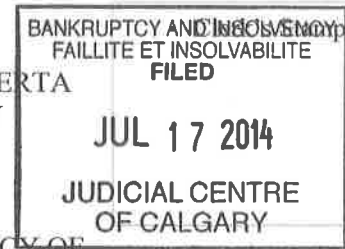


COURT FILE NUMBER **BK01-094419**
COURT COURT OF QUEEN'S BENCH OF ALBERTA
IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE Calgary



IN THE MATTER OF THE BANKRUPTCY OF
ASSISTIVE FINANCIAL CORP. and the
Bankruptcy and Insolvency Act, RSC 1985, c B-
3, as amended

APPLICANT **HARDIE & KELLY INC., IN ITS
CAPACITY AS TRUSTEE IN
BANKRUPTCY OF ASSISTIVE
FINANCIAL CORP.**

RESPONDENT **BURNET, DUCKWORTH & PALMER LLP**

DOCUMENT **APPLICATION (Delivery of
Property & Records)**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT
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NOTICE TO RESPONDENT:

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date Tuesday September 9, 2014
Time 10:00 a.m.
Where Calgary Courts Centre, 601-5th Street S.W., Calgary AB

Before Whom The Honourable Justice K.M. Horner (Commercial List)

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. The within application is brought by Hardie & Kelly Inc., in its capacity as the trustee in bankruptcy (the “**Trustee**”) of Assistive Financial Corp. (“**Assistive**”), for an order including but not limited to the following relief:
 - (a) Declaring that the Trustee is entitled to any and all files, records and materials, without alterations, redactions or removals, in any format including electronic of Assistive (the “**Assistive Records**”) currently in possession by Burnet, Duckworth & Palmer LLP (“**BDP**”), regardless of whether privilege is asserted over the Assistive Records, including solicitor-client privilege as between Assistive and BDP;
 - (b) Directing BDP to deliver to the Trustee all the Assistive Records that are currently in BDP’s possession no later than September 30, 2014;
 - (c) Directing BDP to deliver to the Trustee each and every one of Assistive’s computers currently in possession by BDP;
 - (d) Directing BDP to deliver to the Trustee all of BDP’s files in which BDP acted as counsel on behalf of Assistive in any matter;
 - (e) Directing BDP to deliver to the Trustee all of BDP’s files for which Assistive paid the legal fees in any matter;
 - (f) Extending or staying any and all time periods prescribed by the Alberta *Rules of Court* as they relate to the Trustee’s obligations to take any steps in the Action;
 - (g) Costs of the within Application in favour of the Trustee on a full indemnity basis; and
 - (h) Such further and other relief as Counsel for the Trustee may advise and this Honourable Court considers just and appropriate in the circumstances.

Grounds for making this application:

Background to BDP’s Possession of Records

2. A bankruptcy order was granted in respect of Assistive on February 3, 2014 (the “**Bankruptcy Order**”), and appointed the Trustee as the trustee in bankruptcy over all of the property of Assistive.

3. Pursuant to Section 158(a) and (b) of the *Bankruptcy and Insolvency Act* (“**BIA**”), Assistive is obliged to deliver all its property, books, records, documents, writings and papers in its possession or under its control to the Trustee.
4. Pursuant to Section 16 (3) of the BIA, the Trustee has a duty to collect all Assistive’s property, books, records, documents, writings and papers, and for the purpose of doing so, is entitled to enter onto any premises where such property and records may be found.
5. Pursuant to Section 164 of the BIA, the Trustee is entitled to demand and receive production of all Assistive’s property and records from any person who has, or is believed or suspected to have in his possession or power such property and/or records, to produce and deliver same to the Trustee.
6. Pursuant to the Bankruptcy Order, all of Assistive’s property vested in the Trustee and ceased to belong to the corporation. The Trustee is the proper person to exercise any directions relating to such property.
7. BDP has, or is believed or suspected to have, in its possession files, books, records, and documents related to the dealings of Assistive, by virtue of the fact that BDP previously acted as Assistive’s corporate and litigation counsel.
8. BDP represented Assistive in litigation which is still pending between Assistive and the Cash Store Group under Action No. 1301-11081 in this Court (the “**CSF Action**”).
9. BDP has, or is believed or suspected to have, in its possession files, books, records, and documents related to the dealings of Randy and Slade Schiffner in relation to Assistive, which may have been paid for by Assistive.
10. The Trustee has demanded that BDP delivers to the Trustee all its files in which it acted on behalf of Assistive.
11. The Trustee demanded that all property and records of Assistive be delivered to the Trustee. In response some of the Defendants delivered records and computers (the “**Computers**”) belonging to Assistive to BDP.
12. Pursuant to a consent order granted in the within bankruptcy proceedings on February 13, 2014 (the “**Consent Order**”), BDP was directed to retain possession of the Computers until further

order of the Court. The Consent Order further provided that the Trustee reserved its rights to seek production of the documents and records over which BDP and some of the Defendants asserted privilege.

13. BDP has delivered some records to the Trustee, and has undertaken to deliver further records to the Trustee, which records BDP in its sole discretion has purported to determine not to be privileged.
14. BDP and some of the Defendants assert privilege over some of the contents of the Computer records, some of the contents of BDP's files in which it acted as counsel for Assistive, including over BDP's entire file related to the CSF Action, allegedly on account of solicitor-client and litigation privilege belonging to Assistive, or solicitor-client and litigation privilege belonging to the Defendants, Randy and Slade Schiffner.
15. The Trustee has not invoked the process provided for by Section 164 of the BIA against BDP because the parties are agreed that the Trustee's right to claim delivery to the records and property of Assistive remaining in BDP's possession, requires a decision by the Court about the applicability of the decision by the Alberta Court of Appeal in *Re Bre-X Minerals Ltd.*, 2001 ABCA 255.
16. The Trustee's claim to the records and property of Assistive in BDP's possession is not barred by the Bre-X decision; alternatively, the Bre-X decision was incorrectly decided.
17. On behalf of Assistive, the Trustee has commenced Action No. 1401-04781 in the Alberta Court of Queen's Bench (the "**Action**") against the former directors and officers of Assistive, the shareholders of Assistive and other members of the Schiffner family.
18. The Trustee requires delivery of the records and property of Assistive in the possession of BDP for purposes of the proper administration of Assistive's bankrupt estate, the conduct of the Action, and the potential future continuation of the CSF Action.
19. The unilateral attempt by some of the Defendants and BDP to withhold information and records which are potentially prejudicial to the interests of such defendants constitutes an obstruction of the Action and the CSF Action which brings the administration of justice into disrepute and is contrary to the purpose of solicitor client privilege as a whole.

Material or evidence to be relied on:

20. The pleadings filed in the bankruptcy action.
21. The pleadings filed in the Action.
22. The pleadings filed in the CSF Action.
23. The Affidavit of Marc Kelly sworn on July 17, 2014.

Applicable rules:

24. *Alberta Rules of Court*, AR 124/2010, Division 2 of Part 1, Rules 6.3 and 13.5.
25. Such further and other Rules as counsel may advise and this Honourable Court may permit.

Applicable Acts and regulations:

26. *Judicature Act*, RSA 2000, c J-2, s 8.
27. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.
28. Law Society of Alberta, *Code of Conduct*.

Any irregularity complained of or objection relied on:

29. None.

How the application is proposed to be heard or considered:

30. In person, before the Honourable Justice K.M. Horner, with some or all of the parties present, on affidavit evidence.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.