

COURT FILE NO. 2301-08305

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c. C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF WALLACE & CAREY INC., LOUDON BROS LIMITED and CAREY MANAGEMENT INC.

APPLICANT DIGIFLEX INFORMATION SYSTEMS INC.

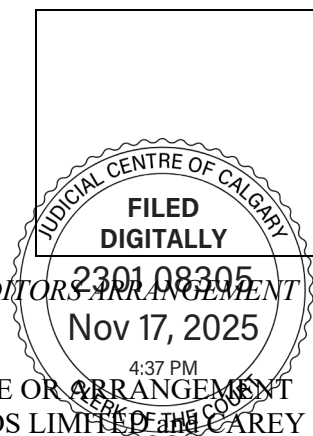
RESPONDENTS 7-ELEVEN CANADA INC. and 7-ELEVEN DISTRIBUTION CANADA CORPORATION

DOCUMENT **BRIEF OF DIGIFLEX INFORMATION SYSTEM INC.**

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**Hearing via Webex before the Honourable Justice Marion  
on the Commercial List on November 27, 2025 commencing at 10:00 AM**

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## I. INTRODUCTION

1. This is the Brief of Law of Digiflex Information Systems Inc. (**Digiflex**) in support of its application (the **Application**), wherein it seeks an immediate order declaring that it has no obligation to provide 7-Eleven, Inc., 7-Eleven Canada, Inc. (**7-Eleven**), or 7-Eleven Distribution Canada Corporation (**SEDCC**), access to its ERP software (as defined below) or any associated services and that nothing in the within proceedings (the **CCAA Proceedings**) requires otherwise.

2. Throughout the CCAA Proceeding, 7-Eleven has been improperly using Digiflex's ERP software without a license from Digiflex or payment of same. These are acts of copyright infringement, which Digiflex has continuously objected to.

3. 7-Eleven's position on why it is entitled to use Digiflex's ERP software without a license from Digiflex has been fluid. First, 7-Eleven's position was that it was not using the Digiflex software – that only Wallace & Carey (one of the debtor companies) was and only in its ordinary course of business. Next, 7-Eleven tried to say that the Transition Services Agreement (the **TSA**), a contract between 7-Eleven and Wallace & Carey, endorsed its actions. And finally, now that Wallace & Carey is clearly no longer operating in the normal course of business, 7-Eleven is essentially asking this Court to issue a mandatory injunction against Digiflex, forcing it to give 7-Eleven access to its software and associated services for free, without having a *prima facie* cause of action against Digiflex or proving any irreparable harm.

4. One thing is clear. No matter how 7-Eleven justifies its actions, none of them withstand scrutiny. 7-Eleven's actions are not supported by the *Copyright Act*, the *Companies' Creditors Arrangement Act*, nor any of the Court Orders or Agreements in the CCAA Proceeding.

5. As explained further below, Digiflex submits that, if 7-Eleven is permitted to carry on as it has for the last two years, this CCAA Proceeding will have significant negative downstream effects for both intellectual property and bankruptcy and restructuring law. First, it would allow purchasers in restructuring transactions to obtain valuable intellectual property rights for free, weakening Canadian intellectual property rights, contrary to Parliament's intention as found in the *Copyright Act* and *CCAA*. Second, it would endorse the use of TSAs in future CCAA proceedings as a work-around to the requirement that counterparties must be given notice of a potential forced assignment. Such a remedy is not appropriate and not in line with Parliament's intention of the CCAA regime.

6. For all of the reasons explained below, Digiflex respectfully requests that its Application be granted on an immediate basis.

## II. FACTS

7. The facts in support of Digiflex's Application are set out in the Affidavit of Mohamad Mardukhi sworn on November 14, 2025 (the **Mardukhi Affidavit**). Mr. Mardukhi is Digiflex's founder, President, CEO, and sole director and shareholder.<sup>1</sup>

### A. Relationship between Digiflex and Wallace & Carey

8. Digiflex is in the business of developing and marketing ERP software for the grocery distribution and food service industry.<sup>2</sup> ERP software is a type of business management software that helps companies manage and integrate core processes of their business by collecting data across many business functions.<sup>3</sup> ERP software is critical for companies in supply chain management as it optimizes inventory, planning, and purchasing.<sup>4</sup>

9. Digiflex's ERP software consists of several software programs, including ProCLASS Distribution Management System, CLASS Financials, and LAZER DBMS (collectively, the **Digiflex ERP Software**).<sup>5</sup> The Canadian Intellectual Property Office has registered the Digiflex ERP Software as literary works.<sup>6</sup>

10. Digiflex's clients use the Digiflex ERP Software by purchasing a software license.<sup>7</sup> To license the Digiflex ERP Software, a client enters into two agreements: (i) a software license agreement which allows the client to use the Digiflex ERP Software but does not transfer Digiflex's ownership rights in the Digiflex ERP Software to the client; and (ii) a maintenance agreement which provides for software upgrades and enhancements and a 24/7 helpdesk support line for the software.<sup>8</sup> A 24/7 helpdesk support line for ERP software is critical given that even a few minutes of downtime at a critical time can lead to operational nightmares, especially for companies in the food distribution business.

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<sup>1</sup> Affidavit of Mohamad Mardukhi, affirmed November 14, 2025 (**Mohamad Affidavit**) at para 1.

<sup>2</sup> Mardukhi Affidavit at para 7.

<sup>3</sup> Mardukhi Affidavit at para 8.

<sup>4</sup> Mardukhi Affidavit at para 8.

<sup>5</sup> Mardukhi Affidavit at paras 9–12.

<sup>6</sup> Mardukhi Affidavit at para 18 and Exhibit A.

<sup>7</sup> Mardukhi Affidavit at para 20.

<sup>8</sup> Mardukhi Affidavit at para 21.

11. Wallace & Carey was Digiflex's long-term client.<sup>9</sup> Starting in 2000, Digiflex licensed the Digiflex ERP Software to Wallace & Carey through a series of software license agreements (the **W&C Software Licenses**) and associated maintenance agreements (the **W&C Maintenance Agreements**).<sup>10</sup> The W&C Software Licenses granted Wallace & Carey non-transferable, non-exclusive, perpetual licenses to use the Digiflex ERP Software.<sup>11</sup> The W&C Software Licenses were limited to Wallace & Carey's current businesses and did not apply to new business acquisitions.<sup>12</sup> Additionally, no party was allowed to assign their rights without the written consent of the other.<sup>13</sup>

## **B. Wallace & Carey enter CCAA protection**

12. On June 22, 2023, Wallace & Carey sought and obtained a court order (the **Initial Order**) granting them creditor protection and related relief under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (**CCAA**).<sup>14</sup> Under the Initial Order, a Monitor (the **Monitor**) was appointed to oversee the assets, business, and financial affairs of Wallace & Carey.<sup>15</sup>

13. The Initial Order was amended and restated on June 30, 2023 (the **ARIO**).<sup>16</sup> The ARIO expanded the Monitor's powers to assist restructuring efforts and granted an extension of the stay period.<sup>17</sup> Under the ARIO, no person was permitted to terminate or interfere with any agreement or license held by Wallace & Carey.<sup>18</sup> Also, all persons with a supply contract with Wallace & Carey, including with respect to computer software, were restrained from, among others, discontinuing, suspending, or terminating the supply of such goods or services.<sup>19</sup>

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<sup>9</sup> Mardukhi Affidavit at para 25.

<sup>10</sup> Mardukhi Affidavit at paras 25–30 and Exhibits B, C, D.

<sup>11</sup> Mardukhi Affidavit, Exhibits B, C, D (W&C Software Licenses), article 2.A (PDF pp 306, 319, 330).

<sup>12</sup> Mardukhi Affidavit, Exhibits B, C, D (W&C Software Licenses), article 4 (PDF pp 306, 319, 331).

<sup>13</sup> Mardukhi Affidavit, Exhibits B, C, D (W&C Software Licenses), article 15 (PDF pp 309, 322, 334).

<sup>14</sup> [CCAA Initial Order](#) dated June 22, 2023 (**CCAA Initial Order**).

<sup>15</sup> [CCAA Initial Order](#) at para 21.

<sup>16</sup> [Amended and Restated Initial Order](#) dated June 30, 2023 (**ARIO**).

<sup>17</sup> [Affidavit No. 2 of Brian M. Birnie](#), sworn June 27, 2023 (**Birnie Affidavit #2**) at para 15.

<sup>18</sup> [ARIO](#) at para 18.

<sup>19</sup> [ARIO](#) at para 19.

14. At this time, Digiflex was not informed of the CCAA Proceeding.<sup>20</sup>

**C. 7-Eleven Canada, Inc. acquires Wallace & Carey's assets**

15. Facing ongoing liquidity and cash flow issues, and in the absence of a viable restructuring plan, Wallace & Carey commenced a sale and investment solicitation process (**SISP**).<sup>21</sup> At the time, 7-Eleven was Wallace & Carey's largest customer, representing over 50 percent of its annual revenue.<sup>22</sup> 7-Eleven was not in the distribution business then and therefore was not prepared to acquire or invest in Wallace & Carey at first.<sup>23</sup> However, Wallace & Carey was 7-Eleven's major provider of logistics services, and 7-Eleven had concerns about the ability of interested bidders to meet their service needs.<sup>24</sup>

16. 7-Eleven eventually submitted a proposal, and on November 7, 2023, 7-Eleven and Wallace & Carey entered into an asset purchase agreement (the **APA**)<sup>25</sup> whereby 7-Eleven agreed to purchase Wallace & Carey's personal property and equipment assets, as well as intellectual property, technology, software, and systems relating to Wallace & Carey's entire business (the **Transaction**).<sup>26</sup> The Transaction closed on November 19, 2023.

17. The Transaction was dependent on certain contracts being assigned to 7-Eleven.<sup>27</sup> As such, Wallace & Carey sought and obtained consent to assign certain leases and software licenses.<sup>28</sup> The assigned contracts were explicitly set out in Schedule "A" of the APA as "Assigned Contracts".<sup>29</sup>

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<sup>20</sup> Mardukhi Affidavit at para 45.

<sup>21</sup> [Affidavit No. 3 of Eric Rolheiser](#), sworn November 7, 2023 (**Rolheiser Affidavit #3**) at para 18.

<sup>22</sup> [Third Report of the Monitor](#) dated August 21, 2023 (**Monitor's 3<sup>rd</sup> Report**) at para 4.6.1.

<sup>23</sup> [Monitor's 3<sup>rd</sup> Report](#) at para 4.6.2.

<sup>24</sup> [Sixth Report of the Monitor](#) dated November 8, 2023 (**Monitor's 6<sup>th</sup> Report**) at para 3.3.6; [Ninth Report of the Monitor](#) dated February 15, 2024 at para 4.0.2.

<sup>25</sup> [Approval and Vesting Order](#) dated November 17, 2023 (**Approval and Vesting Order**), Schedule B (PDF p 15).

<sup>26</sup> [Affidavit No. 2 of Patrick Carey](#), sworn November 21, 2023 (**Carey Affidavit #2**) at para 24.

<sup>27</sup> [Rolheiser Affidavit #3](#) at para 49.

<sup>28</sup> [Rolheiser Affidavit #3](#) at paras 53, 55.

<sup>29</sup> [Approval and Vesting Order](#), Schedule B (APA), Schedule A (PDF p 40).

18. Digiflex was never contacted about the SISP or the Transaction.<sup>30</sup> Further, the W&C Software Licenses are not included in the list of Assigned Contracts in the APA. In fact, neither Digiflex nor any of its software programs, including the Digiflex ERP Software, are referenced in the APA.

19. The Monitor has acknowledged that the W&C Software Licenses have not been assigned to 7-Eleven.<sup>31</sup>

#### **D. The Transition Services Agreement**

20. Pursuant to the APA and concurrent with the closing of the Transaction, the Wallace & Carey, 7-Eleven, and the Monitor entered into the TSA.<sup>32</sup> Digiflex is not a party to the TSA and was never given notice of the TSA when it was being negotiated or entered into.

21. The purpose of the TSA was for Wallace & Carey to maintain in good standing certain property leases and other contracts for the benefit of 7-Eleven and continue to provide services to 7-Eleven while 7-Eleven considered if and how to operate Wallace & Carey's business, including deciding what to do about those leases and contracts.<sup>33</sup> The contracts were those required for the operation of the Wallace & Carey business which were not part of the assets purchased by or assigned to 7-Eleven.<sup>34</sup>

22. Following the closing of the Transaction, Wallace & Carey began a wind-down and termination of their third-party customer business such that 7-Eleven remained the only customer.<sup>35</sup> Under the TSA, 7-Eleven agreed to fund essentially all Wallace & Carey's operations.<sup>36</sup>

23. The term of TSA was 15 months from the closing date for Wallace & Carey's business in Alberta and British Columbia (the **Western Business**) and 9 months from the closing date for Wallace & Carey's

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<sup>30</sup> Mardukhi Affidavit at para 45.

<sup>31</sup> Mardukhi Affidavit, Exhibit N (PDF p 166).

<sup>32</sup> [Carey Affidavit #2](#) at para 25; [Approval and Vesting Order](#), Schedule B (APA), Schedule B (Form of Transition Services Agreement) (PDF p 42).

<sup>33</sup> [Monitor's 6<sup>th</sup> Report](#) at para 4.0.4; [Affidavit No. 7 of Patrick Carey](#), sworn February 10, 2025 (**Carey Affidavit #7**) at para 26.

<sup>34</sup> [Approval and Vesting Order](#), Schedule B (APA), Schedule B (Form of Transition Services Agreement), art G (PDF p 43).

<sup>35</sup> [Rolheiser Affidavit #3](#) at para 38.

<sup>36</sup> [Affidavit No. 6 of Patrick Carey](#), sworn November 19, 2024 at para 19.



business east of Alberta (the **Eastern Business**).<sup>37</sup> The TSA also gave 7-Eleven the option to extend each period by two 90-day extensions.<sup>38</sup>

**E. 7-Eleven launches SEDCC on January 1, 2025**

24. At some point, 7-Eleven decided that they would not keep Wallace & Carey but rather start their own Canadian distribution company – 7-Eleven Distribution Canada Corporation (**SEDCC**).<sup>39</sup>

25. Digiflex understands that SEDCC was launched on January 1, 2025, but that 7-Eleven started planning SEDCC's launch much earlier.<sup>40</sup> By July 2024, 7-Eleven had instructed Wallace & Carey's employees to set up SEDCC on the Digiflex ERP Software.<sup>41</sup> By November 2024, SEDCC had started to work on the ERP software transition.<sup>42</sup> By January 2025, all Wallace & Carey's logistics and administrative employees had moved over to SEDCC.<sup>43</sup>

26. As admitted by 7-Eleven Inc.'s Director of Logistics, Joshua Buchanan, launching SEDCC has not been an easy task for a number of reasons, including because:

- (a) 7-Eleven Canada is a retail store chain, not a logistics company;<sup>44</sup>
- (b) The logistics of 7-Eleven and SEDCC are tremendously complicated given, among other factors, the locations of its stores, the amount of products it sells, and the various provincial sales tax regimes they are subject to;<sup>45</sup>
- (c) 7-Eleven required significant lead time to launch SEDCC, because they had to determine how to structure SEDCC, how to implement that structure, and how to obtain all the

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<sup>37</sup> [Approval and Vesting Order](#), Schedule B (APA), Schedule B (Form of Transition Services Agreement), art 18(a) (PDF p 50).

<sup>38</sup> [Approval and Vesting Order](#), Schedule B (APA), Schedule B (Form of Transition Services Agreement), art 18(a) (PDF p 50).

<sup>39</sup> [Affidavit of Joshua Buchanan](#), sworn September 8, 2025 (**Buchanan Affidavit**) at para 10.

<sup>40</sup> Mardukhi Affidavit at para 47 and Exhibits G (PDF p 116) and AA (PDF p 221).

<sup>41</sup> Mardukhi Affidavit at para 36 and Exhibit F (PDF pp 102–08).

<sup>42</sup> [Buchanan Affidavit](#) at para 24.

<sup>43</sup> [Buchanan Affidavit](#) at para 14.

<sup>44</sup> [Buchanan Affidavit](#) at para 13.

<sup>45</sup> [Buchanan Affidavit](#) at paras 12, 13.

necessary operating licenses and permits in each jurisdiction in which SEDCC intends to operate;<sup>46</sup>

- (d) The integration of the Digiflex ERP Software with the 7-Eleven/SEDCC systems was more complicated than anticipated.<sup>47</sup> As a result, 7-Eleven/SEDCC decided to design and implement its own ERP software which is essentially an "entire business transformation process" and would take a "significant amount of time to rollout".<sup>48</sup>

#### **F. Digiflex discovers that SEDCC wants to use the Digiflex ERP Software**

27. Until July 2024, Digiflex had no knowledge about the CCAA proceeding, the Transaction, or that SEDCC was to replace Wallace & Carey.<sup>49</sup>

28. On July 4, 2024, Mr. Mardukhi received an email from Wallace & Carey's Director of IT, Heather Miller, requesting a quote for Digiflex to set up a completely separate ERP system using the Digiflex ERP Software for their new distribution company.<sup>50</sup> Ms. Miller indicated that the new system would launch January 1, 2025 and run temporarily until March 31, 2025.<sup>51</sup> Mr. Mardukhi was surprised by this request, as setting up a new company would require a substantial new license.<sup>52</sup> Mr. Mardukhi told this to Ms. Miller. Subsequently, Ms. Miller changed her request. She advised that instead of setting up a separate company, Wallace & Carey wished to only change the company name and fiscal year end.<sup>53</sup>

29. Around the same time, Mr. Mardukhi spoke with Patrick Carey, the former CEO of Wallace & Carey, and David Morgan, a director at Wallace & Carey, about the logistics of setting up a new company on the Digiflex ERP Software.<sup>54</sup> Through these conversations, Mr. Mardukhi learned for the first time that the new distribution company replacing Wallace & Carey was SEDCC.<sup>55</sup>

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<sup>46</sup> [Buchanan Affidavit](#) at para 13.

<sup>47</sup> [Buchanan Affidavit](#) at paras 15, 18, 19,

<sup>48</sup> [Buchanan Affidavit](#) at para 23.

<sup>49</sup> Mardukhi Affidavit at para 45.

<sup>50</sup> Mardukhi Affidavit at para 36 and Exhibit F (PDF p 108).

<sup>51</sup> Mardukhi Affidavit at para 36 and Exhibit F (PDF p 108).

<sup>52</sup> Mardukhi Affidavit at para 38 and Exhibit F (PDF pp 107–08)

<sup>53</sup> Mardukhi Affidavit at para 43 and Exhibit F (PDF p 102).

<sup>54</sup> Mardukhi Affidavit at para 46 and Exhibit G.

<sup>55</sup> Mardukhi Affidavit at para 48.

30. In October 2024, Digiflex started to receive emails from 7-Eleven employees about the Digiflex ERP Software.<sup>56</sup> However, throughout the correspondence, 7-Eleven employees, including Mr. Buchanan, never provided clear answers as to when or how SEDCC would be taking over. For example, when Mr. Mardukhi first asked who to issue invoices to related to the Digiflex ERP Software, Mr. Buchanan advised "SEDCC".<sup>57</sup> However, when Mr. Mardukhi reiterated that if it was SEDCC who was using the software, a new license would be required, Mr. Buchanan advised that invoices should be issued to Wallace & Carey.<sup>58</sup>

**G. Digiflex agrees to provide its ERP Software to Wallace & Carey during the ordinary course of business**

31. Mr. Mardukhi never received a clear response from 7-Eleven on whether SEDCC would be using the Digiflex ERP Software come their launch day of January 1, 2025.<sup>59</sup> Thus, on December 3, 2025, based on the lack of response, Mr. Mardukhi informed 7-Eleven that Digiflex would be terminating access to the software and services come January 1, 2025, when he was expecting SEDCC to take over.<sup>60</sup>

32. Mr. Mardukhi then received a call from the Monitor.<sup>61</sup> This was Mr. Mardukhi's first time being contacted by the Monitor during the CCAA Proceedings.<sup>62</sup> Mr. Knight left a voicemail advising that Digiflex could not terminate the W&C Software Licenses because it was not SEDCC who would be using the Digiflex ERP Software but rather Wallace & Carey.<sup>63</sup>

33. Mr. Mardukhi subsequently received a letter from the Monitor's counsel.<sup>64</sup> In his letter, the Monitor's counsel stated that Wallace & Carey was operating in the ordinary course of business and that the ARIO forbade Digiflex from terminating the W&C Software Licenses while a stay of proceedings was

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<sup>56</sup> Mardukhi Affidavit at para 55 and Exhibit H.

<sup>57</sup> Mardukhi Affidavit at para 59 and Exhibit H (PDF pp 121–22).

<sup>58</sup> Mardukhi Affidavit, Exhibit H (PDF pp 119–20).

<sup>59</sup> Mardukhi Affidavit at para 65.

<sup>60</sup> Mardukhi Affidavit at para 65 and Exhibit L (PDF p 149).

<sup>61</sup> Mardukhi Affidavit at para 68.

<sup>62</sup> Mardukhi Affidavit at para 68.

<sup>63</sup> Mardukhi Affidavit at para 68.

<sup>64</sup> Mardukhi Affidavit at para 70 and Exhibit N.

in effect.<sup>65</sup> The Monitor's counsel also advised that it would bring an application to hold Digiflex and Mr. Mardukhi in contempt of court, if they continued to pursue termination of the W&C Software Licenses.<sup>66</sup>

34. Based on the Monitor's representations that Wallace & Carey was operating in the "ordinary course of business", Mr. Mardukhi offered a proposal to resolve the matter.<sup>67</sup> Specifically, the offer was for Digiflex to continue to provide maintenance services to Wallace & Carey (not SEDCC or 7-Eleven) until the end of the stay of the CCAA Proceedings (**Stay Period**), which was, at the time, April 30, 2025.<sup>68</sup> Mr. Mardukhi did not expect Wallace & Carey to be operating in the ordinary course past January 1, 2025 and therefore did not expect the Stay Period to be extended beyond April 30, 2025.<sup>69</sup>

35. A consent order (the **Consent Order**) was issued by the Honourable Justice Neilson on December 17, 2024.<sup>70</sup> The Consent Order states that Digiflex must provide maintenance services to Wallace & Carey until the later of the end of the Stay Period or the end of the TSA period for the Western Business.<sup>71</sup> These provisions relating to the TSA was not part of Mr. Mardukhi's offer but was included in the draft consent order prepared by counsel for the Monitor.<sup>72</sup> Counsel for the Monitor never highlighted these changes to Mr. Mardukhi.<sup>73</sup>

#### **H. 7-Eleven continues to extend the term of the TSA following the issuance of the Consent Order on the basis that it needs access to the Digiflex ERP Software**

36. Since the Consent Order has been issued, 7-Eleven has asked for several extensions of the TSA.

37. First, on January 9, 2025, shortly after the Consent Order was issued, 7-Eleven exercised its first option to extend the TSA term for the Western Business.<sup>74</sup> This extended the TSA term for the Western Business to May 22, 2025, subject to one further 90-day extension. At that point, 7-Eleven had already

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<sup>65</sup> Mardukhi Affidavit at para 71 and Exhibit N (PDF pp 166–67).

<sup>66</sup> Mardukhi Affidavit at paras 71, 78 and Exhibits N (PDF p 167) and R (PDF pp 180–81).

<sup>67</sup> Mardukhi Affidavit at para 79 and Exhibit S.

<sup>68</sup> Mardukhi Affidavit at para 79 and Exhibit S (PDF p 183).

<sup>69</sup> Mardukhi Affidavit at para 84.

<sup>70</sup> [Consent Order](#) dated December 17, 2024 (**Consent Order**).

<sup>71</sup> [Consent Order](#) at para 3.

<sup>72</sup> Mardukhi Affidavit at paras 79–84 and Exhibit U (PDF pp 188–99).

<sup>73</sup> Mardukhi Affidavit at paras 79–84 and Exhibit U (PDF pp 188–89).

<sup>74</sup> [Fifteenth Report of the Monitor](#) dated February 13, 2025 (**Monitor's 15<sup>th</sup> Report**) at para 3.1.3.

exhausted both its options for the Eastern Business TSA period, which was set to expire on February 17, 2025.<sup>75</sup> Therefore, to align the expiration dates, Wallace & Carey, the Monitor, and 7-Eleven simply amended the terms of the TSA.<sup>76</sup>

38. Second, on February 7, 2025, 7-Eleven exercised its second option with respect to the Western Business, which extended the expiry period to August 20, 2025.<sup>77</sup>

39. Third, in late May 2025, 7-Eleven advised the Monitor that it would require continued use of the Digiflex ERP Software past the August 20, 2025 deadline to complete the transition of Wallace & Carey's business to 7-Eleven.<sup>78</sup> Subsequently, 7-Eleven and the Monitor unilaterally, and without involving Wallace & Carey or Digiflex in the negotiations, further amended the TSA to have an expiry date of February 15, 2026 or on such other date as may be agreed to by the parties in writing.<sup>79</sup> Digiflex is not a party to this agreement. The Monitor has admitted that the reason for this amendment to the TSA was to permit 7-Eleven's access to the Digiflex ERP Software.<sup>80</sup>

40. The Court partially approved the second amendment, extending the TSA to September 30, 2025.<sup>81</sup>

41. On September 11, 2025, the Monitor proposed entering into a third amendment to the TSA to extend the period to February 15, 2026.<sup>82</sup> On September 19, 2025, the Monitor successfully applied for a stay of proceedings up to and including February 15, 2026 and for approval of the extension of the TSA to February 15, 2026.<sup>83</sup> The Monitor has admitted that the reason for this third amendment to the TSA was to permit 7-Eleven's access to the Digiflex ERP Software.<sup>84</sup>

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<sup>75</sup> [Monitor's 15<sup>th</sup> Report](#) at para 3.1.2.

<sup>76</sup> [Monitor's 15<sup>th</sup> Report](#) at para 3.1.4.

<sup>77</sup> [Monitor's 15<sup>th</sup> Report](#) at para 3.1.3; [Affidavit No. 8 of Patrick Carey](#), sworn August 15, 2025 (**Carey Affidavit #8**) at para 27.

<sup>78</sup> [Seventeenth Report of the Monitor](#) dated August 13, 2025 (**Monitor's 17<sup>th</sup> Report**) at para 4.2.1.

<sup>79</sup> [Carey Affidavit #8](#) at para 33 and Exhibit F (Second Amendment to the TSA) (PDF p 36).

<sup>80</sup> [Carey Affidavit #8](#), Exhibit D (PDF p 28).

<sup>81</sup> [Stay Extension Order](#) dated August 18, 2025 (**August 18 Order**) at para 3.

<sup>82</sup> [Second Supplement to the Seventeenth Report of the Monitor](#) dated September 11, 2025 (**Monitor's 17<sup>th</sup> Report, 2<sup>nd</sup> Supplement**) at para 2.2.1 and Appendix A (Third Amendment to the TSA) (PDF p 11).

<sup>83</sup> [Order Approving Stay Extension and Third TSA Amendment](#) dated September 19, 2025 (**September 19 Order**) at paras 3, 4.

<sup>84</sup> [Monitor's 17<sup>th</sup> Report, 2<sup>nd</sup> Supplement](#) at para 2.2.1.

## I. Wallace & Carey is no longer operational

42. It is Digiflex's understanding and belief that Wallace & Carey is no longer operating in the ordinary course of business, and has not been for quite some time, possibly since January 1, 2025 and by April 30, 2025 at the latest. For example:

- (a) As of January 1, 2025, or the latest February 10, 2025, all remaining employees of Wallace & Carey had been hired by 7-Eleven or SEDCC.<sup>85</sup>
- (b) As of January 20, 2025, SEDCC had taken over any remaining rights and interests in Wallace & Carey's remaining leases.<sup>86</sup>
- (c) Patrick Carey, Wallace & Carey's former President and CEO, has stated that as of April 30, 2025, SEDCC had "fully-taken over the transition of the logistics business".<sup>87</sup>
- (d) In August 2025, the Monitor's counsel stated that "the business of the CCAA Entities has been transferred to [7-Eleven]".<sup>88</sup>
- (e) Since at least early October 2025, Wallace & Carey's website has not been operational and all customer functionalities (e.g. Login page) appear to have been transferred to the SEDCC website.<sup>89</sup>
- (f) Wallace & Carey no longer has any directors or officers. Mr. Carey resigned from his position as President and CEO in December 2024 and entered into a consulting agreement with SEDCC, which expired on April 30, 2025.<sup>90</sup> Since that time, the Monitor has been appointed as a Super Monitor.<sup>91</sup>

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<sup>85</sup> [Carey Affidavit #7](#) at para 34; [Buchanan Affidavit](#) at para 14.

<sup>86</sup> [Carey Affidavit #7](#) at para 32.

<sup>87</sup> [Carey Affidavit #8](#) at para 23.

<sup>88</sup> [Notice of Application](#) filed August 13, 2025 at para 8.

<sup>89</sup> Mardukhi Affidavit at para 93 and Exhibit AB; Affidavit of Jennifer Allen, affirmed November 12, 2025 (**Allen Affidavit**), Exhibits D and E (PDF pp 63–66).

<sup>90</sup> [Carey Affidavit #8](#) at para 23.

<sup>91</sup> [Order \(Monitor's Enhanced Powers\)](#) dated August 26, 2025 at para 3.

## **J. Digiflex opposes further TSA extensions**

43. Each time that Wallace & Carey or the Monitor applied to court for approval of the amendment to the TSA, Digiflex has opposed the extension.<sup>92</sup>

44. On August 18, 2025, Wallace & Carey applied to court for its approval of the second amendment to the TSA.<sup>93</sup> While the Monitor sought to extend the TSA to February 15, 2026, Wallace & Carey sought approval for a shorter extension to September 30, 2025.<sup>94</sup> Mr. Mardukhi appeared at the hearing on his own, without counsel, objecting to the extension of the TSA and the Stay Period.<sup>95</sup> At the hearing, the Honourable Justice Marion, who heard the application, stated:

The Court needs more evidence about why a further number of months is needed, and the concern is made worse by the [Consent Order], which effectively requires Digiflex to continue providing services. So in my mind, there is an issue about whether or not the continued provision of the services is really part of the restructuring any longer, or is it just something that 7-Eleven would like.<sup>96</sup>

45. Justice Marion required additional evidence before it could grant an extension past September 30, 2025.<sup>97</sup> Thus, an extension of the TSA was granted to September 30, 2025.<sup>98</sup>

46. On September 19, 2025, pursuant to its enhanced powers, the Monitor brought an application for approval of the third amendment to the TSA, seeking again to extend the TSA to February 15, 2026.<sup>99</sup> Mr. Mardukhi appeared again without representation to oppose the application.<sup>100</sup>

47. In support of the application, Mr. Buchanan's affidavit was tendered as evidence.<sup>101</sup> Mr. Buchanan's evidence was that the TSA period should be extended because: (1) SEDCC is working on designing and implementing a new ERP software specifically for SEDCC; (2) SEDCC needs significant amount of time

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<sup>92</sup> Mardukhi Affidavit at para 95 and Exhibits AC and AD.

<sup>93</sup> [Application](#) Returnable August 18, 2025.

<sup>94</sup> [Monitor's 17<sup>th</sup> Report](#) at para 4.2.1; [Carey Affidavit #8](#) at para 34.

<sup>95</sup> Mardukhi Affidavit at para 95.

<sup>96</sup> Allen Affidavit, Exhibit A at 14:26–14:30 (PDF p 19).

<sup>97</sup> [Monitor's 17<sup>th</sup> Report, 2<sup>nd</sup> Supplement](#) at para 1.0.4.

<sup>98</sup> [August 18 Order](#) at para 4.

<sup>99</sup> [Application – Stay Extension and Third TSA Amendment](#) dated September 19, 2025.

<sup>100</sup> Mardukhi Affidavit at para 95.

<sup>101</sup> [Buchanan Affidavit](#).

to design, build, test, and implement the new ERP software; and (3) SEDCC needs access to the Digiflex ERP Software, which is "mission critical" to SEDCC, until they finish implementing the new ERP software.<sup>102</sup>

48. On September 19, 2025, Justice Feasby granted the extension but also granted leave to Digiflex to bring an application to seek termination of the TSA or otherwise commence proceedings against 7-Eleven provided that Digiflex retain counsel (the **Feasby Order**).<sup>103</sup>

#### **K. Within Application**

49. Following the Feasby Order, Digiflex retained Burnet, Duckworth & Palmer LLP.

50. Digiflex believes that it was never obligated to provide 7-Eleven access to its software for free or services with respect to the same for free. Indeed, the W&C Software Licenses were never assigned to 7-Eleven or to SEDCC, and the TSA does not mention Digiflex or the Digiflex ERP Software at all. Now that Wallace & Carey is no longer operating in the normal course of business, Digiflex wants confirmation that it does not need to provide 7-Eleven or SEDCC access to its proprietary software.

### **III. ISSUES**

51. The fundamental issue in this Application is whether this CCAA Proceeding has granted 7-Eleven the right to use the Digiflex ERP Software without a license or payment and, if so, under what basis.

52. Digiflex submits that:

- (a) The Digiflex ERP Software is protected by copyright, a wholly statutory regime, and there is nothing in the *Copyright Act*, RSC 1985, c C-42 (***Copyright Act***) or any other Act of Parliament that permits a Court to allow use of a copyright work without a license;
- (b) Further, and in the alternative, permitting unauthorized use of the Digiflex ERP Software is not consistent with the purpose of the CCAA regime;

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<sup>102</sup> [Buchanan Affidavit](#) at paras 19–23.

<sup>103</sup> [September 19 Order](#) at para 7.



- (c) In any event, there are no orders or agreements that in the within CCAA Proceeding that require Digiflex to provide the Digiflex ERP Software and services to 7-Eleven for free (including the ARIO, the APA, the TSA, or the Consent Order);
- (d) 7-Eleven's request to use the Digiflex ERP Software for free amounts to a request for a mandatory injunction, without a *prima facie* cause of action against Digiflex or any proof of irreparable harm; and
- (e) Finally, given that Wallace & Carey is no longer operating, the stay in relation to Wallace & Carey ought to be lifted vis-à-vis Digiflex. This will permit Digiflex to terminate the W&C Software Licenses such that 7-Eleven will no longer be able to profit from the Digiflex ERP Software for free.

53. In sum, Digiflex submits that it has no obligation to provide 7-Eleven, with the Digiflex ERP Software or related services for free. Digiflex would like to be removed from this CCAA Proceeding.

#### IV. LAW AND ARGUMENT

**A. The Digiflex ERP Software is protected by copyright, a wholly statutory regime, and there is nothing in the *Copyright Act* or any other Act of Parliament that permits a Court to allow use of a copyright work without a license**

1. Copyright legal principles

54. Copyright is a legal right that is granted to "authors" of original "literary works", such as books and computer programs.<sup>104</sup> Copyright gives the author (or owner) exclusive control over how their literary work is reproduced.<sup>105</sup> With respect to computer programs (e.g. software), they are reproduced during their use.<sup>106</sup>

55. The *Copyright Act* is explicit that "No person is entitled to copyright otherwise than under and in accordance with this Act or any other Act of Parliament".<sup>107</sup> The Supreme Court of Canada has made clear

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<sup>104</sup> *Copyright Act*, s 2, definition of "literary work" [Authorities, Tab 3].

<sup>105</sup> *Copyright Act*, ss 3(1)(a), 13(3) [Authorities, Tab 3]; *B&S Publications Inc v Max-Contracts Inc*, 2001 CanLII 61010 (ABKB) (*B&S*) at para 21 [Authorities, Tab 7].

<sup>106</sup> *Copyright Act*, s 3(1)(h) [Authorities, Tab 3]; See e.g. *Trimble Solutions Corporation v Quantum Dynamics Inc*, 2021 FC 63 (*Trimble*) at paras 2, 3 [Authorities, Tab 28].

<sup>107</sup> *Copyright Act*, s 89 [Authorities, Tab 3].

that "copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive."<sup>108</sup> This means that, any person claiming an interest in a literary work, including the right to use the Digiflex ERP Software, must base its claim within the *Copyright Act* or another Act of Parliament.

56. Digiflex's copyright over the Digiflex ERP Software is grounded on the fact that Mr. Mardukhi, Digiflex's CEO, has been granted Certificates of Registration of Copyright by the Canadian Intellectual Property Office (the **Copyright Registrations**).<sup>109</sup> Pursuant to section 53(2) of the *Copyright Act*, these Copyright Registrations are evidence that copyright subsists.<sup>110</sup>

57. Wallace & Carey was permitted to use the Digiflex ERP Software – through the W&C Software Licenses that Digiflex granted to Wallace & Carey via section 13(4) of the *Copyright Act*. Importantly, as prescribed by section 13(4) of the *Copyright Act*, only the owner (Digiflex and Mr. Mardukhi) has the right to grant the license.

58. Also important is that Wallace & Carey was only granted a **license** and not an **assignment**. As noted by the SCC in *Kraft*, with respect to copyrights, Parliament has preserved the traditional distinction between assignees and licensees that exist at common law for copyright: a copyright licensee (such as Wallace & Carey) does not enjoy property rights and therefore has no ownership rights in the copyrighted work; this is in contrast with an assignee, who receives a property interest from the original owner and steps into the shoes of the owner with respect to the rights assigned.<sup>111</sup>

59. Given that Wallace & Carey only had a license, and not an assignment, Wallace & Carey had no ownership rights over the Digiflex ERP Software and, as a result, could not: (1) sell the Digiflex ERP Software to 7-Eleven; or (2) grant 7-Eleven a sublicense to the Digiflex ERP Software.<sup>112</sup>

60. Instead, Wallace & Carey's rights in the Digiflex ERP Software were circumscribed by the terms of the W&C Software Licenses. This included terms that the Wallace & Carey's rights were "non-transferable", limited "to the current Customer's business" and "new business acquisitions or startups are not covered under this unlimited use License."<sup>113</sup> Any use of the Digiflex ERP Software outside the terms

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<sup>108</sup> *Euro-Excellence Inc v Kraft Canada Inc*, 2007 SCC 37 (**Kraft**) at para 3 [Authorities, Tab 14].

<sup>109</sup> Mardukhi Affidavit at para 18 and Exhibit A; *B&S* at para 21 [Authorities, Tab 7].

<sup>110</sup> *Copyright Act*, s 53(2) [Authorities, Tab 3].

<sup>111</sup> *Kraft* at paras 27, 28 [Authorities, Tab 14].

<sup>112</sup> As only the owner can grant licenses: *Copyright Act*, s 13(4) [Authorities, Tab 3].

<sup>113</sup> Mardukhi Affidavit, Exhibits B, C, D, articles 2, 4 (PDF pp 306, 319, 330–31).

of the W&C Software Licenses is an act of copyright infringement. This includes indirectly giving Wallace & Carey's copy of the Digiflex ERP Software to 7-Eleven upon the close of the APA.<sup>114</sup> 7-Eleven's use of the Digiflex ERP Software without a license has resulted in court proceedings for copyright infringement being commenced against 7-Eleven in the Federal Court of Canada.<sup>115</sup>

61. The issue in this Application whether there is any basis for 7-Eleven to use the Digiflex ERP Software based on the *Copyright Act* or another Act of Parliament. As shown below, this is not the case. No matter which Act of Parliament you look to – the *Copyright Act*, the *CCAA*, or the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (*BIA*) – Parliament has given copyright owners and authors the ultimate say in who can use their rights.

2. *No provisions within the Copyright Act give 7-Eleven a free ride*

62. The *Copyright Act* does not endorse 7-Eleven actions. To the contrary, the provisions in the *Copyright Act* make it clear that no one can use the Digiflex ERP Software without Digiflex's explicit permission. For example:

- (a) no assignment in copyright is valid unless it is in writing signed by the owner;<sup>116</sup>
- (b) no license in copyright is valid unless it is in writing signed by the owner;<sup>117</sup> and
- (c) moral rights associated with a copyrighted work – author's right to integrity, the right to be associated with the work, and the right to remain anonymous – can never be assigned.<sup>118</sup>

63. Therefore, to the extent that 7-Eleven claims that Wallace & Carey's license somehow extends to it, that is incorrect. Any such extension would need to be in writing and signed by Digiflex.

3. *No provisions within the CCAA and BIA give 7-Eleven a free ride*

64. There is also nothing in either the *CCAA* or *BIA* that permits parties to an insolvency proceeding to use copyrighted works without a license. The provisions within the *CCAA* and *BIA* that cover copyright

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<sup>114</sup> *SNMP Research International Inc v Nortel Networks Corp*, 2016 ONCA 749 at paras 2, 4 [Authorities, Tab 25].

<sup>115</sup> Allen Affidavit, Exhibit C (PDF p 46).

<sup>116</sup> *Copyright Act*, s 13(4) [Authorities, Tab 3].

<sup>117</sup> *Copyright Act*, s 13(4) [Authorities, Tab 3].

<sup>118</sup> *Copyright Act*, ss 14.1(1), 14.1(2), 28.2(1)(b) [Authorities, Tab 3].

show that Parliament intended to vigorously protect copyright owner's and author's rights to control their copyrighted work.

65. Section 83 of the *BIA* is illustrative.<sup>119</sup> Under section 83, if a person has been *assigned* an interest in a copyright, and subsequently goes bankrupt, the author of the copyright (who is presumed to be the original copyright owner)<sup>120</sup>, has priority rights over copyrighted work, and in some instances, the *BIA* mandates that all rights in the copyright shall return to the author.

66. For example, if the copyrighted work is not marketable at the time of bankruptcy, and the bankrupt has not incurred any expenses in connection with the work, the copyright *shall* revert to the author, and any contract between the author and the bankrupt *shall* terminate and be void.<sup>121</sup> By way of another example, if the copyrighted work is marketable, the trustee can sell the copies of the published work; *however*, the author is entitled to the first right of refusal, and the trustee cannot assign the copyright or grant any interest by license or otherwise, *without the written consent of the author*, except on terms that will guarantee the author is entitled to royalties or a share of the profits.<sup>122</sup>

67. Importantly, section 83 of the *BIA* starts with "*Notwithstanding anything in this Act or in any other statute*" meaning that no conflicting provision in any other piece of legislation can trump this provision. Clearly, Parliament's intention is to protect copyright authors, and to do so, it does not permit assigned ownership rights to be sold off in bankruptcy without consulting the original author of the work.

68. As noted above, Wallace & Carey only had a license, and not an assignment. Under the *Copyright Act*, only the owner (i.e. Digiflex/Mr. Mardukhi) has the power to decide to whom a license in their copyrighted work will be granted. If *assigned* copyright rights do not survive bankruptcy without consulting the original owner, clearly Parliament had no intention for *licensed* copyright rights (such as Wallace & Carey's rights to the Digiflex ERP Software) to survive a CCAA wind-down without consulting the original owner.

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<sup>119</sup> The Ontario Superior Court has held that section 83 applies to all assigned copyright interests: *Song Corp, Re*, 2002 CanLII 49574 (ONSC) at para 47 [Authorities, Tab 26].

<sup>120</sup> *Copyright Act*, s 13(1) [Authorities, Tab 3].

<sup>121</sup> *BIA*, s 83(1)(a) [Authorities, Tab 1].

<sup>122</sup> *BIA*, s 83(2)(b) [Authorities, Tab 1].

4. *Other Acts of Parliament reveal that compulsory IP licensing must be explicit and come with protections that protect the IP owner*

69. Finally, no other Act of Parliament, contains any compulsory licensing provisions related to copyrights. If Parliament intended there to be instances that permitted the compulsory licensing of copyrights, Parliament would have included explicit provisions within the *Copyright Act* or other Acts of Parliament. Indeed, Parliament has done so in the *Patent Act* – another wholly statutory IP regime.<sup>123</sup> Previous versions of the *Patent Act* contained provisions that permitted the compulsory licensing of pharmaceutical patents to third parties to make and sell patented medicines. The purpose of these provisions was to promote affordable patented medicines for all Canadians. However, these provisions weakened IP rights in Canada, discouraged Canadian R&D, and were contrary to Canada's international IP obligations. Thus, in 1993, Parliament abolished the compulsory licensing regime.<sup>124</sup>

70. Compared to the within Application, if Parliament does not endorse the compulsory licensing of IP to give Canadians access to cheaper innovative drugs, surely Parliament would not endorse the compulsory licensing of ERP software, to give one private company – 7-Eleven – a free ride. Such an encroachment on an owner of copyrighted software would need to be explicit within the *Copyright Act* or another Act of Parliament, and undoubtedly, it would also carry with it protections for the copyright owner, including a limited term, notice to the copyright owner, and compensation for use of the IP work. Here, allowing this situation to continue to the benefit of 7-Eleven would be essentially issuing a retroactive compulsory license, for an unlimited term, without notice to the copyright holder, and without the copyright holder being paid for such use.<sup>125</sup> Surely that is not what Parliament intended for copyright.

**B. Endorsing 7-Eleven's actions is not consistent with the purpose of the CCAA regime**

71. The fact that there is no Act of Parliament that explicitly supports 7-Eleven's actions of using the Digiflex ERP Software without a license is a full answer to Digiflex's request in this Application. However, further, and in the alternative, 7-Eleven's actions are also inconsistent with the purpose of the CCAA regime.

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<sup>123</sup> *Apotex Inc v Sanofi-Synthelabo Canada Inc*, 2008 SCC 61 at para 12 [Authorities, Tab 6].

<sup>124</sup> *Merck Canada Inc c Procureur general du Canada*, 2022 QCCA 240 at paras 17–37 [Authorities, Tab 18].

<sup>125</sup> For example, the current *Patent Act* does contain provisions that permits Canadian governments to apply to the Patent Office to permit government use of patented inventions in emergency situations. However, even then, there are provisions that protect the patent owner (e.g. restricted use, the patent owner must be notified, the patent owner must be paid for the use of the patent). And this can only be done if the patent owner refuses to provide access to the patent without being forced to. See *Patent Act*, RSC 1985, c P-4, s 19 [Authorities, Tab 4].

1. CCAA legal principles

72. The CCAA regime, and the discretion it gives to supervising judges, is rooted in, and requires, considerations of appropriateness, good faith and due diligence.<sup>126</sup> The requirement of good faith requires that the parties to a CCAA proceeding be honest, candid and forthright throughout the proceedings both to the court and to the stakeholders directly affected by the process.<sup>127</sup>

73. Justice Osborne of the Ontario Superior Court of Justice also recently endorsed the principle that: "any relief granted under the CCAA should result in the "fair" treatment of all stakeholders commensurate with the circumstances".<sup>128</sup> This includes the third parties to the reorganization process, such as counterparties to debtor contracts (e.g. Digiflex) – they ought to be treated "fairly and equitably".<sup>129</sup>

74. Indeed, the CCAA regime includes protections for third parties that get caught in restructuring proceedings. For example, the CCAA requires that: (i) counterparties to contracts that are to be forcibly assigned be given notice under s. 11.3(1); (ii) the court consider the effect that a sale of a debtor's assets might have on "other interested parties" under s. 36(3)(e); and (iii) a critical supplier of a debtor company be given security in the debtor's property.

2. A remedy that permits 7-Eleven's continued use of the Digiflex ERP Software is not appropriate

75. The ongoing requirement that Digiflex continues to provide 7-Eleven with access to the Digiflex ERP Software and services without a software license, and payment of same, would be inappropriate under the CCAA regime.

76. First, as admitted by the Monitor, 7-Eleven is not a company to which this CCAA Proceeding applies.<sup>130</sup> Early on in the CCAA Proceeding, 7-Eleven decided that it would not keep Wallace & Carey on

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<sup>126</sup> *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 (**Century Services**) at para 70 [Authorities, Tab 11].

<sup>127</sup> CCAA, s 18.6 [Authorities, Tab 2]; BIA, s 4.2 [Authorities, Tab 1]; *CWB Maximum Financial Inc v 2026998*, 2021 ABQB 137 at paras 56–57 [Authorities, Tab 12], citing *Bhasin v Hrynew*, 2014 SCC 71 (**Bhasin**) [Authorities, Tab 8]; *Century Services* at para 24 [Authorities, Tab 11]; 9354-9186 *Québec inc v Callidus Capital Corp*, 2020 SCC 10 at para 74 [Authorities, Tab 5]; *Bhasin* at para 73 [Authorities, Tab 8]; *Re: San Francisco Gifts Ltd*, 2005 ABQB 91 (**San Francisco Gifts**) at paras 14–16 [Authorities, Tab 22].

<sup>128</sup> *In Re Hudson's Bay Company*, 2025 ONSC 5998 (**HBC**) at para 32 [Authorities, Tab 21].

<sup>129</sup> *Veris Gold Corp (Re)*, 2015 BCSC 1204 (**Veris**) at para 58 [Authorities, Tab 29]; see also *HBC* at para 32 [Authorities, Tab 21].

<sup>130</sup> Mardukhi Affidavit, Exhibit N (Letter from Monitor's counsel dated December 3, 2024) (PDF p 166).

as a going concern. Rather, it decided to launch its own distribution company – SEDCC. Wallace & Carey is now nothing but a shell, with no employees, officers or directors, and is under the supervision of a Super Monitor. 7-Eleven's proposed request does not further any of the policy objectives of the *CCAA*, which would have been a proposed restructuring of Wallace & Carey or keeping Wallace & Carey rolling as a going concern.<sup>131</sup>

77. 7-Eleven has tried to argue that its requested relief advances the policy objectives of the *CCAA* because, without access to the Digiflex ERP Software, SEDCC would experience an "immediate discontinuation of the SEDCC business", including the "catastrophic disruption of the SEC retail business across Canada".<sup>132</sup> However, again, neither 7-Eleven nor SEDCC are companies to which the *CCAA* Proceedings apply: there is no stay in place that prevents SEDCC's suppliers, or those who do business with SEDCC, to cut off SEDCC from the goods and services it needs due to lack of payment.

78. Further, 7-Eleven is not entitled to indirectly benefit from licenses that belong to a shell company that it chose not to revive. While purchasers in the *CCAA* regime may get good deals, that is not a goal or necessity of the *CCAA* regime. The *CCAA* regime does not endorse actions where the only outcome is that non-insolvent purchasers are afforded free goods and services.

79. Second, endorsing 7-Eleven's request would also be inappropriate given that 7-Eleven has not been acting in good faith toward Digiflex throughout the *CCAA* Proceedings. As this Court has stated, acting honestly is at the core of considering whether a party has acted in good faith.<sup>133</sup> Here, there is reason to believe that 7-Eleven has not been honest, forthright, or candid with Digiflex. For example:

- (a) As soon as 7-Eleven discovered that SEDCC would need its own license to use the software, 7-Eleven appears to have instructed all of those involved to inform Digiflex that Wallace & Carey would still be using the software, not SEDCC;<sup>134</sup>
- (b) 7-Eleven has kept Digiflex in dark and uninformed around the whole situation. It refused to provide clear answers to Digiflex's questions about whether SEDCC would be launching

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<sup>131</sup> *HBC* at para 130 [Authorities, Tab 21].

<sup>132</sup> *Buchanan Affidavit* at para 20.

<sup>133</sup> *San Francisco Gifts* at paras 14–16 [Authorities, Tab 22].

<sup>134</sup> *Mardukhi Affidavit* at paras 36–45; 54–62.

on January 1, 2025,<sup>135</sup> and instead, sent the Monitor and the Monitor's counsel after Digiflex, who in turn, threatened to put Mr. Mardukhi in prison;<sup>136</sup>

- (c) A mere three weeks after Digiflex signed the Consent Order on the assumption that Wallace & Carey would be wound down soon, and the Stay would end in April 2025,<sup>137</sup> 7-Eleven amended the TSA term; and
- (d) 7-Eleven appears to have instructed its SEDCC IT employees to email Mr. Mardukhi via their Wallace & Carey emails, to continue to façade that Wallace & Carey is the one using the Digiflex ERP Software, and not SEDCC.<sup>138</sup>

80. These are not the type of actions that this Court should condone.

3. *If the TSA was supposed to implicate Digiflex, it should have been given notice*

81. As set out above, at no time was Digiflex informed about the Transaction, the APA, or the TSA. Prior to the APA and TSA being executed in November 2023, Digiflex had no opportunity to engage with Wallace & Carey, 7-Eleven, or the Monitor or negotiate how the Digiflex ERP Software may or may not be transferred to and used by 7-Eleven.

82. If the true intention of the TSA was to allow 7-Eleven to continue to use the Digiflex ERP Software while it launched its brand new distribution company, Digiflex ought to have been given notice of this. If Digiflex had been given notice, it would have been given a chance to voice any concerns it had about the Transaction.

83. Indeed, had Wallace & Carey chosen to seek an assignment of the W&C Software Licenses to 7-Eleven, Digiflex would have been given notice under section 11.3(1) of the *CCAA*. This is true even though Digiflex was not a creditor of Wallace & Carey, and therefore was not on the service list:

It may often be the case that a counterparty is not a creditor of the estate and therefore, that party would not get notice of the filing at the commencement of those proceedings. Further, even if that is the case, no

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<sup>135</sup> Mardukhi Affidavit at paras 63–67.

<sup>136</sup> Mardukhi Affidavit at paras 68–78.

<sup>137</sup> Mardukhi Affidavit at paras 79–84.

<sup>138</sup> Mardukhi Affidavit at paras 90–91.



assignment issue may be apparent at the time of initial service to the point that such person would take steps to be placed on the service list.

**The best practice in these circumstances is to serve all counterparties to the particular contracts that are sought to be assigned, whether they are on the service list or not.** Section 11.3(1) specifically provides that the application is to be "on notice to every party to an agreement". **Common sense dictates that the person to be directly affected by the assignment should have the ability to consider whether the applicant debtor company has satisfied its burden that the order is appropriate, including the factors set out in s. 11.3(3).** Only by service will that counterparty be made aware of the need to consider its position if such approval is granted and possibly advance evidence and considerations that would be equally relevant to the court's decision on the issue.<sup>139</sup> [Emphasis Added]

84. Allowing 7-Eleven to carry on with access to the Digiflex ERP Software without a license would, in effect, be endorsing the use of TSAs in future CCAA proceedings as a work-around to the requirement that counterparties must be given notice of a potential forced assignment under section 11.3(1). This should not be the law. Use of TSAs in this fashion is not forthright (as required by good faith) and does not treat counterparties in a fair manner (as required by appropriateness).

85. Digiflex submits that the counterparty notice requirement ought to be even more prominent where the contract at issue relates to a product or service that is critical to the assignee's business – as is the case here with the Digiflex ERP Software and SEDCC. Without being able to raise its voice, a counterparty could thus end up in a position where it is contractually tied to a third party that it did not agree to do business with, for an indefinite period (or so long as the TSA continues to be extended). This would be an extreme encroachment on the freedom of contract.

4. *In any event, an assignment would have been inappropriate in this case*

86. A final example of how 7-Eleven's actions are inconsistent with the CCAA regime is the fact that, even if Wallace & Carey had sought an assignment of the W&C Software Licenses at the appropriate time,<sup>140</sup> there would have been strong reasons to deny such an assignment.

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<sup>139</sup> *Veris* at paras 60–61 [Authorities, Tab 29].

<sup>140</sup> A forced assignment at this stage would be too late since it would do nothing to increase the proceeds to the creditors or advance the remedial purpose of the CCAA. See *Century Services* at paras 1, 15, 18, 47, 56, 59, 70 [Authorities, Tab 11]; see also *Canada v Canada North Group Inc*, 2021 SCC 30 at paras 21, 137–38, 170 [Authorities, Tab 9].

87. Section 11.3 of the *CCAA* allows a court, on application by a debtor company, and on notice to every party to the agreement and the monitor, to make an order assigning a contract to any person. In deciding whether to issue such an order, a Court can consider several factors, including those enumerated factors listed under section 11.3(3) – whether the monitor approved the assignment, whether the assignee would be able to perform the obligations, and whether it would be appropriate.<sup>141</sup>

88. Recently, in *HBC*, Justice Osborne of the Ontario Superior Court of Justice reiterated that allowing assignments within *CCAA* proceedings is an "extraordinary power":

Section 11.3 of the *CCAA* is an extraordinary power. It permits the court to require counterparties to an executory contract to accept future performance from somebody they never agreed to deal with. But for s. 11.3 of the *CCAA*, a counterparty in the unfortunate position of having a bankrupt or insolvent counterpart might at least console themselves with the thought of soon recovering their freedom to deal with the subject-matter of the contract. Unlike creditors, the counterparty subjected to a non-consensual assignment will be required to deal with the credit-risk of an assignee post-insolvency and potentially for a long time. Creditors, on the other hand, will generally be in a position to take their lumps and turn the page.<sup>142</sup>

89. In *HBC*, Justice Osborne declined to force the assignment of 25 of HBC's department store leases to Ruby Liu Commercial Investment Corp. (**Central Walk**). In doing so, Justice Osborne raised several considerations that have parallels to Wallace & Carey's case. For example:

- (a) Justice Osborne noted that assignments are not generally appropriate in a liquidating *CCAA* proceeding.<sup>143</sup> In the case of *HBC*, the HBC stores had all closed and were not to re-open, whether or not the proposed assignments were approved.<sup>144</sup> Likewise, in the case of Wallace & Carey, it was also decided early on that Wallace & Carey would not continue to operate, but rather, it would wind down and SEDCC would take over;<sup>145</sup>

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<sup>141</sup> *HBC* at para [43](#) [Authorities, Tab 21].

<sup>142</sup> *HBC* at para [27](#) [Authorities, Tab 21], citing *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678 at para [27](#) [Authorities, Tab 13]; see also *HBC* at para [29](#) [Authorities, Tab 21].

<sup>143</sup> *HBC* at para [129](#) [Authorities, Tab 21].

<sup>144</sup> *HBC* at para [129](#) [Authorities, Tab 21].

<sup>145</sup> [Monitor's 14<sup>th</sup> Report](#) at para 4.0.3.

- (b) Justice Osborne was concerned that Central Walk would not be able to perform the lease obligations, as Central Walk and Riby Liu had never operated a department store before.<sup>146</sup> Likewise, in the case of Wallace & Carey, 7-Eleven has admitted that taking over Wallace & Carey was a significant step outside of its regular retail chain business.<sup>147</sup>
- (c) Justice Osborne noted how the remaining term of the contract is a relevant factor to the assignment analysis.<sup>148</sup> In the case of HBC, the remaining term of the leases was significant, with the potential to not end until 2060 or 2091.<sup>149</sup> In the case of the W&C Software Licenses, as admitted by the Monitor, there is no set term or expiration date for the W&C Software Licenses.<sup>150</sup>

90. Another important factor would have been that Digiflex had not been compensated by Wallace & Carey for use of the software in many years as Digiflex was paid via a single lump-sum for the software when the licenses were executed in March 2000 and August 2003.<sup>151</sup> As a result, had the W&C Software Licenses been forcibly assigned to 7-Eleven, it would have received the use of the Digiflex ERP Software for free – for an entirely brand new distribution business (SEDCC), for an indefinite period of time. Such an assignment would be extremely unfair to Digiflex and thus would not be appropriate or in line with the principles of the CCAA regime.

91. Further, another important factor is the W&C Software Licenses are not simply a license to use the software product, but also, carry with them, the obligation of Digiflex to also provide 24/7 maintenance services.<sup>152</sup> As a result, a forced assignment of the W&C Software Licenses would also carry with it, a forced requirement for Digiflex to have employees available to the new company 24/7 – a company that Digiflex did not independently agree to contract with.<sup>153</sup> In other words, the W&C Software Licenses carry with them a personal service contract that cannot be forcibly assigned,<sup>154</sup> and therefore, the W&C Software

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<sup>146</sup> *HBC* at para [135](#) [Authorities, Tab 21].

<sup>147</sup> [Buchanan Affidavit](#) at para 13.

<sup>148</sup> *HBC* at para [43\(m\)](#) [Authorities, Tab 21].

<sup>149</sup> *HBC* at para [139](#) [Authorities, Tab 21].

<sup>150</sup> [Monitor's 14<sup>th</sup> Report](#) at para 3.0.9.

<sup>151</sup> *Mardukhi Affidavit* at paras 22, 27.

<sup>152</sup> *Mardukhi Affidavit* at paras 21, 77; see also [Buchanan Affidavit](#) at para 20. See also, for example, *Trimble* at para [2](#) [Authorities, Tab 28].

<sup>153</sup> *Mardukhi Affidavit* at para 77.

<sup>154</sup> *Goska J Nowak Professional Corp v Robinson*, 2016 ABCA 240 at para [19](#) [Authorities, Tab 15].

Licenses amount to contracts that are not assignable "by reason of their nature", pursuant to s. 11.3(2) of the *CCAA*.<sup>155</sup>

92. In sum, considering that an *assignment* would not have been appropriate for the W&C Software Licenses, it would be inappropriate for this Court to endorse 7-Eleven's continued use of the Digiflex ERP Software through a TSA work-around.

**C. There are no Orders or Agreements in the within CCAA Proceeding that require Digiflex to provide the Digiflex ERP Software and services to 7-Eleven for free**

93. None of the ARIO, the APA, the TSA, or the Consent Order require Digiflex to provide the Digiflex ERP Software and services to 7-Eleven for free. To the extent that these orders and agreements contemplate provision of software or services by Digiflex, if at all, it is limited to the W&C Software Licenses and does not include 7-Eleven.

**1. The ARIO**

94. Under the ARIO, no person is permitted to terminate or interfere with any agreement or license held by Wallace & Carey. Among other things, the ARIO provides that during the Stay Period, all persons having written agreements with Wallace & Carey and Loudon Bros Limited (**Loudon Bros**) are restrained from discontinuing, altering, interfering with, suspending or terminating services under the agreements.<sup>156</sup>

95. The ARIO only contemplates the continuation of existing agreements under existing terms and prevents the altering of, or interference with, those agreements. However, Wallace & Carey is not operating within the terms of the W&C Software Licenses. Rather, 7-Eleven is using Wallace & Carey's license for the Digiflex ERP Software, which is plainly contrary to the terms of the W&C Software Licenses (as discussed elsewhere). 7-Eleven is not a party to the W&C Software Licenses, nor does it have its own agreement or license with Digiflex for the Digiflex ERP Software. Therefore, it is Wallace & Carey and/or 7-Eleven that is improperly altering or interfering with the performance of the W&C Software Licenses contrary to the ARIO.

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<sup>155</sup> *CCAA*, s [11.3\(2\)](#) [Authorities, Tab 2].

<sup>156</sup> [ARIO](#) at para 19.

96. In a similar factual situation, the Ontario Superior Court of Justice considered, among other things, whether a third party's right to terminate under the initial contract was valid.<sup>157</sup> The third party was not given notice of the purchase or the assignment of the contract.<sup>158</sup> The Court advised that the assignment of the contract should not be allowed as it involved a permanent stay of the third party's right to terminate the agreement.<sup>159</sup>

## 2. The APA and TSA

97. On the face of the APA and TSA, Digiflex has no obligation to provide software or services to 7-Eleven. As discussed further below, Digiflex is not a party to APA or TSA, nor do the APA or TSA refer to or otherwise contemplate Digiflex or its software or services, including Digiflex's agreements with Wallace & Carey and Loudon Bros.

### i. Digiflex is Not Mentioned in the APA

98. The APA is between Wallace & Carey, Loudon Bros, and Carey Management Inc. (**CMI**) (Wallace & Carey's parent company) (together, the Vendors, as defined in the APA) and 7-Eleven (the Purchaser, as defined in the APA). The APA concerns the sale of specified "Purchased Assets" to 7-Eleven, which includes the assignment of specified "Assigned Contracts".

99. The "Purchased Assets" are defined as:

- (a) all furniture, fixtures, equipment, machinery and other tangible personal property by the Vendors and located in Alberta and British Columbia;
- (b) all Assigned Contracts as set out in Schedule "A";
- (c) each vendor's rights under warranties, indemnities and all similar rights against third parties to the extent related to any Purchased Assets;
- (d) originals, or where not available, copies of all Books and Records...that exclusively relate to the Purchased Assets or Assigned Contracts;

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<sup>157</sup> *Nexient Learning Inc (Re)*, [2009 CanLII 72037](#) (ONSC) (*Nexient*) [Authorities, Tab 19].

<sup>158</sup> *Nexient* at para [28](#) [Authorities, Tab 19].

<sup>159</sup> *Nexient* at para [101](#) [Authorities, Tab 19]. See paras [59–63](#) of *Nexient* for analysis [Authorities, Tab 19].

- (e) all Intellectual Property owned by each Vendor and used in connection with the business, including any registrations related thereto, including without limitation:
  - (i) all rights, title and interest in and to the WORCS warehouse management software platform (including all object code, source code, and documentation);
  - (ii) all rights, title and interest in and to the WOnline online ordering software portal (including all object code, source code, and documentation); and
  - (iii) all the Vendor's rights under its existing per-device licenses for the LXEZ software package (including add-on library, connection server and application) that provides access to the WORCS server software.<sup>160</sup>

100. The "Assigned Contracts" set out in Schedule "A" to the APA are limited to two lease agreements and "[a]ll existing per-device licenses for the LXEZ software package (including add-on library connection server and application) that provides access to the WORCS server software".<sup>161</sup>

101. The W&C Software Licenses are not expressly contemplated within the APA, including with respect to the "Purchased Assets" or the "Assigned Contracts". For greater clarity, the "Intellectual Property" enumerated within the meaning of "Purchased Assets", i.e. the WORCS software platform, WOnline software portal, and LXEZ software package, are wholly unrelated to Digiflex.

102. Put simply: Digiflex is not at all mentioned in the APA. A plain reading of the APA leaves no doubt that neither the "Purchased Assets" generally nor the "Assigned Contracts" specifically, include or in any way relate to, Digiflex or its software or services, including Digiflex's software licenses with Wallace & Carey and Loudon Bros.

103. Further, as discussed above, to the extent that "Intellectual Property" as described within the "Purchased Assets" was intended to capture Digiflex's software, which Digiflex denies, Wallace & Carey and Loudon Bros cannot unilaterally assign their rights under the W&C Software Licenses to 7-Eleven without Digiflex's consent. Such an action is not endorsed by the *Copyright Act* nor the W&C Software Licenses.

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<sup>160</sup> [Approval and Vesting Order](#), Schedule B (APA) (PDF p 15), art 2.1

<sup>161</sup> [Approval and Vesting Order](#), Schedule B (APA), Schedule A (Assigned Contracts) (PDF p 40).

**ii. Digiflex is not mentioned in the TSA**

104. The TSA is an agreement for services between the Debtors (CMI and Wallace & Carey), the Purchaser (7-Eleven), and the Monitor. Digiflex is not a party. The TSA can neither bind nor burden Digiflex. On its face, the TSA cannot be read to require Digiflex to provide software or services to 7-Eleven.

105. The TSA sets out, among other things, certain contracts and permits that the Debtors are required to maintain and preserve for the operation of the Debtors' business (defined in the TSA as Transition Contracts and Transition Permits, respectively).<sup>162</sup>

106. The TSA states, subject to limited enumerated exceptions, that the Debtors shall remain party to the Transition Contracts and Transition Permits.<sup>163</sup> One exception is if a Transition Contract or Transition Permit is assigned to the Purchaser (7-Eleven).<sup>164</sup>

107. The TSA also states that the Purchaser (7-Eleven) grants the Debtors (CMI and Wallace & Carey) a temporary license to use any information technology systems that were included in the Purchase Assets (as defined in the APA) for specific purposes, including the wind-down of the Debtors and their affiliates.<sup>165</sup>

108. None of the above-stated provisions, nor any other part of the TSA, mention Digiflex, the Digiflex ERP Software, or any Digiflex services. Further, there are no general "catch all" provisions that could be read as encompassing the W&C Software Licenses. Even if there was, or even if the intention was to capture the W&C Software Licenses as Transition Contracts or Transition Permits, which Digiflex denies, Wallace & Carey did not have the right under the W&C Software Licenses or copyright law to either: (i) use the Digiflex ERP Software for a new business acquisition – such as assisting 7-Eleven with the launch of its own distribution company;<sup>166</sup> or (ii) transfer its right to use the Digiflex ERP Software.<sup>167</sup>

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<sup>162</sup> [Approval and Vesting Order](#), Schedule B (APA), Schedule B (Form of Transition Services Agreement), arts G, H (PDF p 43).

<sup>163</sup> [Approval and Vesting Order](#), Schedule B (APA), Schedule B (Form of Transition Services Agreement), art 6 (PDF p 45).

<sup>164</sup> [Approval and Vesting Order](#), Schedule B (APA), Schedule B (Form of Transition Services Agreement), art 6 (PDF p 45).

<sup>165</sup> [Approval and Vesting Order](#), Schedule B (APA), Schedule B (Form of Transition Services Agreement), art 8 (PDF pp 45–46).

<sup>166</sup> Mardukhi Affidavit, Exhibits B, C, D (W&C Software Licenses), article 4 (PDF pp 306, 319, 331).

<sup>167</sup> Mardukhi Affidavit, Exhibits B, C, D (W&C Software Licenses), article 2 (PDF pp 306, 319, 330).

### 3. The Consent Order

109. The Consent Order does not limit or otherwise obstruct the relief sought by Digiflex. Among other things, the Consent Order (1) relates to Digiflex's relationship with Wallace & Carey only and does not contemplate 7-Eleven, and (2) in any event, was executed in a manner plainly unfair to Digiflex.

110. First, the Consent Order is between the Monitor and Digiflex and Mr. Mardukhi. The Consent Order provides that Digiflex will "continue to provide services to Wallace & Carey in the manner...and subject to the terms prescribed in the [W&C Software Licenses]".<sup>168</sup> There is no mention of 7-Eleven in the Consent Order; and there is no mention, of course, of 7-Eleven in the W&C Software Licenses. These documents only relate to software and services provided by Digiflex to Wallace & Carey.

111. As detailed above, Wallace & Carey is no longer using the ERP Software for the purposes of its own business. Rather, 7-Eleven is using the ERP Software under the guise of Wallace & Carey without a license to do so. 7-Eleven's use of the ERP Software is clearly outside the scope of the W&C Software Licenses, which in no way relate to 7-Eleven. Therefore, the Consent Order does not impede Digiflex' ability to seek relief as against 7-Eleven. In fact, to the extent Wallace & Carey is permitting 7-Eleven to use the W&C Software Licenses, Wallace & Carey is breaching the W&C Software Licenses and also committing copyright infringement, which is not permitted by the TSA.<sup>169</sup> This is also grounds for this Court to lift the Stay so that Digiflex can terminate the W&C Software Licenses and stop the exploitation of its ERP Software for free.

112. Second, and notwithstanding Digiflex's position that the Consent Order is not relevant to the determination of this Application, the Consent Order was unfairly executed to the detriment of the Digiflex. At the time the Digiflex entered into the Consent Order, it was self-represented by Mr. Mardukhi. In entering the Consent Order, Mr. Mardukhi was simply agreeing to respect the contracts that Digiflex already had with Wallace & Carey. This is reflected in the terms that Mr. Mardukhi proposed to the Monitor prior to execution, which the Monitor's counsel agreed to.<sup>170</sup>

113. In agreeing to Mr. Mardukhi's terms, the Monitor's counsel also insisted that a consent order be presented to the Court the very next day. Further, the Monitor's counsel had advised Mr. Mardukhi that any

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<sup>168</sup> Mardukhi Affidavit, Exhibit V.

<sup>169</sup> [Approval and Vesting Order](#), Schedule B (APA), Schedule B (Form of Transition Services Agreement), art 21(b)(i) (PDF p 51).

<sup>170</sup> Mardukhi Affidavit at paras 79–82 and Exhibits S and T.



failure by Digiflex to honour the W&C Software Licenses could result imprisonment for up to two years for civil contempt. Under these circumstances, and with the understanding that the Consent Order merely reflected Digiflex's existing contractual obligations with Wallace & Carey, he agreed to execute the Consent Order.

114. Even more, Mr. Mardukhi's information was that the services Digiflex would provide Wallace & Carey pursuant to the Consent Order had a clear end date, given that Mr. Mardukhi did not expect Wallace & Carey to be in business much longer. In fact, Mr. Mardukhi had specific knowledge that Wallace & Carey would be wound down by January 1, 2025. Based on this knowledge and information, Digiflex had no reason to believe the CCAA Stay Period would extend beyond the expiry date of April 30, 2025.

**D. 7-Eleven's Request would result in a Mandatory Injunction being ordered without any cause of action against Digiflex or any irreparable harm, while prejudicing Digiflex**

115. With no support for 7-Eleven's actions in the *Copyright Act*, the *CCAA*, the *APA*, the *TSA*, or the Consent Order, the only way that this Court could continue to permit 7-Eleven to use the Digiflex ERP Software is by essentially granting a mandatory injunction against Digiflex to force it to provide its ERP Software and services to 7-Eleven for free.

116. The three-part test for a mandatory injunction is well-known. An applicant must demonstrate (i) a strong *prima facie* case that it will succeed at trial, (ii) irreparable harm will result if the relief is not granted, and (iii) that the balance of convenience favours granting the injunction.<sup>171</sup> This sort of intervention is extraordinary.<sup>172</sup>

117. 7-Eleven would not be able to meet this test for several reasons, including that it has no cause of action against Digiflex. Further, any argument that 7-Eleven will suffer "the immediate discontinuation" of its business and "catastrophic disruption" of its business across Canada (as Mr. Buchanan states in his affidavit) without a Court order is non-sensical. No court order is required. There is a simple way for 7-Eleven to solve its problem without having to rely on court resources: 7-Eleven can enter a software license

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<sup>171</sup> *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 18 [Authorities, Tab 20]; *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC) (*RJR-MacDonald*) [Authorities, Tab 23].

<sup>172</sup> *RJR-MacDonald* at 338–39 [Authorities, Tab 23], citing *Trieger v Canadian Broadcasting Corp*, 1988 CanLII 4568 (ONSC) [Authorities, Tab 27].

with Digiflex and pay Digiflex's license fee and associated maintenance fees. Paying for a license to use a software that 7-Eleven itself has described as "mission critical" is not a form of irreparable harm.

118. In contrast, if Digiflex is forced to continue to provide its ERP Software and associated services to 7-Eleven, for free, for an indefinite period of time, it will undoubtedly continue to be prejudiced. Digiflex is a small software company and 7-Eleven's actions are causing it to live in a state of uncertainty.<sup>173</sup> Such an order would also continue to prejudice Mr. Mardukhi who, for the last year and a half, has seen his own life's work be stolen from under him.<sup>174</sup> This is undoubtedly an infringement of Mr. Mardukhi's moral rights as the author of the Digiflex ERP Software.<sup>175</sup>

119. Finally, any court order that endorses 7-Eleven's actions is in blatant disregard for the Canadian intellectual property system and Digiflex's copyright in its ERP Software.

#### **E. The stay of CCAA Proceedings should be lifted**

120. Digiflex submits that the stay of proceedings against Wallace & Carey should be lifted to allow Digiflex to terminate all agreements with Wallace & Carey, including any associated with its related company, Loudon Bros, including the W&C Software Licenses and any associated Maintenance Agreements.

121. The courts have held that a stay may be lifted when there are "sound reasons" consistent with the scheme of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and, where relevant, the merits of the proposed action.<sup>176</sup> The factors that will support a finding that lifting the stay is appropriate include, among other things: the applicant would suffer hardship that is caused by the stay, the applicant would be significantly prejudiced, and it is in the interests of justice to do so.<sup>177</sup>

122. For all the reasons described in this Brief, Wallace & Carey and 7-Eleven have been improperly relying on the W&C Software Licenses to provide 7-Eleven with free and unlicensed access to the Digiflex ERP Software. As a result, Digiflex now has claims for copyright infringement against both 7-Eleven and

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<sup>173</sup> Mardukhi Affidavit at para 98.

<sup>174</sup> Mardukhi Affidavit at para 104.

<sup>175</sup> *Copyright Act*, s [14.1](#), [28.2\(1\)](#) [Authorities, Tab 3]. Mr. Mardukhi has alleged that 7-Eleven has infringed his moral rights in the Federal Court Statement of Claim: Allen Affidavit, Exhibit C, paras 1(e), 56–58, 72.

<sup>176</sup> *ICR Commercial Real Estate (Regina) Ltd v Bricore Land Group Ltd.*, 2007 SKCA 72 at para [68](#) [Authorities, Tab 16].

<sup>177</sup> *Canwest Global Communications Corp, Re*, [2009] OJ No 5379 (ONSC) at para 33 [Authorities, Tab 10].

Wallace & Carey, as well as a claim against Wallace & Carey for breach of the W&C Software Licenses. Digiflex has consistently held that there are no court orders or agreements in the CCAA Proceeding that are stopping Digiflex from refusing to provide services and access to its software for free. However, each time it tries to exercise its rights, it has been met with relentless actions from both the Monitor and the Monitor's counsel. Lifting the Stay vis-à-vis Digiflex will permit Digiflex to terminate all agreements it has with Wallace & Carey, including the W&C Software Licenses, and finally put an end to 7-Eleven's theft of the Digiflex ERP Software. Further, Digiflex and Mr. Mardukhi will no longer be required to provide 24/7 maintenance service to 7-Eleven for free, to a company that it never agreed to do business with.

123. As such, Digiflex is entitled to terminate the W&C Software Licenses and the associated W&C Maintenance Agreements and has clearly established sound reasons to do so.

## **V. CONCLUSION**

124. In light of the foregoing, Digiflex respectfully requests an immediate order:

- (a) lifting the stay in relation to Wallace & Carey and Loudon Bros such that it no longer operates in respect of Digiflex. Specifically, paragraphs 15, 16, 17, 18 and 19 of the ARIO, as amended, in the within CCAA Proceeding no longer apply to Digiflex;
- (b) declaring that Digiflex has no obligation to provide 7-Eleven Inc., 7-Eleven Canada, Inc. or SEDCC access to the Digiflex ERP Software, whether directly, or indirectly through Wallace & Carey or Loudon Bros, or any associated software services to 7-Eleven, Wallace & Carey, or Loudon Bros, and that no court orders or agreements in this CCAA Proceeding require otherwise, including, without limitation:
  - (i) the ARIO (as amended);
  - (ii) the Consent Order; and
  - (iii) the September 19 Order or the third amendment to the TSA; and
- (c) awarding Digiflex costs on this Application, on the highest possible scale; and
- (d) such further and other relief as counsel may advise and this Honourable Court deems fit.

125. Digiflex seeks enhanced costs in respect of this Application,<sup>178</sup> and respectfully requests that this Honourable Court provide the opportunity to make further submissions on costs following determination of the Application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17<sup>th</sup> DAY OF NOVEMBER, 2025.**

**BURNET, DUCKWORTH & PALMER LLP**

Per:

  
Chelsea Nimmo

Solicitor for Digiflex Information System Inc.

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<sup>178</sup> *McAllister v Calgary (City)*, [2021 ABCA 25](#) [Authorities, Tab 17]; *Serinus Energy PLC v SysGen Solutions Group Ltd*, [2024 ABKB 123](#) [Authorities, Tab 24].

## BOOK OF AUTHORITIES

TAB	DOCUMENT
<b>Legislation</b>	
1.	<i>Bankruptcy and Insolvency Act</i> , <a href="#">RSC 1985, c B-3, as amended</a>
2.	<i>Companies' Creditors Arrangement Act</i> , <a href="#">RSC 1985, c C-36</a>
3.	<i>Copyright Act</i> , <a href="#">RSC 1985, c C-42</a>
4.	<i>Patent Act</i> , <a href="#">RSC 1985, c P-4</a>
<b>Case Law</b>	
5.	<i>9354-9186 Québec inc v Callidus Capital Corp</i> , <a href="#">2020 SCC 10</a>
6.	<i>Apotex Inc v Sanofi-Synthelabo Canada Inc</i> , <a href="#">2008 SCC 61</a>
7.	<i>B&amp;S Publications Inc v Max-Contracts Inc</i> , <a href="#">2001 CanLII 61010</a> (ABKB)
8.	<i>Bhasin v Hrynew</i> , <a href="#">2014 SCC 71</a>
9.	<i>Canada v Canada North Group Inc</i> , <a href="#">2021 SCC 30</a>
10.	<i>Canwest Global Communications Corp, Re</i> , [2009] OJ No 5379 (ONSC)
11.	<i>Century Services Inc v Canada (Attorney General)</i> , <a href="#">2010 SCC 60</a>
12.	<i>CWB Maximum Financial Inv v 2026998</i> , <a href="#">2021 ABQB 137</a>
13.	<i>Dundee Oil and Gas Limited (Re)</i> , <a href="#">2018 ONSC 3678</a>
14.	<i>Euro-Excellence Inc v Kraft Canada Inc</i> , <a href="#">2007 SCC 37</a>
15.	<i>Goska J Nowak Professional Corp v Robinson</i> , <a href="#">2016 ABCA 240</a>
16.	<i>ICR Commercial Real Estate (Regina) Ltd v Bricore Land Group Ltd</i> , <a href="#">2007 SKCA 72</a>

17.	<i>McAllister v Calgary (City)</i> , <a href="#">2021 ABCA 25</a>
18.	<i>Merck Canada Inc c Procureur general du Canada</i> , <a href="#">2022 QCCA 240</a>
19.	<i>Nexient Learning Inc (Re)</i> , <a href="#">2009 CanLII 72037</a> (ONSC)
20.	<i>R v Canadian Broadcasting Corp</i> , <a href="#">2018 SCC 5</a>
21.	<i>In Re Hudson's Bay Company</i> , <a href="#">2025 ONSC 5998</a>
22.	<i>Re San Francisco Gifts Ltd (Companies' Creditors Arrangement Act)</i> , <a href="#">2005 ABQB 91</a>
23.	<i>RJR-MacDonald Inc v Canada (Attorney General)</i> , <a href="#">1994 CanLII 117</a> (SCC)
24.	<i>Serinus Energy PLC v SysGen Solutions Group Ltd</i> , <a href="#">2024 ABKB 123</a>
25.	<i>SNMP Research International Inc v Nortel Networks Corp</i> , <a href="#">2016 ONCA 749</a>
26.	<i>Song Corp, Re</i> , <a href="#">2002 CanLII 49574</a> (ONSC)
27.	<i>Trieger v Canadian Broadcasting Corp</i> , <a href="#">1988 CanLII 4568</a> (ONSC)
28.	<i>Trimble Solutions Corporation v Quantum Dynamics Inc</i> , <a href="#">2021 FC 63</a>
29.	<i>Veris Gold Corp (Re)</i> , <a href="#">2015 BCSC 1204</a>