

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

BONNIE CUMMINGS IN HER CAPACITY AS ESTATE EXECUTRIX
OF THE ESTATE OF THE LATE JOHN CUMMINGS

Applicant

- and -

PEOPLEGE HR SERVICES INC., WINSTON PARK FINANCIAL
SERVICES LTD., CMC FRASER LTD. AND 1624452 ONTARIO
LIMITED

Respondents

**FIFTH REPORT OF BDO CANADA LIMITED
RECEIVER OF PEOPLEGE HR SERVICES INC.,
WINSTON PARK FINANCIAL SERVICES LTD., CMC FRASER LTD.
AND 1624452 ONTARIO LIMITED**

November 3, 2014

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INTRODUCTION

1. BDO Canada Limited was appointed as receiver (the “**Receiver**”) pursuant to section 101 of the *Courts of Justice Act* R.S.O. 1990 C. c.43, as amended, over all of the assets, undertakings, and properties owned and/or administered by (a) Peopledge HR Services Inc. (“**Peopledge**”) and by (b) Winston Park Financial Services Ltd. (“**WPFS**”), CMC Fraser Ltd. (“**CMC**”) and 1624452 Ontario Limited (“**162**”) (collectively, the “**Related Companies**”, and together with Peopledge, the “**Debtors**”) pursuant to the Order of the Honourable Mr. Justice Newbould (the “**Receivership Order**”) dated October 29, 2012 (the “**Appointment Date**”). A copy of the Receivership Order, together with the Endorsement of Mr. Justice Newbould, is attached as **Appendix “A”**.
2. Peopledge conducted business as a provider of payroll processing, human resources, and benefits services. Peopledge serviced 152 Canadian customers and eight US customers. Peopledge’s former business operations and the history of the receivership are described in detail in the Second Report of the Receiver dated December 3, 2012 (the “**Second Report**”), a copy of which is attached (without the Appendices thereto) as **Appendix “B”**.
3. The Receiver was appointed to, among other things:
 - (a) oversee the orderly wind-down of the business of Peopledge and accordingly the business of Peopledge was terminated by the Receiver immediately following its appointment;
 - (b) develop and implement an orderly claims process for Peopledge’s customers and third party creditors; and
 - (c) investigate the competing rights of Peopledge’s customers as potential trust claimants in and to the funds maintained in Peopledge’s business accounts.
4. This motion seeks a declaration that Durham College of Applied Arts & Technology (“**Durham College**”) is in breach of the Receivership Order and an order requiring Durham College to forthwith return the amount of \$256,536.38 (plus interest) to the

Receiver being the funds which had been remitted to Peopledge by Durham College approximately three days prior to the granting of the Receivership Order and then electronically recalled from Peopledge's account by Durham College following it having received notice of the Receivership Order.

5. Durham College's actions are a breach of the Receivership Order and have provided it with an unfair and improper advantage and preference over the 79 other Peopledge Canadian customers (holding in excess of \$5.7 million in customer deposit claims against Peopledge), all of whom were all in the exact same position as Durham College on the granting of the Receivership Order.
6. If not remedied, Durham College's exercise of self help in violation of the Receivership Order will entitle it to keep 100% of the \$256,536.38 that it deposited with Peopledge prior to the Receivership Order, while all of the other Canadian customers which also deposited funds with Peopledge prior to the granting of the Receivership Order have only received 35%¹ on account of their claims.
7. Despite repeated demand by the Receiver, Durham College has refused to return the \$256,536.38 to the Receiver. Accordingly, the Receiver brings this motion seeking an order:
 - (a) ordering Durham College to pay to the Receiver the sum of \$256,536.38, plus interest from October 29, 2012 calculated in accordance with the *Courts of Justice Act*, R.S.O., 1990, C. c-43, as amended, or interest in such other amount as may be determined by the Court;
 - (b) ordering that the sum of \$256,536.38 (with applicable interest) received from Durham College shall be credited by the Receiver to the Canadian Customer Account Funds, as defined by the Order of the Honourable Mr. Justice Newbould

¹ As of the date of this Fifth Report, Canadian Customer Deposit Claimants have received an interim distribution from the Receiver in the amount of 35% of their proven Canadian Customer Deposit Claim, subject to further distributions that may be made by the Receiver.

dated May 15, 2013 (the “**Claim Determination and Interim Distribution Order**”);

- (c) declaring that, upon payment to the Receiver of the sum of \$256,536.38 (plus interest), Durham College shall be deemed to have a Proven Canadian Customer Deposit Claim (as such term is defined in the Claim Determination and Interim Distribution Order) in the amount of \$256,536.38;
- (d) authorizing and directing the Receiver to distribute to Durham College from the Canadian Customer Account Funds a dividend in accordance with paragraph 10 of the Claim Determination and Interim Distribution Order; and
- (e) ordering that Durham College pay to the Receiver its costs of this motion on a substantial indemnity basis.

TERMS OF REFERENCE

- 8. All references to currency or dollars (\$) in this Fifth Report shall mean Canadian dollars unless otherwise stated. The Receiver has relied upon unaudited financial information of Peopledge, including its books and records, certain financial information prepared by Peopledge, and discussions with Peopledge’s management. The information has not been audited in any manner by the Receiver.

OVERVIEW OF ESTATE ASSETS AND CUSTOMER TRUST CLAIMS

- 9. As set out in the Second Report, as part of its payroll processing business, funds delivered to Peopledge by its customers designated for payroll and related governmental and other remittances (collectively, “**Payroll Funds**”) were deposited into one of two “**Consolidated Payroll Accounts**”, being (i) the “**Canadian Consolidated Account**” held with Bank of Montreal (“**BMO**”) which was used to administer payrolls for customers with Canadian employees, and (ii) the “**US Consolidated Account**” held with BMO Harris Bank in the United States which was used to administer payrolls for customers with US employees. In addition to the Consolidated Payroll Accounts, Peopledge also held a number of additional accounts with BMO seemingly designated for general business operations (the “**Peopledge General Accounts**”).

10. As such, the assets of Peopledge are categorized into three separate pools: (i) Payroll Funds deposited into the Canadian Consolidated Account (the “**Canadian Customer Account Funds**”); (ii) Payroll Funds deposited into the US Consolidated Account (the “**US Customer Account Funds**”); and (iii) funds in Peopledge’s remaining accounts seemingly designated for general business operations (the “**Peopledge General Accounts Funds**”).
11. As set out in the Second Report, there were no separate or designated trust or other like accounts for deposits on a customer-by-customer basis. The effect of this was that whenever a customer deposited Payroll Funds, regardless of the nature of the funds, the deposited funds were co-mingled with all other funds held in the Consolidated Payroll Accounts, including funds which had been deposited by other customers and with all funds from processing fees earned by Peopledge.
12. The co-mingling of Payroll Funds was further compounded (i) by a lack of proper accounting by Peopledge of funds received from and paid out on behalf of Peopledge’s customers, and (ii) by numerous transfers of funds made by Peopledge to and from the Consolidated Payroll Accounts, the Peopledge General Accounts, accounts maintained in the names of the Related Companies, and other related or third party accounts.
13. As at the Appointment Date a number of Peopledge’s former customers asserted trust claims in and to funds subject to the Receivership Order. The aggregate quantum of potential trust claims significantly exceeded the aggregate quantum of funds in the Peopledge estate as at the Appointment Date.
14. The Receiver attended before the Honourable Mr. Justice Newbould on May 9, 2013 to seek advice and directions from the Court with respect to, among other things, the entitlement of former customers and creditors to the funds in the estates of the Debtors (the “**May Directions Motion**”). In connection with the May Directions Motion, the Receiver filed its Fourth Report to the Court dated April 5, 2013 together with its Supplement to Fourth Report dated May 1, 2013 (collectively, the “**Fourth Report**”). The Fourth Report set out the Receiver’s recommendations for, among other things, claimant’s entitlements to distributions from the various pools of funds in the

receivership estates. The Fourth Report is attached (without the Appendices thereto) as **Appendix “C”**.

15. As part of the relief granted by the Court on the May Directions Motion, Justice Newbould granted the Claim Determination and Interim Distribution Order declaring that former Canadian customers with proven claims in and to the Canadian Customer Account Funds may receive a distribution from such funds on a *pari passu ex post facto pro rata* basis, and that former US customers with proven claims in and to the US Customer Account Funds may receive a distribution from such funds on a *pari passu ex post facto pro rata* basis.
16. In his Endorsement dated May 15, 2013, Justice Newbould concluded that the Canadian Consolidated Account should be treated as a trust account for the benefit of all of the Canadian customers who advanced payroll deposits to Peopledge and the US Consolidated Account should be treated as a trust account for the benefit of all of the US customers who advances payroll deposits to Peopledge.
17. In that regard, Justice Newbould accepted the Receiver’s recommendation that trust funds should be distributed on a *pari passu ex post facto pro rata*, which approach best balanced the relative benefits and prejudices to the various trust claimants, applied a reasonably justified principled approach to a distribution, and reduced to the greatest extent possible professional costs to maximize claimants’ recovery.
18. A copy of the Claim Determination and Interim Distribution Order is attached hereto as **Appendix “D”** and a copy of the Endorsement of Justice Newbould dated May 15, 2013 is attached hereto as **Appendix “E”**.

RECALL OF FUNDS BY DURHAM COLLEGE

19. Durham College pre-arranged for deposits of payroll funds by electronic fund transfers on October 26, 2012 of \$845,164.34 (the “**First Payroll Deposit**”) and on October 29, 2012 of \$1,998,615.03 (the “**Second Payroll Deposit**”), totalling \$2,843,779.37. The same electronic deposit process was utilized by most, if not all, of Peopledge’s customers.

20. On October 29, 2012, Durham College was provided with notice of the Receivership Order (in substantially the form attached to the Receivership Order as Schedule "A").
21. Despite paragraph 7 of the Receivership Order which stayed and suspended all rights and remedies against any of the Debtors, the Receiver, or affecting the property subject to the receivership (including any potential trust property), following receipt of notice of the Receivership Order Durham College took steps to recall both electronic fund transfers by contacting its financial institution (also BMO) and instructing BMO to recall both electronic fund transfers.
22. BMO advises the Receiver that because of the electronic transfer nature of the original deposits made by Durham, BMO was unable to prevent or stop the recall of the deposit instructed by Durham College. As a result, \$2,843,779.37 was recalled by Durham College after the issuance of the Receivership Order.
23. It was discovered shortly after the recall had been processed that net payroll amounts had also been distributed to Durham College employees from the Canadian Consolidated Accounts as follows:
 - (a) in respect of the First Payroll Deposit, \$588,627.96; and
 - (b) in respect of the Second Payroll Deposit, \$1,467,769.33.
24. Ultimately, on demand by the Receiver, Durham College returned funds equal to the net amount paid out to its employees to correct the "double dip" created by the concurrent withdrawals.
25. As a result, Durham College deposited \$2,057,078.50 (being the total of the \$588,627.96 and \$1,467,769.33 payrolls processed) on November 2, 2012 directly into an account maintained by the Receiver. That left a balance of the First Payroll Deposit of \$256,538.38 and balance of the Second Payroll Deposit of \$530,845.70.
26. By Order of the Honourable Mr. Justice Campbell dated December 10, 2014 (the "**Comeback Directions Order**"), on motion by the Receiver, this Court authorized and

directed the Receiver to return to the applicable customer any deposits which had been automatically made into Peopledge's accounts after 12:01 a.m. on the Appointment Date, as such funds would not properly form part of the receivership estate. The Receiver's justification for such motion may be found at paragraphs 50 – 55 of the Second Report.

27. As such, in accordance with the Comeback Directions Order, the balance of the Second Payroll Deposit in the amount of \$530,845.70 would have been returned to Durham College pursuant to the Comeback Directors Order even if it had not been already recalled by Durham College. As such, the Receiver has not demanded the return of the balance of the Second Payroll Deposit and those funds are not at issue in this motion.
28. The Receiver has however made several demands to Durham College for recovery of the balance of the First Payroll Deposit in the amount of \$256,536.38, which to date remains unreturned.
29. Despite receiving notice of the Receivership Order and the stay provisions set out therein, Durham College exercised self-help and took possession of certain funds which were subject to the protections of the Receivership Order and the authority of BDO Canada Limited as court appointed Receiver.
30. It is the Receiver's view that this constitutes a breach of the terms of the Receivership Order by Durham College.
31. If left unremedied, Durham College will receive an unfair advantage over others customers who, but for Durham College's breach of the Receivership Order, were in the exact same situation as was Durham College on the granting of the Receivership Order.
32. In particular, Durham College's actions have provided it with an unfair and improper advantage and preference over the 79 of Peopledge's former Canadian customers that filed and have proven Customer Deposit Claims in excess of \$5.7 million against Peopledge and who were all in the exact same position as Durham College on the granting of the Receivership Order.

33. If not remedied, Durham College's exercise of self help in violation of the Receivership Order will entitle it to keep 100% of the \$256,536.38 that it deposited with Peopledge, while all of the other Canadian customers also deposited funds with Peopledge prior to the granting of the Receivership Order have only received 35% on account of their claims.²

DURHAM COLLEGE'S RESULTING CANADIAN CUSTOMER DEPOSIT CLAIM

34. The Claims Process Order directed and empowered the Receiver to administer a claim process as discussed in detail in the Fourth Report. The Claims Process Order required that, among other things, all claims be filed by 5:00 p.m. (Eastern Standard Time) on Friday, January 18, 2013 (the "**Claims Bar Date**"). A copy of the Claims Process Order is attached as **Appendix "F"**.
35. The Receiver reasonably assumes that had Durham College not exercised self-help, it would have filed a valid Proof of Canadian Customer Deposit Claim as part of the claims process. Durham did not file any claim (contingent or otherwise) before the Claims Bar Date.
36. However, the Receiver recommends that it is reasonable and appropriate for Durham College to be deemed to hold a valid Canadian Customer Deposit Claim in the event that this Court orders Durham College to return the balance of the First Payroll Deposit.
37. Accordingly, the Receiver recommends that the Court order that, upon payment to the Receiver of the sum of \$256,536.38 (plus interest), Durham College be deemed to have a Proven Canadian Customer Deposit Claim in the amount of \$256,536.38, and that the Court authorize and direct the Receiver to distribute to Durham College from the Canadian Customer Account Funds a dividend in accordance with paragraph 10 of the Claim Determination and Interim Distribution Order.
38. Such an order would also entitle Durham College to participate in any further distribution by the Receiver as a holder of a Proven Canadian Customer Deposit Claim.

² A further and final distribution is expected in these receivership proceedings.

SUMMARY OF RELIEF SOUGHT

39. For the foregoing reasons, the Receiver respectfully recommends that this Honourable Court grant the relief as described in paragraph 7 herein.

All of which is respectfully submitted this 3rd day of November, 2014.

BDO CANADA LIMITED

In its capacity as the Receiver of
Peopledge HR Services Inc.,
Winston Park Financial Services Ltd.,
CMC Fraser Ltd. and 1624452 Ontario Limited
and not in its personal capacity

Per:



Eugene P. Migus, CPA, CA, CIRP
Senior Vice President