

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 KSV RESTRUCTURING INC., in its capacity as court-appointed monitor of Wallace & Carey Inc., Loudon Bros. Limited and Carey Management Inc.

RESPONDENTS DIGIFLEX INFORMATION SYSTEMS INC.

DOCUMENT **RESPONDING BRIEF OF DIGIFLEX, RE: MONITOR'S APPLICATION TO ASSIGN SOFTWARE LICENSES**

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**Hearing via Webex before the Honourable Justice Marion
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I. INTRODUCTION

1. This is the Brief of Law of Digiflex Information Systems Inc. (**Digiflex**) responding to 7-Eleven's Application to assign the W&C Software Licenses and the LB Software Licenses (together the **W&C Software Licenses**)¹ to SEDCC. The Monitor brought this application, on the request of 7-Eleven, after Digiflex asked this Court to declare that SEDCC had no rights to use the Digiflex ERP Software without a license. 7-Eleven's timing is telling.

2. For the reasons below, Digiflex submits that 7-Eleven's Application ought to be dismissed.

3. First and foremost, Digiflex submits that Parliament has made clear that, under no circumstances, including in bankruptcy and insolvency, should copyrighted works be licensed without the consent of the copyright owner (here Digiflex). Accordingly, copyright licenses, such as the W&C Software Licenses, fall under the exception of section 11.3(2) of the *CCAA*, as being "not assignable by reason of their nature".

4. Parliament made this rule to ensure that the monopoly afforded to copyright authors and owners is protected, which in turn facilitates the creation of further intellectual works, for the benefits of all Canadians. Digiflex, and its President and founder, Mr. Mardukhi, worked hard to develop an ERP software for use in the distribution industry, and spent millions of dollars to do so. In turn, Canadian distributors and grocers have benefited from a highly reliable ERP software that has kept their businesses afloat.

5. On the one hand, SEDCC admits that the Digiflex ERP Software is critical to its business. However, on the other hand, 7-Eleven has the nerve to say that Digiflex's request to be paid for a license to use its ERP Software is equivalent to a "ransom payment". Digiflex is not seeking its "ransom payment". Digiflex is protecting its rights – rights that Canadian Parliament has granted to it.

6. 7-Eleven's strategy has been to not engage in the IP issues. Rather, it has tried to send the message that: *this is a CCAA Proceeding, the Court is a rubber stamp, and what Parliament says about IP rights in CCAA Proceedings is irrelevant.*

7. But that is not the law. Although this is a CCAA Proceeding, this is still a Court of law, and the law still needs to be followed. When all the appropriate law is considered, it is clear that Parliament intended IP holders to retain ultimate control over who can use their IP rights. The *Copyright Act*, RSC 1985, c C-42 (**Copyright Act**) and the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (**CCAA**) or the

¹ Unless otherwise stated, defined terms used in this brief have the same meaning as in Digiflex's Brief filed November 17, 2025.

Bankruptcy and Insolvency Act, RSC 1985, c B-3 (**BIA**) are presumed to be harmonious, and as shown below, they in fact are.

8. Further, in any event, even if copyright licenses can be forcibly assigned, this is not a case where such an assignment would be appropriate. 7-Eleven seeks this assignment two years after the close of the Asset Purchase Agreement and after the creditors have been paid. Neither the Debtor Companies nor the creditors will benefit from the assignment, only 7-Eleven will.

9. And worse of all, if 7-Eleven's assignment were granted, it would leave Mr. Mardukhi, working for 7-Eleven 24 hours a day/7 day a week. SEDCC's actions have forced Mr. Mardukhi, Digiflex's founder and President, to work for SEDCC for the last two years without SEDCC paying him for use of his product.

II. FACTS

10. The facts that are relevant to 7-Eleven's application are set out in:

- (a) Digiflex's Brief filed November 17, 2025; and
- (b) The two affidavits provided by Mr. Mardukhi, Digiflex's founder, President, CEO, and sole director and shareholder.
 - (i) Affidavit affirmed on November 14, 2025 (the **Mardukhi Affidavit**).
 - (ii) Supplemental Affidavit affirmed on November 24, 2024 (the **Supplemental Mardukhi Affidavit**).

11. Facts that require further explanation or clarity are set out below.

A. The W&C Software Licenses

12. 7-Eleven is asking for an assignment of the W&C Software Licenses. The W&C Software Licenses state they are "non-transferable, non-exclusive, perpetual License of certain computer application software owed by Digiflex".² They specifically grant the licensee a "license to use".³

13. Terms relevant to the within application of the W&C Software Licenses are:

² Mardukhi Affidavit, Exhibits B, C, D, E (PDF pp 47, 60, 72, 84).

³ Mardukhi Affidavit, Exhibits B, C, D, E (W&C Software Licenses), art 2 (PDF pp 48, 61, 72, 85).

4. LICENSE TO USE FEE. [...] This unlimited License shall apply to the current Customer's business. New businesses acquisitions or startups are not covered under this unlimited use License.

12. PROPRIETARY RIGHTS, TRADE SECRETS AND TITLE. Customer hereby acknowledges that the Package, any copies thereof and any updates, enhancements or modifications thereof, in whole or in part, and all copyright, patent, trade secret and other intellectual property and proprietary rights (collectively, "Proprietary Rights"), therein, are and remain the valuable property of Digiflex. Customer agrees to communicate to any user of the Package Digiflex's Proprietary Rights by instruction, agreement or notice including but not limited to incorporating and maintaining Digiflex's copyright notice and proprietary warning on each copy of the Package. [...]

14. ENTIRE AGREEMENT. This Agreement and attached Schedules including: Schedule A – Maintenance; Schedule B – Rate Schedule form part of this agreement and contain the entire Agreement between Customer and Digiflex [...]. [...]

15. ASSIGNABILITY. This Agreement shall be binding upon and enure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither party shall assign its rights under this Agreement without first obtaining the written consent of the other, such consent not to be unreasonably withheld. [...]

iii. **Hotline Service.** Digiflex shall provide Customer remote telephone access to Digiflex personnel on a 7 x 24 basis with respect to use of the Software. In providing such service, Digiflex will respond to a request from Customer, but not necessarily correct any error, within four (4) business hours of Customer's request.

B. The Digiflex ERP Software is not usable without maintenance fees

14. Digiflex's clients use the Digiflex ERP Software by purchasing a software license.⁴ A license has two components: (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.⁵ 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.

⁴ Mardukhi Affidavit at para 20.

⁵ Mardukhi Affidavit at para 21.

15. Problems anywhere in the supply chain can result in empty shelves at the store level which can have a large impact on the stores' profitability and reputation. This is why a 24/7 helpdesk is a crucial service that accompanies an ERP software license.⁶

16. If a company wants to run an active distribution company with the Digiflex ERP Software, it needs to keep an active maintenance agreement. Otherwise, it risks a complete failure of their business.⁷

17. To date, SEDCC continues to ask Digiflex for help to run its distribution company. On November 24, 2025, SEDCC IT emailed Mr. Mardukhi identifying "a major problem... which will cause a number of issues for our period end...and a lot of timing errors". SEDCC needed Digiflex's help to fix it.⁸

C. Digiflex's begins to wind down

18. In 2021, Wallace & Carey selected a new ERP provider and was planning to move away from Digiflex. At the time, Wallace & Carey was Digiflex's largest customer, and Mr. Mardukhi knew that once Wallace & Carey had transitioned to its new ERP, it would not be financially possible to keep additional full-time employees. Mr. Mardukhi also wanted to retire. Mr. Mardukhi thus made the decision to wind down Digiflex.⁹

19. In September 2023, two months prior to the 7-Eleven Transaction, Mr. Mardukhi asked his last full-time employees to become contractors.¹⁰

D. In July 2024, Digiflex was asked to provide a quote for a new license for SEDCC

20. Initially, 7-Eleven and Wallace & Carey seemed to understand that SEDCC would need its own license to use the Digiflex ERP Software. On July 4, 2024, Heather Miller, Wallace & Carey's Director of IT, emailed Digiflex to request "a completely separate ERP system using Digiflex software for our new

⁶ Supplemental Mardukhi Affidavit at para 19.

⁷ Supplemental Mardukhi Affidavit at para 22.

⁸ Supplemental Mardukhi Affidavit at para 25 and Exhibit A.

⁹ Supplemental Mardukhi Affidavit at paras 36–38.

¹⁰ Supplemental Mardukhi Affidavit at para 38.

distribution company".¹¹ Ms. Miller also asked for "a quote for the development, test and go-live support and ongoing maintenance and support agreements".¹²

21. In the ensuing weeks, Ms. Miller sought multiple quotes for new license fees based on annual sales ranging from \$100 million to \$700 million. Then, on July 22, 2024, Ms. Miller suddenly changed her approach, advising Mr. Mardukhi that after "discussion with Finance...we do not require a separate company" and instead want to "change our company name and fiscal calendar".¹³

22. Digiflex tried to initiate discussions about a license with 7-Eleven through Wallace & Carey's CEO.¹⁴

E. In December 2024, there was no intention to seek an assignment

23. In December 2024, Digiflex tried to terminate the W&C Software Licenses given that Mr. Mardukhi understood that SEDCC was going to be launching on January 1, 2025.¹⁵

24. Digiflex was subsequently told by the Monitor that Digiflex could not terminate the W&C Software Licenses because of the ARIO and because Wallace & Carey continued to operate in the ordinary course of business.¹⁶ At that time, the Monitor acknowledged that the W&C Software Licenses were not assigned to 7-Eleven.¹⁷

25. Digiflex signed a Consent Order to continue to provide Wallace & Carey (not SEDCC) maintenance services on the assumption that the Stay period was ending April 2025.¹⁸

¹¹ Mardukhi Affidavit at para 36 and Exhibit F (PDF p 108).

¹² Mardukhi Affidavit at para 36 and Exhibit F (PDF p 108).

¹³ Mardukhi Affidavit at para 43 and Exhibit F (PDF p 102).

¹⁴ Mardukhi Affidavit at paras 46–53.

¹⁵ Mardukhi Affidavit at paras 68–84.

¹⁶ Mardukhi Affidavit at paras 68–84.

¹⁷ Mardukhi Affidavit, Exhibit N (PDF p 166).

¹⁸ Mardukhi Affidavit at paras 79–84.

F. 7-Eleven Has Trouble with its New Distribution Business

26. When Digiflex was first asked to provide a quote for a Digiflex ERP license for SEDCC, the goal was to have SEDCC only use the Digiflex ERP Software until March 31, 2025, with a possible extension to June 30, 2025.¹⁹

27. However, since that time, 7-Eleven has asked for multiple extensions to the TSA, which, in its view, allow it to use the Digiflex ERP Software for free. The Monitor has stated that each of the TSA amendments "was sought because SEC has experienced delays implementing a new ERP for its business".²⁰

28. 7-Eleven has also admitted that setting up its new distribution company has not gone as planned, in part, because it is a retail company, not a distribution company.²¹

29. Under the most recent TSA extension, 7-Eleven asked for an expiry on February 15, 2026, or on such other date as may be agreed to by the parties in writing.²²

G. Digiflex continues to protest to 7-Eleven's illegal use of the Digiflex ERP Software and brings its own Application

30. Each time that Wallace & Carey or the Monitor applied to court for approval of the amendment to the TSA, Digiflex has opposed the extension.²³

31. At the latest application on September 19, 2025, Mr. Mardukhi appeared at the hearing on his own, without counsel, objecting to the extension of the TSA and the Stay Period.²⁴ At the hearing Justice Feasby 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**).²⁵

32. Following the issuance of the Feasby Order, Digiflex retained Burnet, Duckworth & Palmer LLP.

¹⁹ Mardukhi Affidavit, Exhibit F (PDF p 108).

²⁰ [Eighteenth Report of the Monitor](#) dated November 20, 2025 (**Monitor's 18th Report**) at para 3.1.5.

²¹ [Affidavit of Joshua Buchanan](#), sworn September 8, 2025 (**Buchanan Affidavit**) at paras 10, 12, 13, 14, 24.

²² [Affidavit No. 8 of Patrick Carey](#), sworn August 15, 2025 at para 33 and Exhibit F (Second Amendment to the TSA) (PDF p 36); [Order Approving Stay Extension and Third TSA Amendment](#) dated September 19, 2025 (**September 19 Order**) at paras 3, 4.

²³ Mardukhi Affidavit at para 95 and Exhibits AC and AD.

²⁴ Mardukhi Affidavit at para 95.

²⁵ [September 19 Order](#) at para 7.

33. Digiflex subsequently brought its own application, seeking to lift the stay against it to be able to terminate the W&C Software Licenses. Digiflex also seeks a declaration that it has no obligation to provide 7-Eleven or SEDCC access to its proprietary software.²⁶

H. Within Application

34. Following the service and filing of Digiflex's Application, 7-Eleven asked the Monitor, in its capacity as court-appointed monitor of the Companies, to seek an assignment of the W&C Software Licenses.

35. The Monitor has admitted that: it would not be seeking an assignment of the W&C Software Licenses but for Digiflex's Application;²⁷ and "SEC/SEDCC is the primary beneficiary of any relief granted during the application".²⁸

36. The Monitor has filed a Report related to the proposed assignments and believes it is appropriate.²⁹ 7-Eleven Canada and SEDCC have filed a brief.³⁰

III. ISSUES

37. The fundamental issue is whether this Court should approve the forced assignment of the W&C Software Licenses.

38. As set out below, Digiflex submits that:

- (a) Pursuant to section 11.3(2) of the *CCAA*, the W&C Software Licenses cannot be assigned because copyright licenses are not assignable "by reason of their nature";
- (b) Further, or in the alternative, pursuant to section 11.3(2) of the *CCAA*, the W&C Software Licenses cannot be assigned because of their intractable service component, which also makes them not assignable "by reasons of their nature"; and/or

²⁶ Application by Digiflex Information Systems Inc. filed November 13, 2025.

²⁷ Email from KSV's counsel to the Court dated November 21, 2025 at 11:09:27 AM (**Nov 21 Email**)

²⁸ Nov 21 Email.

²⁹ [Monitor's 18th Report](#).

³⁰ Bench Brief of 7-Eleven Canada, Inc. and 7-Eleven Distribution Canada Corporation re Assignment of the DigiFlex License Agreements, filed November 21, 2025 (**7-Eleven Brief**).

- (c) Finally, in any event, the W&C Software Licenses should not be assigned considering the circumstances as a whole. Such an assignment would not be appropriate.

39. In sum, Digiflex submits that, no matter which way you look at the issue, the W&C Software Licenses should not be assigned to SEDCC.

IV. LAW AND ARGUMENT

A. Legal Principles

40. Prior to summarizing the law on section 11.3 and contracts that can never be forcibly assigned, it will be helpful to review some basic principles of copyright, licenses, and copyright infringement, particularly in the case of software. Digiflex believes that much of the confusion within this case – about who owns what, and about what Digiflex's software is – is related to the fact that there has been significant confusion about copyright ownership.

1. Copyright principles

i. Copyright is a monopoly that grants the owner exclusive rights

41. At its core, copyright grants the owner a monopoly – an exclusive right.³¹

42. The Supreme Court of Canada has endorsed the teaching that:

What the term "copy-right" very certainly reveals is the actual function of copyright. It is an **exclusive right** and, as it applies to the part that relates to the **commercial exploitation of the work**, a **true monopoly on reproduction**.³²

43. The Supreme Court has also explained that the *Copyright Act* strikes "a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining

³¹ *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34 (*Théberge*) at paras 119, 123 [Supplemental Authorities, Tab 11], citing *Apple Computer Inc v Mackintosh Computers Ltd.*, 1986 CanLII 6820 (FC) at 200; see also *Cinar Corporation v Robinson*, 2002 SCC 34 (*Cinar*) at paras 1, 23 [Supplemental Authorities, Tab 3].

³² *Théberge* at para 116 [Supplemental Authorities, Tab 11], citing Pierre-Emmanuel Moyse, "La nature du droit d'auteur: droit de propriété ou monopole?" (1998) 43 McGill LJ 507 at 562.

a just reward for the creator."³³ This is done giving the copyright owner a statutory monopoly which prevents the exploitation of the work without the copyright holder's consent.³⁴

44. 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".³⁵ The Supreme Court of Canada has made clear that "copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive."³⁶ 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.

45. The *Copyright Act* contains several provisions that highlight the exclusive control that a copyright owner has over the control over its work. Section 13(4) is the most relevant to the within application, which states:

The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, **and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made**, or by the owner's duly authorized agent.³⁷

46. In *Kraft*, the Supreme Court of Canada highlighted the differences between a copyright license and an assignment:

Under the common law, a licensee does not enjoy property rights: "A license is merely permission to do that which would otherwise amount to trespass". In contrast, an assignee receives a property interest from the original owner and steps into the shoes of the owner with respect to those rights assigned. ...

A contextual reading of the *Copyright Act* reveals that Parliament has preserved the traditional distinction between assignees and licenses with some modification. Under the present Act, there is a distinction between "assignee", "licensee" and "exclusive licensee". An assignee possess full ownership rights in the copyright with respect to the rights assigned. A

³³ *Théberge* at para 30 [Supplemental Authorities, Tab 11]; *Cinar* at para 23 [Supplemental Authorities, Tab 3].

³⁴ *Cinar* at para 1 [Supplemental Authorities, Tab 3].

³⁵ *Copyright Act*, s 89 [Authorities, Tab 3].

³⁶ *Euro-Excellence Inc v Kraft Canada Inc*, 2007 SCC 37 (*Kraft*) at para 3 [Authorities, Tab 14].

³⁷ *Copyright Act*, s 13(4) [Authorities, Tab 3].

non-exclusive licensee has no property rights in the copyright and enjoys only contractual rights *vis-à-vis* the owner-licensor.³⁸

47. The *Copyright Act* also grants statutory protections to the author of the original work – called moral rights. These rights can never be assigned. The relevant provisions from the *Copyright Act* are:

Moral rights

14.1 (1) The author of a work has, subject to section 28.2, the right to integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

No assignment of moral rights

(2) Moral rights may not be assigned but may be waived in whole or in part.³⁹

ii. Example of copyright infringement in the software context, in a CCAA regime

48. The case of *Re Nortel Networks Corporation et al (Nortel)*⁴⁰ is a good example that illustrates the principles discussed above within a similar fact pattern as the within CCAA Proceeding. Like the within proceeding, *Nortel* was in the context of a CCAA Proceeding.

49. Prior to Nortel entering CCAA protection, a company called SNMP had licensed its software to Nortel for over 20 years. This relationship was governed by a license agreement between Nortel and SNMP, together with schedules, that identified: (i) the specified Nortel entity licensed to use the Software, (ii) the portion(s) of the software that the specified Nortel entity was licensed to use, and (iii) the particular purpose or product for which the licensed software could be used. No Nortel entities other than the specified Nortel entity that executed the schedule, were authorized to use or have access to the software identified on the

³⁸ *Kraft* at paras [27](#), [28](#) [Authorities, Tab 14].

³⁹ *Copyright Act*, s [14.1](#) [Authorities, Tab 3].

⁴⁰ *Re Nortel Networks Corporation et al*, [2016 ONSC 2732](#) [Supplemental Authorities, Tab 7], aff'd [2016 ONCA 749](#) [Authorities, Tab 25].

schedule.⁴¹ The Court also noted that "Nortel paid yearly maintenance fees for telephone and email support and the right to receive and use fixes and updates to the SNMP software."⁴²

50. The Court noted that "SNMP does not sell its software. It licenses the software to its customers. The property in the software remains with SNMP."⁴³ Specifically, SNMP licensed the source code for its software to the customer.⁴⁴

51. Like the 7-Eleven Transaction, as part of Nortel's CCAA proceeding, it sold several assets (referred to in the decision as the "LOB assets") to a number of entities. The asset purchase agreement provided for the sale of intellectual property owned by the Nortel entities that was used in connection with the business being sold. Any license rights that Nortel did not own but possessed, such as SNMP software licenses, were not assigned or transferred to the purchaser.⁴⁵

52. In order to transfer Nortel's sold assets, Nortel provided purchasers with access to certain aspects of its software management system, including a database known as "ClearCase". This database had pieces of SNMP's software code.⁴⁶ Nortel eventually conceded that SNMP's software code was transferred to the purchasers.⁴⁷

53. Since under the SNMP license agreement, Nortel was not authorized by SNMP to provide SNMP's source code to anyone, Nortel had breached the SNMP license agreement, and its actions also constituted copyright infringement and breach of confidence.⁴⁸ Nortel tried to argue that it was not responsible for the breaches and infringements on the basis that the asset sale was authorized by court order.⁴⁹

54. The Court disagreed. The Court's reasons were based on the language of the APA which only sold IP owned by Nortel. The Court noted that Nortel did not own the SNMP software, but rather, all Nortel owned was its license rights with SNMP and these rights were not assigned or transferred to any

⁴¹ *Nortel* at para [4](#) [Supplemental Authorities, Tab 7].

⁴² *Nortel* at para [7](#) [Supplemental Authorities, Tab 7].

⁴³ *Nortel* at para [3](#) [Supplemental Authorities, Tab 7].

⁴⁴ *Nortel* at para [5](#) [Supplemental Authorities, Tab 7].

⁴⁵ *Nortel* at paras [9–12](#) [Supplemental Authorities, Tab 7].

⁴⁶ *Nortel* at para [12](#) [Supplemental Authorities, Tab 7].

⁴⁷ *Nortel* at para [16](#) [Supplemental Authorities, Tab 7].

⁴⁸ *Nortel* at para [18](#) [Supplemental Authorities, Tab 7].

⁴⁹ *Nortel* at paras [19](#), [22](#) [Supplemental Authorities, Tab 7].

purchasers.⁵⁰ The Court refused to read into the APA that it covered software not owned by Nortel, but by SNMP.⁵¹ The Court noted that the purchasers did not receive any rights to the SNMP software.⁵²

55. With respect to the purchasers who had unlawfully obtained a copy of the SNMP software as part of the asset transfer, those purchasers who wished to use the SNMP software signed their own licenses, under which they paid to use the SNMP software.⁵³

56. There was one purchaser who refused to enter a license with SNMP, Avaya. Avaya did not like the terms of SNMP's license. SNMP sued Avaya.⁵⁴

57. The facts of *Nortel* are very similar to the within proceeding. Here, when 7-Eleven purchased Wallace & Carey's physical assets, 7-Eleven purchased Wallace & Carey's servers that contained Digiflex's software. Only Wallace & Carey was authorized to have a copy of the Digiflex ERP Software under the W&C Software Licenses. SEDCC is now using Digiflex's ERP Software,⁵⁵ for which it does not have a license, to run SEDCC. 7-Eleven did not buy Digiflex's ERP Software during the APA because it could not have: Wallace & Carey never owned Digiflex's ERP Software, it only had a license to use the software. A license which was not transferrable.

2. **Exceptions to forced assignment of agreements in the CCAA**

58. Section 11.3 read reads:

Assignments of agreements

11.3(1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.⁵⁶

⁵⁰ *Nortel* at para 23 [Supplemental Authorities, Tab 7].

⁵¹ *Nortel* at para 24 [Supplemental Authorities, Tab 7].

⁵² *Nortel* at para 35 [Supplemental Authorities, Tab 7].

⁵³ *Nortel* at para 36 [Supplemental Authorities, Tab 7].

⁵⁴ *Nortel* at para 36 [Supplemental Authorities, Tab 7].

⁵⁵ Supplemental Mardukhi Affidavit at paras 30–35.

⁵⁶ *CCAA*, s 11.3(1) [emphasis added] [Authorities, Tab 2].

59. Recently, in *In Re Hudson's Bay Company*, 2025 ONSC 5998 (*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.⁵⁷

60. Critical to the within application is that section 11.3 is not absolute. First, section 11.3 is not mandatory (i.e. the court "may"), and second, the *CCAA* includes exceptions to section 11.3(1), under section 11.3(2), which reads:

Exceptions

11.3(2) Subsection (1) does not apply in respect of **rights and obligations that are not assignable by reason of their nature** or that arise under

- (a) an agreement entered into or after the day on which proceedings commenced under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement.⁵⁸

61. Rights and obligations that are not assignable by reason of their nature include: (i) contracts which by their assignment throw uncontemplated burdens on the debtor; (ii) personal contracts; (iii) maintenance contracts; and (iv) assignments prohibited by statutory provisions.⁵⁹

⁵⁷ *In Re Hudson's Bay Company*, 2025 ONSC 5998 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].

⁵⁸ *CCAA*, s. [11.3\(2\)](#) [emphasis added] [Authorities, Tab 2].

⁵⁹ *Remington Development Corporation v Enmax Power Corporation*, 2012 ABCA 196 (*Remington*) at para [15](#) [Supplemental Authorities, Tab 10], citing *Fredrickson v Insurance Corp*, [1986 CanLII 1066](#) (BCCA) (*Fredrickson*) [Supplemental Authorities, Tab 4].

62. As set out below, Digiflex submits that the W&C Software Licenses are "not assignable by reason of their nature" and fall into all the above categories.

63. Further, and in the alternative, Digiflex also submits that when considering the factors that guide s. 11.3, an assignment of the W&C Licenses to 7-Eleven would not be appropriate.

B. STATUTORY EXCEPTION: THE *COPYRIGHT ACT* PROHIBITS FORCED ASSIGNMENTS

64. As a broad overarching principle, Digiflex submits that copyright licenses cannot be forcibly assigned as their rights and obligations are "not assignable by reason of their nature" and hence fall under the section 11.3(2) exception. To date, Digiflex has been unable to find a Canadian case that explicitly says copyright licenses are not assignable in bankruptcy/CCAA, but Digiflex submits that its argument is supported by general principles of statutory interpretation.

i. The Copyright Act mandates that no assignment is valid unless signed by the owner

65. First, the *Copyright Act* itself states that "no assignment or grant is valid unless it is in writing signed by the owner". Parliament's intention to award the copyright holder with the exclusive control of its rights is set out in several provisions within the *Copyright Act*, including, among others, sections 3(1), 13(4), and 89. Most relevant to whether copyright licenses can be forcibly assigned is section 13(4), as referenced above. Again, section 13(4) reads:

The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, **but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made**, or by the owner's duly authorized agent.

66. Digiflex submits that Parliament enacted section 13(4) to protect the owner's statutory monopoly to be able to exploit its right for his own economic self-interest. Given that no other "Act of Parliament"⁶⁰ overrides section 13(4)'s application in the bankruptcy or insolvency context, Digiflex submits that, even

⁶⁰ As stated in *Copyright Act*, s 89 [Authorities, Tab 3].

in the context of a CCAA proceeding or receivership, Parliament intended for copyright owners to retain their exclusive control over who can license their work.

ii. *The BIA and CCAA support no forced assignment*

67. Second, there is nothing in the *BIA* or *CCAA* that suggest s. 13(4) of the *Copyright Act* does not apply in bankruptcy or insolvency, such that a forced assignment under s. 11.3(1) would be applicable. If any other "Act of Parliament"⁶¹ were to override s. 13(4) of the *Copyright*, it would be either the *BIA* or *CCAA*.

68. In fact, the IP and copyright provisions within the *BIA* and *CCAA* support Digiflex's argument that a copyright license is not forcibly assignable. They demonstrate that Parliament intended to vigorously protect copyright owner's and author's rights. This is in line with the presumption of coherence that presumes the *Copyright Act*, the *BIA* and *CCAA* are meant to work together.⁶²

69. Section 83 of the *BIA* is illustrative.⁶³ It demonstrates that, in certain situations, Parliament does not want assigned copyright interests to survive bankruptcy.⁶⁴ 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)⁶⁵, has priority rights over the copyrighted work, and in some instances, the *BIA* mandates that all rights in the copyright shall return to the author.

70. 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.⁶⁶ 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 a first right of refusal, and the trustee cannot assign the copyright or grant any interest

⁶¹ As stated in *Copyright Act*, s [89](#) [Authorities, Tab 3].

⁶² Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada Inc., 2022) at ch 11, § 11.01[1] [Supplemental Authorities, Tab 14].

⁶³ 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].

⁶⁴ As a reminder, assigned rights in copyright are more valuable than a license. An assignment amounts to ownership. A license does not.

⁶⁵ *Copyright Act*, s [13\(1\)](#) [Authorities, Tab 3].

⁶⁶ *BIA*, s [83\(1\)\(a\)](#) [Authorities, Tab 1].

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.⁶⁷

71. Other provisions in the *BIA* and *CCAA* that are illustrative are those that Parliament added in 2009 and 2019 to address a situation where an IP owner becomes insolvent or bankrupt (**Insolvent IP Owner**): sections 32(6) and 36(8) of the *CCAA*, and sections 65.11(7), 65.13(9), 72.1(1), 72.1(2), 246.1(1), and 246.1(2) of the *BIA* (the **Insolvent IP Owner Provisions**).⁶⁸ The purpose of these provisions was to protect those who had licensed IP (the **Original Licensee**) from an Insolvent IP Owner prior to the Insolvent IP Owner restructuring, liquidating or entering receiverships. To the extent an Insolvent IP Owner wants to disclaim the IP license with the Original Licensee and assign and sell the new IP to a new owner (the **New IP Owner**), these provisions allow Original Licensee to carry on using the IP under the original terms of the license. Parliament's rationale was that it wanted to protect the Original Licensee from a situation where the New IP Owner changed the terms of the license.⁶⁹

72. These provisions both honour how the Insolvent IP Owner originally controlled their work and also ensure that the New IP Owner – who did not create the original work – is not overcompensated for buying IP that it did not create. Buying IP from an Insolvent IP Owner does nothing to promote the dissemination of intellectual works; thus, a slight encroachment on the New IP Owner's rights is permitted.

73. Notably, when Parliament added the Insolvent IP Owner provisions to both the *CCAA* and *BIA*, it did *not* add any provisions to address a situation where an IP licensee becomes insolvent or bankrupt (an **Insolvent Licensee Situation**), as is the case here with Wallace & Carey. This makes sense because if an IP licensee becomes insolvent or bankrupt, it is most likely changing its business structure, or winding down. In other words, the IP licensee may not be the same entity, or use the IP in the same way, as it was or did prior to becoming insolvent or bankrupt. It would be a large encroachment on an IP owner's exclusive rights if an IP licensee was able to apply the terms of its original license to a new business venture, that the IP owner never agreed to. This would not be coherent with Parliament's protection of the IP holder's monopoly. The IP owner gets to choose how their work is used.

⁶⁷ *BIA*, s [83\(2\)\(b\)](#) [Authorities, Tab 1].

⁶⁸ *CCAA*, ss [32\(6\)](#), [36\(8\)](#) [Authorities, Tab 2]; *BIA*, ss [65.11\(7\)](#), [65.13\(9\)](#), [72.1\(1\)](#), [72.1\(2\)](#), [246.1\(1\)](#), [246.1\(2\)](#) [Authorities, Tab 1].

⁶⁹ Hansard, Mark Schaan, [Standing Committee on Finance, Number 184](#), 1st Session, 42nd Parliament, Monday, November 5, 2018 [Supplemental Authorities, Tab 12].

74. Under the statutory principle of implied exclusion, Parliament's *exclusion* of a provision addressing an Insolvent Licensee Situation, as compared to Parliament's *inclusion* of the Insolvent IP Owner Provisions, it is presumed that Parliament's silence with respect to the former is deliberate: "if a statute specifies one exception (or more) to a general rule, other exceptions are not to be read in. The rationale is that the legislator has turned its mind to the issue and provided for the exemptions which were intended."⁷⁰ This implied exclusion is reinforced by the policy considerations of protecting IP owner's monopoly.⁷¹

iii. *Other Federal IP Acts prevent the forcible assignment of IP licenses*

75. Third, no other Federal IP statute contains provisions that allow the forced assignments of IP licenses.⁷² If Parliament intended for this to be allowed, it would have included explicit provisions in IP statutes saying so. By way of example – Parliament previously allowed compulsory licensing of certain pharmaceutical patents in the *Patent Act* – a wholly statutory IP regime,⁷³ as is copyright.⁷⁴ 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.⁷⁵

76. Compared to 7-Eleven's Application, if Parliament does not endorse the compulsory licensing of IP to give Canadians access to cheaper innovative drugs, surely Parliament would not endorse a forced assignment of a copyright license to use ERP software, to give one private company – 7-Eleven – a free ride. Such an encroachment on copyright 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.⁷⁶ Surely that is not what Parliament intended for copyright.

⁷⁰ Sullivan at ch 8, §§ 8.09[1], 8.09[2], 8.09[3], 8.09[4] [Supplemental Authorities, Tab 14].

⁷¹ Sullivan at ch 8, § 8.09[4] [Supplemental Authorities, Tab 14].

⁷² Sullivan at ch 13, §§ 13.04[1], 13.04[2] [Supplemental Authorities, Tab 14]; *Kraft* at para 83 [Authorities, Tab 14].

⁷³ *Apotex Inc v Sanofi-Synthelabo Canada Inc*, 2008 SCC 61 at para 12 [Authorities, Tab 6].

⁷⁴ *Kraft* at para 113 [Authorities, Tab 14].

⁷⁵ *Merck Canada Inc c Procureur general du Canada*, 2022 QCCA 240 at paras 17–37 [Authorities, Tab 18].

⁷⁶ 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

iv. US bankruptcy and insolvency law does not permit the forced assignment of IP licenses

77. Finally, the fourth reason that supports Digiflex's argument as to why IP licenses cannot be forcibly assigned, is the US case law. As mentioned above, to date, Digiflex has not been able to find a Canadian case that has applied Parliament's intention to prevent the forcible assignment of an IP license in the bankruptcy/IP context. Digiflex has, however, found a number of US cases⁷⁷ that are helpful in setting out a roadmap for this Court's analysis in explaining why Wallace & Carey's right to use the Digiflex ERP Software cannot be forcibly assigned.⁷⁸ Canada's copyright laws are similar to the US laws.

78. Under § 365(c) of the Bankruptcy Code, when an "executory contract" cannot be assigned under applicable non-bankruptcy law, it may not be assumed or assigned by the bankruptcy trustee without permission of the other contracting party. The relevant portion of § 365(c) states:

Trustees may not assume or assign an executory contract... of the debtor, whether or not such contract ... prohibits or restricts assignment of rights if, ...

applicable law excuses a party, other than the debtor, to such contract from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession ... whether or not such contract ... prohibits or restricts assignment of rights or delegation of duties; and

... such party does not consent to such assumption or assignment.⁷⁹

79. An "executory contract" is when the obligations of "both the bankrupt and the other party to the contract are so far underperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other".⁸⁰ US Courts have generally found IP licenses to be "executory" within the meaning of section 365(c).⁸¹

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].

⁷⁷ *In re Golden Books Family*, 269 BR 300 (2001) (**Golden Books**) [Supplemental Authorities, Tab 5]; *In re NCP Marketing Grop*, 337 BR 230 (2005) [Supplemental Authorities, Tab 6]; *In re Patient Education Medica, Inc*, 210 BR 237 (1997) [Supplemental Authorities, Tab 8]; *In the Matter of: Buildnet, Inc*, 2022 WL 31103235 (2002) [Supplemental Authorities, Tab 9].

⁷⁸ Sullivan at ch 13, §13.07[5] [Supplemental Authorities, Tab 14].

⁷⁹ 11 USC tit 11 § 365(c) (2024).

⁸⁰ *Golden Books* at 5 [Supplemental Authorities, Tab 5].

⁸¹ *Golden Books* at 5 [Supplemental Authorities, Tab 5].

80. The following analysis then becomes relevant:

The issue under § 365(c) thus becomes a question of copyright law: Does copyright law preclude the free assignment of the licenses at issue? Courts have generally found that the answer to this question turns on whether each particular license is exclusive or nonexclusive. [citations omitted]

Under copyright law, "a nonexclusive licensee...has only a personal and not a property interest in the [intellectual property]," which "cannot be assigned unless the [intellectual property] owner authorizes the assignment..." [citations omitted] By contrast, however, an exclusive licensee does acquire property rights and "may freely transfer his rights and moreover, the licensor cannot transfer the same rights to anyone else."⁸²

81. The court then looks to the license at issue to see if it is exclusive or nonexclusive.⁸³

82. The US analysis has parallels to the law in Canada:

	US Law	Canadian Law
Bankruptcy / CCAA Provision	§ 365(c) "Trustees may not assume or assign any executory contract...if...A) applicable law excuses a party...from rendering performance to an entity other than the debtor" and "such party does not consent to such assumption or assignment"	s. 11.3(2) "Subsection (1) does not apply in respect of rights and obligations that are <u>not assignable by reason of their nature</u> "
Copyright Law	A non-exclusive licensee only has a personal and not a property interest in the IP, which cannot be assigned unless the IP owner authorizes the assignment...	A copyright licensee does not enjoy property rights and therefore has no ownership rights in the copyrighted work

83. Applying the US analysis to the W&C Software Licenses, they should not be assignable. The W&C Software Licenses are "non-transferable, non-exclusive".⁸⁴

⁸² *Golden Books* at 6 [Supplemental Authorities, Tab 5].

⁸³ *Golden Books* at 7 [Supplemental Authorities, Tab 5].

⁸⁴ *Mardukhi Affidavit*, Exhibits B, C, D, E (W&C Software Licenses), art 2 (PDF pp 48, 61, 72, 85).

C. OTHER EXCEPTIONS: PERSONAL, MAINTENANCE, UNEXPECTED BURDENS

84. Digiflex submits that the above analysis with respect to forced assignments of copyrights is a full answer to 7-Eleven's application. Nevertheless, in the alternative, Digiflex further submits that a forced assignment of the W&C Software Licenses ought not to be permitted as the W&C Software Licenses also have obligations that are personal, maintenance, and unexpected burdens. Digiflex submits that these are obligations which "are not assignable by reason of their nature" and s. 11.3(2) applies.

1. Legal principles related

85. **Personal service contracts.** Personal service contracts are those which are based on confidences or considerations applicable to special personal characteristics that cannot be usefully performed to or by another.⁸⁵ In *Fredrickson*, the British Columbia Court of Appeal explained the rule against assignment of personal contracts:

As a general rule contracts for personal services cannot be assigned. The right to assign contractual rights without consent is confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it.⁸⁶

86. In *Remington*, the Alberta Court of Appeal cites *Fredrickson* for the principle that personal service contracts cannot be assigned. In that case, the Court upheld the trial judge's finding that agreements granting the right to operate transmission lines were not personal contracts because there was no "special skill, knowledge, character or other personal characteristics".⁸⁷ In contrast, motor vehicle insurance policies have been found to be personal contracts.⁸⁸

87. This line of cases indicates that personal service contracts are those which:

- (a) are based on confidences, or considerations applicable to special personal characteristics that cannot be performed by another;

⁸⁵ *Ford Credit Canada Ltd v Welcome Ford Sales Ltd*, 2011 ABCA 158 at para 55 [7-Eleven Brief's Authorities, no 6].

⁸⁶ *Fredrickson* at para 47 [Supplemental Authorities, Tab 4].

⁸⁷ *Remington* at paras 17–18 [Supplemental Authorities, Tab 10].

⁸⁸ *Remington* at para 16 [Supplemental Authorities, Tab 10], citing *Fredrickson* at para 53 [Supplemental Authorities, Tab 4].

- (b) make a difference to the person on whom the obligation lies to which of two persons he is to discharge it; or
- (c) the nature of the relationship requires some sort of special skill, knowledge, character or other personal characteristics.

88. ***Maintenance contracts.*** Maintenance contracts in the commercial context are contracts that provide "ongoing maintenance and support" for products such as equipment and software.⁸⁹ Services providing through maintenance contracts include guiding the customer in the operation of the software, correcting errors in the operation of the software, and assisting customer when problems occur in the software.⁹⁰ Maintenance agreements, especially in respect of proprietary software, require special skill and knowledge, and thus fall into the ambit of personal contracts.

89. ***Uncontemplated burdens.*** Contracts which by their assignment throw uncontemplated burdens on the non-assigning party are not well teased out by the case law. Uncontemplated burdens are generally discussed in connection with other issues with assignment, including personal contracts. For example, in *Black Hawk Mining*, the Manitoba Court of Appeal agreed that a unilateral assignment of an agreement involving a relationship of a personal nature "would be apt to throw uncontemplated burdens" on the contracting parties.⁹¹

2. ***The W&C Software Licenses should not be assigned as they involve personal elements, maintenance support, and will continue to place uncontemplated burdens on Mr. Mardukhi***

90. Digiflex submits that the W&C Software Licenses are not assignable by reason of their nature because they have elements of: personal contracts, maintenance contracts, and have, and will continue to, bring on uncontemplated burdens on Digiflex and Mr. Mardukhi.

⁸⁹ Barry B Sookman, *Sookman: Computer, Internet, Electronic Commerce and Artificial Intelligence Law* (Toronto: Thomson Reuters Canada, 1988) (loose-leaf) at ch 2, § 2:13 Maintenance and Support [Supplemental Authorities, Tab 13].

⁹⁰ Sookman at ch 2, § 2:13 Maintenance and Support [Supplemental Authorities, Tab 13].

⁹¹ *Black Hawk Mining Inc v Manitoba (Provincial Assessor)*, 2002 MBCA 51 at para 92 [Supplemental Authorities, Tab 2].

91. W&C Software Licenses are not simply a license to use the ERP Software but also carry with them, the obligation of Digiflex to provide 24/7 maintenance services.⁹² 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.⁹³

92. Mr. Mardukhi's evidence is that, prior to 7-Eleven coming into the picture, Digiflex began to wind down, and since September 2023, he has been Digiflex's only full-time employee.⁹⁴ Mr. Mardukhi was planning on retiring as Wallace & Carey had plans to move onto a new ERP provider.⁹⁵

93. As a result, Mr. Mardukhi himself has been required to be on call 24/7 for 7-Eleven. He has not travelled more than 40 km outside of his house. Payments of Wallace & Carey's and Loudon Bro's maintenance fees are not sufficient to be able to hire new staff.⁹⁶ Mr. Mardukhi wants to retire.⁹⁷ Permitting a forced assignment of the W&C Software Licenses will allow this to continue. As Mr. Mardukhi stated in his First Affidavit, the only way this would not continue is if 7-Eleven pays its outstanding invoices.⁹⁸

94. SEDCC will likely say that this is not an issue, because apparently, 7-Eleven only wants to take part of the W&C Software Licenses. They want to break off Schedule A – the Maintenance Agreements – or what they refer to as the "Ancillary Maintenance Agreements".⁹⁹ However, as explained by Mr. Mardukhi, to the extent SEDCC wants an assignment of the W&C Software Licenses so that SEDCC can continue to run its distribution company, that is objectively not possible.¹⁰⁰ As Mr. Mardukhi stated "running a distribution company without maintenance for its ERP software would be like cancelling fire

⁹² Mardukhi Affidavit at paras 21, 77; see also [Buchanan Affidavit](#) at para 20; see also e.g. *Trimble Solutions Corporation v Quantum Dynamics Inc*, 2021 FC 63 at para 2 [Authorities, Tab 28].

⁹³ Mardukhi Affidavit at para 77.

⁹⁴ Supplemental Mardukhi Affidavit at paras 36–38.

⁹⁵ Supplemental Mardukhi Affidavit at paras 36, 42

⁹⁶ Supplemental Mardukhi Affidavit at paras 39–46.

⁹⁷ Supplemental Mardukhi Affidavit at para 42.

⁹⁸ Mardukhi Affidavit at para 107.

⁹⁹ [Monitor's 18th Report](#), Appendix M (PDF p 233).

¹⁰⁰ Supplemental Mardukhi Affidavit at para 24.

insurance just because you have never had a house fire".¹⁰¹ This is why Digiflex only offers licenses with the Maintenance Agreements. Digiflex's software licenses incorporate the maintenance agreements.¹⁰²

95. In any event, 7-Eleven's position on the maintenance seems disingenuous. On November 24, 2025, SEDCC IT emailed Digiflex with a "major problem" that they needed help to fix to prevent "a lot of timing errors".¹⁰³

96. Splitting off maintenance of the software licenses would be allowing 7-Eleven to renegotiate the terms of the W&C Software Licenses. 7-Eleven doesn't get to re-write the W&C Software Licenses to try to make them assignable.

D. SECTION 11.3 FACTORS DO NOT SUPPORT A FORCED ASSIGNMENT

97. Finally, in the unlikely event this Court does not find that the W&C Software Licenses are contracts that fall under the section 11.3(2) exception of "not assignable by reason of their nature", Digiflex further submits that the factors in considering a forced assignment under section 11.3 do not support one. In the circumstances, 7-Eleven and SEDCC have failed to meet their burden.

1. Factors relevant to forced assignments under s. 11.3(3)

98. In *HBC*, Justice Osborne canvassed the Canadian authorities that have considered proposed assignments pursuant to section 11.3 of the *CCAA* (and its equivalent, section 84.1 in the *BIA*) and identified, a paragraph 43 of the decision, a number of principles that can be relevant in the determination of a contested assignment.¹⁰⁴

99. He also noted that certain elements of the test are clear, in that: (i) approval is in the discretion of the Court; (ii) the factors set out in section 11.3(3) are not mandatory, either individually or collectively, but rather are "to be considered"; and are not an exhaustive list of factors to be considered.¹⁰⁵

¹⁰¹ Supplemental Mardukhi Affidavit at para 24.

¹⁰² Supplemental Mardukhi Affidavit at paras 14–22.

¹⁰³ Supplemental Mardukhi Affidavit at para 25 and Exhibit A.

¹⁰⁴ *HBC* at para 43 [Authorities, Tab 21].

¹⁰⁵ *HBC* at para 23 [Authorities, Tab 21].

100. More generally, assignment must be fair to all stakeholders. As the Court said in *Donnelly Holdings Ltd (Re)*:

[A]ny relief under the *CCAA* should result in "fair" treatment of all stakeholders commensurate with the circumstances. These stakeholders would include a counterparty to a contract... As I stated in *Veris Gold* at para 58:

...the previous approach of the courts in considering whether to approve an assignment based on the twin goals of assisting the reorganization process (i.e., the sale in this case) while also treating a counterparty fairly and equitably.¹⁰⁶

101. Finally, the *CCAA* regime, and the discretion it gives to supervising judges, is rooted in, and requires, considerations of appropriateness, good faith and due diligence.¹⁰⁷ 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.¹⁰⁸

2. **Application of the section 11.3 factors to the proposed forced assignment**

102. Digiflex submits that it should be clear on the record that a forced assignment of the W&C Software Licenses would not be an appropriate remedy in this *CCAA* Proceeding. Listed below are some of the factors that demonstrate this.

103. ***Proposed assignment was brought by 7-Eleven, not a "debtor company"***. An application under s. 11.3(1) is to be brought by a "debtor company". 7-Eleven has admitted that it is not a company to which this *CCAA* Proceeding applies.¹⁰⁹ 7-Eleven asked the Monitor to bring the application.¹¹⁰ 7-Eleven has

¹⁰⁶ *Donnelly Holdings Ltd (Re)*, 2024 BCSC 275 at para 53.

¹⁰⁷ *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 (*Century Services*) at para 70 [Authorities, Tab 11].

¹⁰⁸ *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].

¹⁰⁹ Mardukhi Affidavit, Exhibit N (Letter from Monitor's counsel dated December 3, 2024) (PDF p 166).

¹¹⁰ [Monitor's 18th Report](#), Appendix M (PDF p 233).

admitted that they are the "primary beneficiaries of the relief being sought in the application".¹¹¹ No debtors exist at this point, only through the Super Monitor.

104. ***Proposed assignment does not advance the objectives of the CCAA regime – there will be no advantage to the creditors, and no loss of debtor jobs.*** A forced assignment is a mechanism that is supposed to enhance the remedial objectives of the CCAA – avoiding social and economic losses from liquidation, and to maximize recovery for the creditors of an insolvent company.¹¹² This CCAA Proceeding is nearing a close. Digiflex understands that the majority of the creditors have been paid.¹¹³

105. Further, no social or economic loss will occur if the W&C Software Licenses are not assigned. While 7-Eleven tries to argue the contrary, it has not led evidence to prove this. It has not said it does not have the money to afford a license, nor is that believable.

106. ***Proposed assignment is far too late.*** Assignments ought to be brought at the time of an asset sale.¹¹⁴ Here, the APA closed two years ago. The APA did not mention any ERP Software or Digiflex nor did the Debtor companies seek an assignment of the W&C Software Licenses at that time (which, even then, Digiflex submits would not have been appropriate based on the statutory prohibition against IP licenses). This Court has denied assignments when they were not raised at the time of the initial transaction.¹¹⁵ Here, there was no intention to assign the W&C Software Licenses at the time of the close of the initial transaction. The Monitor told Digiflex a year ago that there had been no assignment.¹¹⁶ The Monitor admitted that the assignment is only being sought now in response to Digiflex's application.¹¹⁷

107. ***7-Eleven has never run a distribution company and therefore cannot meet its obligations.*** Obligations under an agreement are not merely financial. In *HBC*, the Court found that the assignee could not perform the obligations under the lease agreements at issue, despite the fact that it could meet the

¹¹¹ 7-Eleven Brief at para 2.

¹¹² *HBC* at para 6 [Authorities, Tab 21].

¹¹³ [Eighth Report of the Monitor](#) dated January 24, 2024 at paras 2.0.6–2.0.9; [Thirteenth Report of the Monitor](#) dated November 18, 2024 at para 4.0.2; [Order Approving Interim Distribution, Monitor's Activities, and Professional Fees](#) filed November 27, 2024 at para 4.

¹¹⁴ *HBC* at para 43(g) [Authorities, Tab 21].

¹¹⁵ *AlphaBow Energy Ltd (Re)*, [2025 ABKB 550](#) [Supplemental Authorities, Tab 1].

¹¹⁶ Mardukhi Affidavit, Exhibit N.

¹¹⁷ Nov 21 Email.

financial obligations.¹¹⁸ It was the non-monetary obligations that concerned the Court. Among other things, the Court noted how the proposed assignees had never operated a department store before.¹¹⁹

108. Likewise, here by 7-Eleven's own evidence, they have never run a distribution company. 7-Eleven's own evidence also demonstrates that they are having problems with this: problems getting started, problems developing their own software.¹²⁰ Mr. Mardukhi even warned them this would probably happen, but no one listened.¹²¹ Mr. Mardukhi should not have to put his own life on hold because 7-Eleven decided to get into the distribution business.

109. 7-Eleven also continues to move the goal posts regarding the length of time it requires use of the Digiflex ERP Software. 7-Eleven initially thought it would launch its own ERP software come March 31, 2025, or the latest June 30, 2025.¹²² It now says February 2026. However, as 7-Eleven acknowledges, February 2026 is the latest in a series of extensions to the initial TSA. What 7-Eleven has not acknowledged is that the latest TSA Amendment allows for *indefinite extensions*.¹²³

110. ***Proposed assignment is not in pursuit of an ongoing concern.*** In *HBC*, Justice Osborne noted that assignments are not generally appropriate in a liquidating CCAA proceeding.¹²⁴ 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.¹²⁵ 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.¹²⁶

111. ***The W&C Software Licenses have an indefinite duration.*** In *HBC*, Justice Osborne noted how the remaining term of the contract is a relevant factor to the assignment analysis.¹²⁷ In the case of HBC, the

¹¹⁸ *HBC* at para 60 [Authorities, Tab 21].

¹¹⁹ *HBC* at para 135 [Authorities, Tab 21].

¹²⁰ [Buchanan Affidavit](#) at paras 12, 13, 16.

¹²¹ Mardukhi Affidavit, Exhibit G (PDF pp 110, 112).

¹²² Mardukhi Affidavit, Exhibit F (PDF p 108).

¹²³ The Third TSA Amendment provides that the TSA "will terminate on February 15, 2026, or on such other date as may be agreed to by the parties in writing" [emphasis added]: [Second Supplement to the Seventeenth Report of the Monitor](#) dated September 11, 2025, Appendix A (Third Amendment to the TSA) (PDF p 11).

¹²⁴ *HBC* at para 129 [Authorities, Tab 21].

¹²⁵ *HBC* at para 129 [Authorities, Tab 21].

¹²⁶ [Fourteenth Report of the Monitor](#) dated December 13, 2024 (**Monitor's 14th Report**) at para 4.0.3.

¹²⁷ *HBC* at para 43(m) [Authorities, Tab 21].

remaining term of the leases was significant, with the potential to not end until 2060 or 2091.¹²⁸ In the case of the W&C Software Licenses, as admitted by the Monitor, there is no set term or expiration date.¹²⁹

112. ***7-Eleven has not been acting in good faith.*** As this Court has stated, acting honestly is at the core of considering whether a party has acted in good faith.¹³⁰ 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;¹³¹
- (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 on January 1, 2025,¹³² and instead, sent the Monitor and the Monitor's counsel after Digiflex, who in turn, threatened to put Mr. Mardukhi in prison;¹³³
- (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 2025,¹³⁴ 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.¹³⁵

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

¹²⁸ *HBC* at para [139](#) [Authorities, Tab 21].

¹²⁹ [Monitor's 14th Report](#) at para 3.0.9.

¹³⁰ *San Francisco Gifts* at paras [14–16](#) [Authorities, Tab 22].

¹³¹ Mardukhi Affidavit at paras 36–45; 54–62.

¹³² Mardukhi Affidavit at paras 63–67.

¹³³ Mardukhi Affidavit at paras 68–78.

¹³⁴ Mardukhi Affidavit at paras 79–84.

¹³⁵ Mardukhi Affidavit at paras 90–91.

114. ***Proposed assignment would hurt Canadian policy on IP.*** Allowing the forced assignment of the W&C Software Licenses would be giving 7-Eleven a free ride to Canadian-protected IP. A decision that endorses this would undoubtedly weaken IP protection in Canada.

115. ***Proposed assignment would be endorsing breach of the W&C Software Licenses.*** Similar to the *Nortel* case above, it is clear that Wallace & Carey has breached the W&C Software Licenses by:

- (a) giving SEDCC access to Digiflex's ERP Software, contrary to the fact that the licenses were "non-transferrable" and Wallace & Carey's obligation to keep the Digiflex ERP Software confidential, pursuant to section 11 of the W&C Software Licenses; and
- (b) allowing its right to use the Digiflex ERP Software to be used with a new business acquisition, contrary to section 4 of the W&C Software Licenses.

116. ***Proposed assignment would be endorsing copyright infringement.*** Also similar to the *Nortel* case, it is clear that both Wallace & Carey and 7-Eleven have committed copyright infringement with respect to the Digiflex ERP Software. 7-Eleven by using the Digiflex ERP Software without a license, and Wallace & Carey by either using the Digiflex ERP Software outside of the terms of its licenses, and/or inducing 7-Eleven to commit copyright infringement.

117. These are just some of the factors as to why an assignment ought to be denied. There are more.

V. CONCLUSION

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

- (a) dismissing the Monitor's / 7-Eleven Canada, Inc.'s / SEDCC's application to forcibly assign the W&C Software Licenses;
- (b) lifting the stay in relation to Wallace & Carey and Loudon Bros such that it no longer operates in respect of Digiflex. Specifically, an order that paragraphs 15, 16, 17, 18 and 19 of the ARIO, as amended, in the within CCAA Proceeding no longer apply to Digiflex;
- (c) 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
- (d) awarding Digiflex costs on the section 11.3 Application and Digiflex's Application on the highest possible scale; and
- (e) such further and other relief as counsel may advise and this Honourable Court deems fit.

119. Digiflex seeks enhanced costs in respect of this Application,¹³⁶ 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 25th DAY OF NOVEMBER, 2025.

BURNET, DUCKWORTH & PALMER LLP

Per:



Chelsea Nimmo

Solicitor for Digiflex Information System Inc.

¹³⁶ *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
Case Law	
1.	<i>AlphaBow Energy Ltd (Re)</i> , 2025 ABKB 550
2.	<i>Black Hawk Mining Inc v Manitoba (Provincial Assessor)</i> , 2002 MBCA 51
3.	<i>Cinar Corporation v Robinson</i> , 2002 SCC 34
4.	<i>Fredrickson v Insurance Corp</i> , 1986 CanLII 1066 (BCCA)
5.	<i>In re Golden Books Family</i> , 269 BR 300 (2001)
6.	<i>In re NCP Marketing Grop</i> , 337 BR 230 (2005)
7.	<i>Re Nortel Networks Corporation et al</i> , 2016 ONSC 2732
8.	<i>In re Patient Education Medica, Inc</i> , 210 BR 237 (1997)
9.	<i>In the Matter of: Buildnet, Inc</i> , 2022 WL 31103235 (2002)
10.	<i>Remington Development Corporation v Enmax Power Corporation</i> , 2012 ABCA 196
11.	<i>Théberge v Galerie d'Art du Petit Champlain inc</i> , 2002 SCC 34
Secondary Sources	
12.	Hansard, Mark Schaan, Standing Committee on Finance, Number 184 , 1 st Session, 42 nd Parliament, Monday, November 5, 2018.
13.	Barry B Sookman, <i>Sookman: Computer, Internet, Electronic Commerce and Artificial Intelligence Law</i> (Toronto: Thomson Reuters Canada, 1988) (loose-leaf)
14.	Ruth Sullivan, <i>The Construction of Statutes</i> , 7th ed (Toronto: LexisNexis Canada Inc., 2022)