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COURT COURT OF QUEEN'S BENCH OF ALBERTA IN  
BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE CALGARY

PROCEEDING IN THE MATTER OF THE BANKRUPTCY OF  
ASSISTIVE FINANCIAL CORP.

DOCUMENT **FIRST REPORT OF THE TRUSTEE,  
HARDIE & KELLY INC.  
FEBRUARY 10, 2015**

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**FIRST REPORT OF THE TRUSTEE  
HARDIE & KELLY INC.  
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## **INTRODUCTION**

1. On February 3, 2014, the Management Committee of the debenture holders of Assistive Financial Corp. (“Assistive” or the “Company”) made application to the Court of Queen’s Bench of Alberta (the “Court”) for an order adjudging Assistive bankrupt.
2. On February 3, 2014, the Court granted a Bankruptcy Order adjudging Assistive a bankrupt. Hardie & Kelly Inc. was appointed as Trustee (the “Trustee”) of the bankrupt estate (the “Estate”).
3. A first meeting of creditors was held on February 24, 2014 (the “Meeting”). At the Meeting, five estate inspectors (the “Inspectors”) were appointed.
4. The purpose of this report (the “First Report”) is to provide the Court with additional background information leading up to the application for an order pursuant to section 38 of the *Bankruptcy and Insolvency Act* (the “S. 38 Action”) and the Trustee’s position thereon.

## **BACKGROUND**

5. Assistive’s principal line of business was the provision of short-term, high interest loans and other credit facilities (commonly referred to as “Payday Loans”) to subprime consumer borrowers (“Customers”) located in Australia, Europe and Canada facilitated by way of agreements with certain subsidiaries or affiliates of The Cash Store Financial Services Inc. (“CSF”) in which these subsidiaries or affiliates of CSF acted in the role as independent brokers between Assistive and Customers.
6. Assistive financed the loans it made to Customers by way of funds obtained from short term unsecured debentures issued to individual and corporate investors (the “Debenture Holders”). The underlying premise of Assistive’s business model was that the interest earned from funds loaned to Customers would be greater than the sum of its interest obligations payable to Debenture Holders and the losses incurred from “bad loans” made to Customers.

7. The Company's *Statement of Affairs* indicated that AFC's total obligation to Debenture Holders exceeded \$107 Million. As of the date of this First Report, approximately \$98 Million in claims have been filed with the Trustee by Debenture Holders.
8. Loans made to Customers in Australia through Assistive's wholly owned subsidiary Advance Finance Australia Pty Ltd. ("Assistive Australia") were brokered by CSF's affiliate, The Cash Store Pty Limited ("CSA Pty"). The available books and records of Assistive indicate that in excess of \$35 Million had been advanced to CSA Pty. On September 13, 2013, a liquidator was appointed over CSA Pty. The Trustee ultimately received only approximately \$95,000 from the liquidation of CSA Pty.
9. Loans made to Customers in Europe were brokered by RTF Financial Holdings Inc. ("RTF"), an affiliate of CSF. The available books and records of Assistive indicate that in excess of \$70 Million had been advanced to RTF. On October 8, 2014, PricewaterhouseCoopers Inc. was appointed as Receiver and Manager of RTF (the "Receiver"). Based on the information received to date from the Receiver, the extent of recoveries that may ultimately be available to Assistive, if any, is uncertain at best.
10. Loans made to Customers in Canada were brokered by CSF's wholly owned subsidiary, The Cash Store Inc. ("CSI"). In practice, Assistive did not advance funds directly to CSA Pty or to RTF but rather funds were advanced to CSI and then subsequently allocated by CSI to CSA Pty or RTF. Consequently, as at the date of bankruptcy, CSI's position was that it did not owe Assistive any funds as a book of Assistive loans to Canadian Customers had previously been purchased by CSI.
11. On April 14, 2014, CSF and certain of its subsidiaries, including CSI, sought and obtained an Initial Order under the *Companies' Creditors Arrangement Act* (the "CCAA") from the Ontario Superior Court of Justice (Commercial List) granting a stay of proceedings and certain other relief provided under the CCAA.

### **FUNDING OF BANKRUPT ESTATE**

12. Other than the funds received from the liquidation of CSA Pty, the only other readily available recovery was approximately \$55,000 in cash ultimately secured by the Trustee.
13. On March 21, 2014, a meeting of Debenture Holders was convened at which time the Trustee provided an update as to the administration of the Estate, including the likelihood and difficulties inherent with attempting to recover any funds loaned to Customers and the lack of funds available to the Estate to attempt to further pursue potential avenues of recovery.
14. During the meeting, the Debenture Holders present in person, or by proxy, overwhelmingly supported the concept of funding the Estate. Consequently, the Trustee was subsequently authorized by the Inspectors to borrow up to \$750,000 from Debenture Holders to fund the bankruptcy proceedings and potential litigation. Approximately \$551,000 was ultimately raised from Debenture Holders by way of issuance of *Subscription Agreements for Funding Notes* (the “Funding Notes”).

### **ACTION AGAINST FORMER DIRECTORS, OFFICERS AND SHAREHOLDERS**

15. On May 2, 2014 the Trustee, under the direction of the Inspectors, filed a Statement of Claim against the previous directors, officers and shareholders of Assistive, as well as certain non-arms length parties to the Company (the “Estate Action”).
16. A synopsis of the progression of the Estate Action is as follows:
  - (a) On May 26, 2014 a Statement of Defence was filed in Court by Burnet, Duckworth & Palmer LLP (“BDP”) on behalf of the defendants Randy Schiffner, Slade Schiffner, Brandon Schiffner and Elayne Schiffner denying all allegations raised in the Statement of Claim and seeking to have the Statement of Claim dismissed with costs on a solicitor-client basis or on such other basis as the Court may award.

- (b) On June 10, 2014, the Trustee filed an application in Court seeking to have BDP removed as counsel for Randy Schiffner, Slade Schiffner, Brandon Schiffner and Elayne Schiffner (the “Application to Remove Counsel”) on the grounds that BDP was in a disqualifying conflict of interest having previously acted as the principal corporate legal counsel for Assistive prior to the bankruptcy proceedings.
- (c) On June 27, 2014, a Statement of Defence was filed in Court by Reynolds, Mirth, Richards and Farmer LLP on behalf of the defendant Brandi Schiffner denying all allegations raised in the Statement of Claim and seeking to have the Statement of Claim dismissed with costs to be paid by the Trustee.
- (d) On July 3, 2014 a Statement of Defence was filed in Court by Duncan Craig LLP on behalf of the defendant Cameron Schiffner denying all allegations raised in the Statement of Claim and seeking to have the Statement of Claim dismissed with costs to be paid on a solicitor-client basis.
- (e) On July 9, 2014, a Notice of Change of Representation was filed in Court by the firm now known as Peacock, Linder, Halt and Mack LLP (“PLHM”) indicating that PLHM would be replacing BDP and assuming the representation of Randy Schiffner, Slade Schiffner, Brandon Schiffner and Elayne Schiffner and subsequent thereto also Cameron Schiffner (collectively referred to as the “Schiffner Defendants”). Consequently, the Trustee withdrew the Application to Remove Counsel.
- (f) On July 11, 2014, the Trustee filed a Reply to Defence addressing certain allegations in respect of the administration of the Estate raised in the Statement of Defence filed by Randy Schiffner, Slade Schiffner, Brandon Schiffner and Elayne Schiffner.

- (g) Since the commencement of the bankruptcy proceedings, BDP had maintained the position that certain of its files and communications in respect of Assistive were subject to solicitor-client privilege such that BDP was not legally in a position to acquiesce to the Trustee's request to have all Assistive related records in BDP's possession delivered to the Trustee. BDP and the Schiffner Defendants represented by PLHM relied on a decision of the Alberta Court of Appeal in a previous bankruptcy proceeding for the position they took. The Trustee disagreed with such position and consequently, on July 17, 2014, filed an application in Court (the "Records Application") seeking the delivery of all files, records, materials and property in the possession of BDP as they relate to Assistive, including all privileged information. Affidavits were exchanged and Marc Kelly, of the Trustee's office, was cross examined on July 30, 2014.
- (h) On August 13, 2014, the Records Application matter was temporarily resolved to the satisfaction of the Trustee and the Inspectors and a Consent Order was approved by the Court on August 18, 2014 (the "Consent Order"). The effect of the Consent Order was that the Trustee was to be given access to all of Assistive's privileged information, but excluding privileged records where BDP acted for individual members of the Schiffner Defendants and privileged records created as a result of threats by debenture holders of Assistive that they will sue Assistive and the Schiffners personally and also excluding records pertaining to matters where BDP acted for the Schiffners personally, distinct and apart from Assistive.
- (i) BDP subsequently advised that it was unable to comply with the terms of the Consent Order given the quantum of data and an application was subsequently filed by BDP and PLHM seeking the establishment of a form of search term protocol.

- (j) On August 11, 2014, the Schiffner Defendants represented by PLHM filed an application seeking the removal of the Trustee and disqualification of the Trustee's legal counsel Borden Ladner Gervais LLP ("BLG"). Upon the direction of the Inspectors, the Trustee and BLG were authorized to retain independent legal counsel to oppose the application.
  - (k) On September 9, 2014, Mr. Barry Crump, of BDP, was questioned by the Trustee in respect of the application to remove the Trustee and its legal counsel.
17. Given the opposition encountered since the commencement of the Estate Action, it became apparent to the Trustee and the Inspectors that the Estate would not have sufficient funds available to see the Estate Action through to trial. Consequently, a second meeting of creditors was held on November 6, 2014 at which time the Trustee provided an update to creditors in respect of the progress of the Estate Action and the status of funds in the Estate. Potential alternatives in respect of the ongoing funding of the Estate Action were also reviewed including the possibility of an additional round of funding by creditors and the concept of creditors assuming the Estate Action pursuant to section 38 of the *Bankruptcy and Insolvency Act*.
18. On November 14, 2014, the Trustee provided a written update to all creditors and sought responses from creditors as to their interest in potentially further funding the Estate by way of the issuance of a second round of Funding Notes. Very limited positive responses were received such that the Inspectors directed that the Trustee should not pursue a second round of funding.

### **SECTION 38 ACTION**

19. On December 2, 2014, the Trustee received a written request from legal counsel for Mr. Michael Kallis, a significant creditor of the Estate, to continue to pursue the Estate Action.



20. On December 5, 2014, the Inspectors directed the Trustee provide written notice to Mr. Kallis' legal counsel advising that the Trustee is unable to continue to pursue the Estate Action given the limited amount of funds available in the Estate. Mr. Kallis is one of the Inspectors; however, he abstained from participating in this direction to the Trustee.
21. On December 8, 2014 the Trustee wrote to creditors to advise of the following:
  - (a) That the level of interest expressed by the general body of creditors in a second round of funding was very limited such that the Inspectors directed the Trustee not to pursue this course of action;
  - (b) That the Trustee had received a written request from a creditor to continue to pursue the Estate Action and that the Trustee had advised that it was unable to do so given a lack of funds; and
  - (c) That the trustee anticipated Debenture Holders would be contacted by the creditor's legal counsel in respect of the S. 38 Action in due course.
22. Mr. Kallis' counsel was advised that the Trustee was unable to consent to the S. 38 Order being sought as the Trustee desired to have the opportunity to communicate with the Debenture Holders to ensure that those parties previously participating in the funding of the Estate understood that:
  - (a) The proceeds realized, if any, from the S. 38 Action are firstly for the benefit of those creditors participating in the S. 38 Action (the "Participating Creditors") to the extent of their claims and costs; and
  - (b) The Bankrupt Estate would only see any funds in the event a surplus in excess of the claims and costs of the Participating Creditors is realized from the S. 38 Action.
23. On February 3, 2015, the Trustee issued an email to Debenture Holders confirming the above. As of the date of this First Report, the Trustee has received no inquiries in respect of this most recent communication.

**CONCLUSION**

24. The Trustee does not oppose the granting of a S. 38 Order provided that it contain the following provision:

*“Effective from the date of this Order, the Participating Creditors are deemed to have indemnified the Trustee against any liability for any cost orders that may be made in the Estate Action or the S. 38 Application.”*

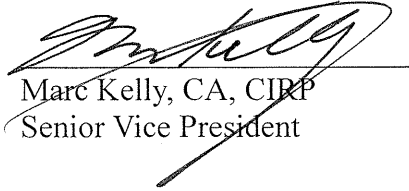
25. The Trustee’s position is based on the following:

- (a) The Estate does not have sufficient funds available to continue to pursue the Estate Action;
- (b) The general body of creditors was provided the opportunity to continue to fund the Estate Action; however, very limited interest was expressed in doing so;
- (c) The Trustee has kept creditors informed of the status of the Estate Action, the financial challenges experienced by the Estate and the potential for the pending S. 38 action;
- (d) The Trustee has informed those parties participating in the initial funding of the Estate of the implications of the pending S. 38 Action; and
- (e) Creditors will still have the opportunity to participate in the ongoing funding of the Estate Action by way of the S. 38 Action.

All of which is respectfully submitted this 10<sup>th</sup> day of February 2015.

Hardie & Kelly Inc., in its capacity as  
Trustee of the Estate of Assistive Financial Corp.

Per:

  
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Marc Kelly, CA, CFP®  
Senior Vice President