induced another party to enter into an agreement by making a material misrepresentation, the principal remedy is rescission.<sup>38</sup> A misrepresentation, to be material, must relate to a matter that would be considered by a reasonable person to be relevant to the decision to enter the agreement in question.<sup>39</sup> It is not necessary for a plaintiff to establish that the misrepresentation was the sole inducement for acting and it does not matter if the misrepresentation was only one of several factors contributing to the plaintiff's decision.<sup>40</sup>

[146] Mr. Markicevic made a material misrepresentation to both Mr. Brewer and Ms. Lewis when he denied any wrongdoing. There is no question that if Mr. Brewer had known of any Mr. Markicevic's fraudulent activities, York would not have terminated him without cause, would not have paid him a large severance (or any severance at all), and would not have granted him the Release.

[147] The Severance Agreement, including the Release, must therefore be set aside.

### **Limitations Defence**

[148] Mr. Markicevic submits that York's action is barred pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24. The action was commenced on January 26, 2012. Mr. Markicevic argues that York cannot meet its burden of proving that it did not know, or could not have known with reasonable diligence, of the facts giving rise to the claim against Mr. Markicevic prior to January 26, 2010.

[149] Mr. Markicevic relies on the notes of Noel Badiou, York's Director of Human Resources.<sup>41</sup> Those notes reveal that by mid-December 2009, various York employees had approached Mr. Badiou to complain about Mr. Markicevic's bullying management style. Some of those complaints also included allegations of financial impropriety. However, none of the potential witnesses were willing to come forward and go on the record at that point. Mr. Badiou continued to speak to potential witnesses and gather information through the end of December and into the first three weeks of January.<sup>42</sup>

[150] It was not until January 29, 2010 that the Whistleblower went on the record, met with Ms. Lewis and brought some documents to support the allegations of financial impropriety.<sup>43</sup>

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<sup>38</sup> J. D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2012) at pages 335-358.

<sup>39</sup> *Barclays Bank PLC v. Devonshire Trust (Trustee of)*, 2011 ONSC 5008 at para. 156, aff'd on appeal 2013 ONCA 494 [*Devonshire Trust*] at para. 157.

<sup>40</sup> *Devonshire Trust* at para. 158.

<sup>41</sup> The parties agreed that those notes are admissible as evidence of Mr. Badiou's knowledge.

<sup>42</sup> Mr. Badiou had relayed some of these allegations to the President, although it is not clear what the extent of their communications were at the time.

<sup>43</sup> I note that those allegations were limited to the use of door locks, hardwood flooring and paint in Mr. Markicevic's house. The allegations with respect to the entire Residence Improvement scheme, the A-Tech scheme and the CAC scheme did not surface until much later.

[151] In my view, that was the earliest date that York can be held to have “discovered” a potential claim against Mr. Markicevic, as defined in s. 5(1)(a) of the *Limitations Act*. Accordingly, the claim is not statute barred.

### **Mr. Markicevic’s Counterclaim**

[152] Mr. Markicevic brought a counterclaim against York for damages that he suffered as a result of York’s allegedly negligent investigation. He also claims that York was precluded from bringing this action against him according to the terms of the Release.

[153] Given my findings and conclusions set out above, Mr. Markicevic’s counterclaim is without merit and is dismissed.

### **Summary and Orders**

[154] Over the period from 2007 to 2010, Mr. Markicevic held a senior and trusted position at York. He abused that trust for his own personal gain. He masterminded two fraudulent schemes, which he implemented through his subordinates. He used York employees to improve his personal residences, at York’s expense. He transferred those residences to Mima and Ms. Fleming to put those assets beyond York’s reach. He then accepted a severance payment of three years’ salary without disclosing any of his fraudulent activities.

[155] Mr. Brown was also a senior and trusted York employee. He also abused his position of trust. He knowingly participated in a scheme to defraud York. He facilitated the attendance of York employees to work on Mr. Markicevic’s residences. He used his Pcard for non-York purposes.

[156] I grant judgment against the defendants for damages as follows:

- Judgment against Mr. Markicevic, Mr. Brown and the “A-Tech defendants”<sup>44</sup> for damages in the amount of \$357,383.50 in respect of the A-Tech scheme, on a joint and several basis;
- Judgment against Mr. Markicevic and the A-Tech defendants for damages in the amount of \$17,600 in respect of the two Aleeyah invoices, on joint and several basis;
- Judgment against Mr. Markicevic for damages in the amount of \$515,461 in respect of the CAC scheme;
- Judgment against Mr. Markicevic for damages in the amount of \$23,000 in respect of the residence improvements at 211 Osprey and 124 Woodville;

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<sup>44</sup> Mr. Jadavji, Aleeyah Apparel Inc., Aleeyah Inc., all of whom have been noted in default.

- Judgment against Mr. Brown for damages in the amount of \$46,262 in respect of Pcard purchases for non-York purposes and \$14,979 in respect of the two Rona purchases; and
- Judgment against Mr. Markicevic for a portion of Navigant's fees reasonably referable to the CAC, A-Tech and Residence Improvement schemes, in the amount of \$200,000. Mr. Brown and the A-Tech defendants are jointly and severally liable for \$75,000 of the \$200,000, for fees reasonably referable to the A-Tech scheme.

[157] I further grant the following declaratory relief:

- A declaration that the Severance Agreement (including the Release) is rescinded and Mr. Markicevic must repay to York the severance paid to him under the Severance Agreement;
- A declaration that the transfer of Mr. Markicevic's interest in 124 Woodville to Mima is void as a fraudulent conveyance;<sup>45</sup>
- A declaration that the transfer of Mr. Markicevic's interest in 211 Osprey to Ms. Fleming is void as a fraudulent conveyance;
- A declaration that York has a constructive trust over 124 Woodville in respect of (i) \$122,000, the amount paid by York for Mr. Ritacca's work on that property; and (ii) \$13,000, the amount paid by York for its employees' work on that property; and
- A declaration that York has a constructive trust over 211 Osprey in respect of \$10,000, the amount paid by York for its employees' work on that property.

[158] If any ancillary orders are sought to implement the above relief, I may be spoken to.<sup>46</sup>

[159] If the parties are unable to agree on costs, I will receive brief submissions (no longer than 10 pages double spaced, exclusive of bill of costs). York's submissions shall be received within 30 days and the defendants' within 15 days thereafter.

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<sup>45</sup> While I am setting aside the transfer as a fraudulent conveyance, I make no decision with respect to any interests that Ms. Fleming and Mima may have in 124 Woodville as a result of their respective contributions to the property. Likewise, I make no decision with respect to any interest Ms. Fleming may have in 211 Osprey as a result of her contribution to that property.

<sup>46</sup> In written submissions, York sought an order restraining the transfer or encumbrance of the two properties and setting aside the June 25, 2013 order of D. M. Brown J. (as he then was) with respect to payment of legal fees from the proceeds or equity of 124 Woodville. Neither counsel addressed those orders in their oral submissions. If York continues to seek this relief, counsel shall arrange a further court attendance before me.

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Conway J.

**Released: June 6, 2016**

**CITATION:** York University v. Markicevic and Brown, 2016 ONSC 3718  
**COURT FILE NO.:** CV-12-9758-00CL  
**DATE:** 20160606

2016 ONSC 3718 (CanLII)

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**

**BETWEEN:**

York University

Plaintiff

– and –

Michael Markicevic, Janet Fleming, Mima Veronica Markicevic, Aleeyah Apparel Inc., operating as A-Tech Construction and Design Inc., Aleeyah Inc., AFC Inc. operating as Arsenal Facility Consulting Inc., Toronto Engineering Company, Guga's International, Canadian & American Concrete Renovation & Drain-Layer Ltd., Roman Ritacca, Luigi Lato, Phil Brown, Riaz Jadavji, Helen Saoulli Georgiou, Vasos Georgiou, George Saoulli, Georgia Saoulli, Guram Sekhniashvili, Gia Sekhniashvili, John Doe #1, John Doe #2, John Doe #3, Jane Doe #1, Jane Doe #2 and Jane Doe #3,

Defendants

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**REASONS FOR JUDGMENT**

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Conway J.

**Released: June 6, 2016**