

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

Applicant

- and -

**PEOPLEDDGE HR SERVICES INC., WINSTON PARK FINANCIAL SERVICES LTD.,
CMC FRASER LTD., 1624452 ONTARIO LIMITED**

Respondents

**FACTUM OF THE RECEIVER, BDO CANADA LIMITED
(MOTION RETURNABLE JANUARY 14, 2015)**

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INDEX

<u>Description</u>	<u>Page No.</u>
Part I – OVERVIEW	1
Part II – THE FACTS	4
The Business of Processing Payrolls	4
Pre-Receivership Accounting and Handling of Payroll Funds	4
The Appointment of the Receiver	6
The Contractual Processing and Authorization of Durham College’s First Payroll Deposit	7
The Receivership Order is Breached by Durham College	9
The Comeback Motion	10
Part III – THE ISSUES	11
Part IV – LAW AND ARGUMENT	12
The Receivership Order and Stay of Proceedings	12
Funds Transfer Fully Completed as Between the Parties on October 26, 2012	15
Payor Protections under the CPA Rules	16
Pre-Debit PAD Protections Under the CPA Rules	17
Post-Debit Protections Under the CPA Rules	18
Bank Clearance and Settlement Procedures under the CPA Rules Are Not Applicable	18
Part V – ORDER REQUESTED	22

FACTUM OF THE RECEIVER, BDO CANADA LIMITED
(MOTION RETURNABLE JANUARY 14, 2015)

PART I – OVERVIEW

1. BDO Canada Limited (“**BDO**”) 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 (“**CJA**”), 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., CMC Fraser Ltd. and 1624452 Ontario Limited (collectively, the “**Related Companies**”, and together with Peopledge, the “**Debtors**”) pursuant to the Order of the Honourable Mr. Justice Newbould dated October 29, 2012 (the “**Receivership Order**”).
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 primary shareholder and directing mind was John Cummings (“**Cummings**”), who died from cancer in 2012. His widow, Bonnie Cummings (“**Bonnie**”), as estate executrix of Cummings’ estate (the “**Cummings Estate**”), began the process of investigating Cummings’ assets and affairs, including the business of Peopledge, which revealed a troubled company in financial distress, with limited to no proper accounting and what appeared to be a significant sum of money missing from the company’s payroll accounts.
3. The Receiver was appointed to, among other things:
 - (a) oversee the orderly wind-down of the business of Peopledge;
 - (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 bank accounts.
4. This motion seeks a declaration that The Durham College of Applied Arts & Technology (“**Durham College**”) is in breach of the Receivership Order and seeks an order requiring

Durham College to return the amount of \$256,536.38 (plus interest) to the Receiver, being the funds which had been transferred from Durham College to Peopledge approximately three days prior to the granting of the Receivership Order and then 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, have allowed it to avoid the orderly administration of the Peopledge estate under the supervision of this Court, 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 in the 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 in funds that were deposited with Peopledge while all of the other Canadian customers which also deposited funds with Peopledge prior to the granting of the Receivership Order have to date only received 35%¹ on account of their claims.

7. While Durham College admits that it instructed its bank to recall the electronic funds transfer to Peopledge following becoming aware of the receivership, Durham College takes the position that such action does not constitute a breach of the Receivership Order on the basis that Durham College is afforded certain "protections" under the rules governing bank-to-bank electronic funds transfers and that under such rules the funds had not "cleared" and become the property of Peopledge prior to the granting of the Receivership Order.

8. That position is flawed. It ignores the payroll processing contractual arrangements that were in place between Peopledge and Durham College and incorrectly seeks to rely on bank processing rules to interpret the rights and entitlements as between Peopledge and Durham College, which the Courts (including the Supreme Court of Canada) have clearly stated should not be applied to determine the private rights of parties.

¹ To date, 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 a final distribution to be made by the Receiver.

9. Prior to the receivership, all of the necessary steps and actions required on the part of both Peopledge and Durham College had been taken to fully effectuate the transfer of the funds in accordance with the contractual arrangements between the parties and, in accordance with Durham College's approval and authorization, the funds were deposited into Peopledge's account and became available for Peopledge's use prior to the granting of the Receivership Order.

10. Durham College is attempting to take advantage of the clearance and settlement rules which govern the *inter*-bank processing technicalities to justify it having taken deliberate action following the granting of the Receivership Order to undo the transfer of the funds which was otherwise fully authorized and completed as between the two parties.

11. In doing so, Durham College improperly avoided the orderly administration of the Peopledge estate under the supervision of this Court and sought to unilaterally determine whether it and the funds that were transferred to Peopledge should be subject to the receivership.

12. Despite repeated demand by the Receiver, Durham College has refused to return the \$256,536.38 to the Receiver. Accordingly, the Receiver seeks in this motion 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 CJA, 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 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.

PART II – THE FACTS

The Business of Processing Payrolls

13. Peopledge conducted business as a provider of payroll processing, human resources, and benefits services. Peopledge serviced 152 Canadian customers (having an aggregate of 9,926 employees) and eight US customers (having an aggregate of 482 employees).²

14. Funds delivered to Peopledge from 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**”).³

Pre-Receivership Accounting and Handling of Payroll Funds

15. Payroll Funds were generally received by Peopledge three days in advance of their required distribution date. Customer payrolls, payroll tax and other remittances, and the payroll processing fees earned by Peopledge were paid directly from the Consolidated Payroll Accounts. The portion of a customer’s Payroll Funds designated for individual employees was typically disbursed within three days of receipt; however, the portion of their Payroll Funds representing

² Second Report of the Receiver dated December 3, 2012 [**Second Report**] at para. 13; Motion Record of the Receiver dated November 3, 2014 [**Motion Record**], Tab 2B, p. 39.

³ Fifth Report of the Receiver dated November 3, 2014 [**Fifth Report**] at para. 9; Motion Record, Tab 2, p. 11.

payroll tax and other deductions might not be distributed for up to 45 days or quarterly. As a result, there was usually a significant balance (comprised primarily of unremitted government deductions) in the Consolidated Payroll Accounts at any given time.⁴

16. Although Peopledge's agreements and/or its arrangements with its customers contemplated that Payroll Funds received by it would be held in trust for the benefit of the depositing customer, in practice Peopledge did not maintain separate or designated trust 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 Payroll Funds which had been deposited by other customers and with all funds from processing fees earned by Peopledge.⁵

17. The co-mingling of Payroll Funds was further compounded by (i) a lack of proper accounting by Peopledge of funds received from and paid out on behalf of Peopledge's customers, and (ii) numerous transfers of funds made by Peopledge to and from the Canadian Consolidated Account, the US Consolidated Account and the Peopledge General Accounts.⁶

18. In addition to co-mingling Payroll Funds, over a significant period of time, Peopledge moved portions of unidentified Payroll Funds from the Canadian Consolidated Account to the Peopledge General Accounts and subsequently to accounts of the Related Companies or other unknown accounts. At the time of the receivership application, there was an estimated \$3.4 million in unaccounted Payroll Funds missing from the Canadian Consolidated Account.⁷

19. Peopledge was also regularly drawing on the Canadian Consolidated Account and using Payroll Funds (again, not accounting from which customer's deposits such payments were made) to fund its business, including the payroll of its own employees.⁸

⁴ Report of BDO Canada Limited as Proposed Receiver of Peopledge HR Services Inc. et al dated October 24, 2012 [**Report of the Proposed Receiver**] at para. 39.

⁵ Fifth Report at para. 11; Motion Record, Tab 2, p. 12.

⁶ Fifth Report at para. 12; Motion Record, Tab 2, p. 12.

⁷ Second Report at paras. 23 - 32; Motion Record, Tab 2B, p. 43 - 44.

⁸ Second Report at para. 30; Motion Record, Tab 2B, p. 44.

The Appointment of the Receiver

20. This was the situation uncovered by Bonnie and BDO, and ultimately led to the Cummings Estate seeking the appointment of the Receiver on October 29, 2012. The stated intention of the receivership was to establish a court-supervised process to:

- (a) orderly wind-down of the business of Peopledge;
- (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.⁹

21. Given the situation, it was clear that the receivership would result in the immediate cessation of payroll services that would impact not only Peopledge's direct customers but the individual employees of those customers. Thus, in conjunction with the receivership application and in order to seek to minimize the impact on customers and employees to the greatest extent possible in the circumstances, BDO developed a transition plan to help customers transfer their accounts to another payroll service provider as efficiently as possible.¹⁰

22. In that regard, BDO negotiated the terms of a transition and referral agreement (the "**Referral Agreement**") with Ceridian Canada Ltd. ("**Ceridian**"). Under the terms of the Referral Agreement, Ceridian agreed to waive certain transfer and implementation fees for Peopledge customers, agreed to immediately transition and provide services to transferees on substantially the same terms as did Peopledge, and agreed to pay a referral fee to the receivership estate.¹¹ Transition of payroll service to Ceridian was voluntary for Peopledge's customers, but with the assistance of the Receiver, approximately 72 of Peopledge's customers made use of the Referral Agreement opportunity.¹²

⁹ Fifth Report at para. 3; Motion Record, Tab 2, p. 9.

¹⁰ Report of the Proposed Receiver at paras. 78 – 96.

¹¹ Report of the Proposed Receiver at para. 86.

¹² Fourth Report of the Receiver dated April 5, 2013 at para. 18(k); Motion Record, Tab 2C, p. 82.

23. The Referral Agreement was approved by Justice Newbould at paragraph 25 of the Receivership Order.¹³ In granting the Receivership Order, Justice Newbould indicated that “.... I am satisfied that a receiver must be appointed immediately to take control of the business and work an orderly transition of the business of the customers to another payroll service ...”.¹⁴

The Contractual Processing and Authorization of Durham College’s First Payroll Deposit

24. Peopledge and Durham College entered into a master agreement which governed the relationship between them, including the rules for the processing of Durham College’s payroll and the transfer of Payroll Funds from Durham College to Peopledge by way of pre-authorized debit (“PAD”) transaction (the “**Master Agreement**”).¹⁵

25. Under the Master Agreement, the electronic transfer of payroll funds from Durham College to Peopledge was to “clear” two days before the applicable scheduled pay date. In order to effectuate that result, at least two days before that date, Peopledge will have initiated the PAD based on the payroll debit information that was provided and approved by Durham College.¹⁶

26. Durham College’s payroll processing schedule is set out in Schedule 5 to the Master Agreement between Peopledge and Durham College, which is reproduced as follows:¹⁷

¹³ Receivership Order of Justice Newbould dated October 29, 2012 [**Receivership Order**] at para. 25; Motion Record, Tab 2A, p. 29.

¹⁴ Endorsement of Justice Newbould dated October 29, 2012.

¹⁵ Appendix “A” to the Supplement to the Fifth Report of the Receiver dated December 8, 2014 [**Supplementary Report**]; Reply Motion Record of the Receiver dated December 8, 2014 [**Reply Motion Record**], Tab 2A, p. 10 – 46.

¹⁶ Supplementary Report at para. 7; Reply Motion Record, Tab 1, p. 3.

¹⁷ Supplementary Report at para. 8; Reply Motion Record, Tab 1, p. 3 - 4. “Employer” or “Client” means Durham College. “The Service Bureau” means Peopledge.