

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Edenbrook Capital, LLC v. Absolute
Software Corporation*,
2026 BCSC 1556

Date: 20260818
Docket: S236294
Registry: Vancouver

Between:

Edenbrook Capital, LLC

Petitioner

And

Absolute Software Corporation, Christy Wyatt, Daniel Ryan, and James Lejeal
Respondents

Before: The Honourable Justice Stephens

Reasons for Judgment

(Document Production Applications)

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Overview

[1] Following my decision ordering hybrid procedures in this petition proceeding, indexed as 2025 BCSC 1469 (the “RFJ”), the petitioner Edenbrook Capital, LLC (“Edenbrook”) has brought two notices of application, filed March 20, 2026 (“NOA #1”) and June 23, 2026 (“NOA #2”), seeking further document production by the respondent Absolute Software Corporation (“Absolute”).

[2] These are preliminary applications and in deciding the applications I make no binding factual findings in this proceeding.

[3] In the RFJ, I stated:

[86] In my view, there is one triable issue in this proceeding, that is:

1. whether the combination of the decisions to amend Absolute’s credit agreement in May 2023 (referred to as the “Second Amendment”), and enter into the 10% dissent condition, violated Edenbrook’s asserted reasonable expectations, and constituted oppression?

[4] I further stated:

[89] In my view, these two factual issues are relevant to the triable issue I have identified:

- (a) why did Absolute amend its credit agreement in 2023, prior to the plan of arrangement (the “Credit Agreement Amendment Issue”); and
- (b) why did Absolute agree with Crosspoint to a 10% dissent provision in the arrangement agreement (the “Dissent Condition Issue”)?

[5] In the RFJ, I held that documents shall be produced by Absolute as follows:

[122] Accordingly, Absolute shall produce documents in its possession related to:

- (a) the Credit Agreement Amendment Issue;
- (b) the Dissent Condition Issue; and
- (c) what was said between Edenbrook and Absolute at the meeting on February 28, 2023.

[6] The order from the RFJ was entered on November 17, 2025 (the “Order”). Paragraph 2(a) of the Order reads, as to document production:

- (a) Absolute shall produce documents related to the following issues, pursuant to Rule 7-1:
 - (i) Why Absolute amended its credit agreement in 2023, prior to the plan of arrangement;
 - (ii) Why Absolute agreed with Crosspoint to a 10% dissent provision in the arrangement agreement; and
 - (iii) What was said between the parties at the meeting between Edenbrook and Absolute on February 28, 2023;

[7] Paragraph 3 of the Order states the parties have liberty to “apply for further orders or directions as to the hybrid procedures ordered”.

[8] After entry of the order, Absolute listed and produced documents under R. 7-1 of the *Supreme Court Civil Rules* [Rules] with an initial list of documents dated December 19, 2025, and an amended list of documents dated May 8, 2026.

[9] Some of Absolute’s produced documents were contained in a condensed book placed before me at this hearing. For example, among other things, Absolute has produced: letters from Crosspoint to Absolute dated April 20, 2023, and May 9, 2023 [Compendium, Tabs 5 and 33]; correspondence involving counsel for Absolute with respect to a restatement of credit agreement, from May 2023 [Compendium, Tabs 23 and 24]; minutes of a special committee meeting dated May 9, 2023 [Compendium, Tab 34]; and a presentation document of Perella Weinberg Partners dated May 10, 2023 [Compendium Tab 36].

[10] However, Edenbrook applies for further and better document disclosure under the court’s Order. Edenbrook contends that all documents in Absolute’s possession relating to the Credit Agreement Amendment Issue and the Dissent Condition Issue have not been produced. Edenbrook also challenges Absolute’s claim of privilege over each of what I understand to be approximately 100 documents listed by Absolute in Part 4 to its amended list of documents.

NOA #1: Application for Document Production

[11] Edenbrook's NOA #1 originally sought an order that Absolute amend its list of documents to list further documents in 16 categories in accordance with para. 3 of the Order, to include asserted specified missing documents or categories of documents.

[12] In its written submissions, Edenbrook states that "Absolute should be ordered to comply with the Hybrid Procedures Order by conducting a broader search for and production of responsive records" (at para. 67).

[13] As matters developed, Edenbrook now seeks further document production from Absolute in 33 categories (two of which I am advised are no longer at issue). Absolute has set out these 33 demands, and its position in response, in an Appendix to its written submissions.

[14] The now 31 document demands at issue (which I refer to below by Item number) fall into two categories: (a) those relating to the first credit agreement amendment; and (b) other categories of documents.

First Credit Agreement Amendment Issue: Items 1–9

[15] I repeat for convenience para. 2(a)(i) of the Order:

(a) Absolute shall produce documents related to the following issues, pursuant to Rule 7-1:

(i) Why Absolute amended its credit agreement in 2023, prior to the plan of arrangement;

[16] In the parties' submissions at this hearing, their main disagreement regarding Items 1-9 is whether Absolute is required to list documents relevant to a March 2023 first credit agreement amendment (the "First Amendment"), which preceded the Second Amendment.

[17] Absolute contends that it is not legally obligated to produce documents related to the First Amendment under the Order, and has not done so, while

Edenbrook contends that these documents fall within the scope of para. 2(a)(i) of the Order.

[18] In oral submissions, Edenbrook submitted that, given the parties' positions on this issue, the court should clarify that para. 2(d)(i) of the Order includes a production obligation for both of the 2023 amendments to Absolute's credit agreements, including the First Amendment not just the Second Amendment.

[19] I take this to be a request for the court to interpret para. 2(a)(i) of the Order.

[20] Absolute submitted that what Edenbrook seeks is a variation of the court's order and none should be granted.

[21] I disagree that Edenbrook is seeking a variation of para. 2(a)(i) of the Order. Edenbrook's NOA #1 sought relief pursuant to para. 3 of the Order, which expressly granted leave for the parties to "apply for further orders or directions as to the hybrid procedures ordered" (see also RFJ at paras. 139, 179(3)); and in my view a request for interpretation of the Order falls within the ambit of para. 3.

[22] As such, the court may consider Edenbrook's NOA #1 as an application for further orders and directions, including on whether para. 2(a)(i) of the Order includes documents related to the First Amendment.

[23] Absolute states that if the court finds that its disclosure obligation was not limited to the Second Amendment, but instead included the First Amendment, then it has further documents to disclose (i.e. list in a further amended list of documents).

[24] I turn now to interpreting para. 2(1)(i) of the Order. When "interpreting an order a court must examine the pleadings in the action in which it was made, the language of the order itself, and the circumstances in which the order was granted": *Purssell v. Purssell*, 2026 BCCA 328 at para. 41. The Court of Appeal added:

[41] ... The reasons for judgment, where they exist, "will often be the strongest indicator of the objective meaning of the order": *R. v. Rajaratnam*, 2019 BCCA 209 at para. 156. To understand the reasons, the court may

consider the evidence and submissions of the parties at trial: *R. v. G.F.*, 2021 SCC 20 at para. 69.

[42] This contextual approach to interpreting a court order applies even if the order appears to be unambiguous. Where there is no apparent ambiguity, it is still necessary to construe a court order having regard to the factual context in which it was made, including the pleadings, the reasons for judgment, and the course of evidence at trial: *Der* at para. 31, citing *Re: Sharpe*, [1992] FCA 616 (Aust.) at para. 20.

[43] The interpretation of a court order is not governed by the subjective understandings of the parties. An issue as to whether a court decision has been properly interpreted by a judge is a question of law: *Der* at para. 32, citing *Hertz v. Kille*, 2023 SKCA 3 at para. 15.

[25] The language of para. 2(a)(i) of the Order does not limit document production to the Second Amendment to the credit agreement, and instead uses the words “in 2023”. Specifically, it states that “Absolute shall produce documents related to the following issues ... : (i) Why Absolute amended its credit agreement in 2023, prior to the plan of arrangement”. The amended petition refers to the First Amendment to the credit agreement, including in the context of the Second Amendment, at paras. 31 and 34(f). The evidence before me leading to the RFJ was that both the First and Second Amendments were made in 2023 (see also RFJ at para. 84).

[26] I have considered the RFJ, the terms of the Order, the context within which the Order was made, and the amended petition.

[27] I interpret para. 2(a)(i) of the Order to include the First Amendment as well as the Second Amendment.

[28] I find that para. 2(a)(i) of the Order includes documents in Absolute’s possession related to the First Amendment.

[29] Absolute submitted that proportionality must play a role in assessing Absolute’s disclosure obligations. Absolute opposed producing further documents on the basis that, among other things, “the time, cost, and effort to produce these documents is disproportionate to their probative value, particularly given their commercially sensitive nature”, although did not refer to evidence in this regard: see

e.g. Absolute's submissions, Appendix A, item 5. However, I do not find that principles of proportionality weigh against the production of such documents.

[30] I make no findings or conclusions about the First Amendment or Second Amendment in these Reasons but do find for the purposes of document production in this proceeding that documents relating to the First Amendment should be produced by Absolute.

[31] I find it is appropriate to order under para. 3 of the Order that documents relating to the First Amendment are included in para. 2(a)(i) of the Order, and that Absolute further amend its list of documents to list documents in its possession relating to the First Amendment to the credit agreement. Doing so does not preclude Absolute asserting privilege over a document falling within the scope of the production order.

[32] Even if para. 2(a)(i) of the Order was not interpreted to include documents relating to the First Amendment, I would have, based on the evidence on this application of documents produced to date, ordered that such documents be produced under para. 3 of the Order. I interpret para. 3 as providing the court with a power to make further orders or directions it considers appropriate in connection with the hybrid procedures, including document production.

[33] Without making any findings on this, documents produced to date by Absolute dated in May 2023 mention the First Amendment, including in the context of the Second Amendment (see e.g. Compendium, Tabs 12, 19, 33), and it appears the Second Amendment is referred to as "Restated First Amendment to Credit Agreement" (Compendium, Tab 31). The documents produced to date by Absolute indicate a sufficient relevant nexus between the two 2023 amendments, document production order para. 2(a)(i) and the triable issue set out in the RFJ, that I would have in any event found in all the circumstances that they warranted production and ordered them to be listed in this proceeding as a further order or direction under para. 3 of the Order.

[34] Having interpreted para. 2(a)(i) of the Order in these Reasons to include the First Amendment, further documents are required to be listed by Absolute. I thus do not grant the orders in Appendix Items 1 to 9, with liberty to re-apply following further production by Absolute.

Other Categories of Documents: Items 10–33 & Edenbrook’s Request for Affidavit of Documents

[35] I address the remainder of the disputed categories of documents, some of which deal with the Dissent Condition Issue.

[36] I find I may also consider these requests under para. 3 of the Order.

Rule 7-1 and Legal Context for Edenbrook’s Document Demands

[37] Absolute opposes all of these document demands. Absolute submits as a threshold matter that R. 7-1 has not been complied with:

50. While Edenbrook’s application should fail based on the above alone, an analysis of its approach having regard to the *Rules* further emphasizes its frailty. Edenbrook insists that this application is properly brought pursuant to the Hybrid Procedures Order and that it was not required to make an initial demand for additional document production or bring an application under Rule 7-1(13) in accordance with the *Rules*. Absolute disputes that position. The Hybrid Procedures Order provided that Absolute would produce documents “pursuant to Rule 7-1”. It follows logically that, if Edenbrook seeks an order for an Amended List of Documents, it ought to have complied with the requirements established by Rule 7-1 to obtain such relief, including in particular by taking the steps described in Rules 7-1(10) and (11), and bringing a proper application under Rule 7-1(13).

[38] While the process under R. 7-1 for demands for further documents was not followed in this case, the parties have now made submissions on the categories of documents listed at Appendix A, and in the interests of the efficient conduct of this proceeding I choose to consider them at this time.

[39] I consider Edenbrook’s application for document production, consistent with the jurisprudence under R. 7-1, and I choose to analyze the further document requests in accordance with the case law under R. 7-1(11).

[40] Some evidence that further documents exist should generally be provided for further document production: *Jang v. Jang*, 2019 BCSC 1325 at paras. 19, 27. The initial set of documents produced by a party can be one source of potential evidence supporting the existence of further documents and precipitating a document demand: see e.g. *Jang* at para. 41.

[41] What evidence will support an order for further production will vary from case to case (*XY, LLC v. Canadian Topsires Selection Inc.*, 2013 BCSC 584 at para. 40), and the court has a discretion to order document discovery without evidence to support the requests (*Cicada Ventures Ltd. v. KGHM Ajax Mining Inc.*, 2022 BCSC 1625 at para. 50).

[42] A court on a document production application is permitted to accept a statement of counsel that a diligent document search was undertaken and all relevant materials were produced: *Jang* at para. 26; *Imperial Parking Canada Corporation v. Anderson*, 2014 BCSC 989 at para. 41; *Cambie Forming Ltd. v. Accuform Construction Ltd.*, 2017 BCSC 127 at para. 34. I add Absolute submits that its production to date has been comprehensive, and in response to several document demands submits that responsive records have been produced.

[43] I now deal with Edenbrook's document demand Items 10–33.

Items 10–12

[44] These Items seek:

10. Any documents relevant to the reasons leading to the Second Amendment shared with Crosspoint in response to or together with the "due diligence tracker" that Absolute provided to Crosspoint on April 19, 2023.

11. Meeting minutes, notes, presentations, reports, memoranda, or emails related to the April 21, 2023 meeting with BSP at which Absolute discussed its engagement with counterparties for a potential PIPE transaction.

[45] Absolute submits that "[t]o the extent that Edenbrook seeks documents 'relevant to the reasons leading to the Second Amendment shared with Crosspoint', this is also an Unsubstantiated Assertion. Responsive records have been produced."

[46] I am not satisfied there has been a failure by Absolute to list responsive documents, and for Item 10 I do not grant an order to produce documents with a 'due diligence tracker'.

[47] Given the timing of this meeting, item 11 may be captured by my decision above regarding the production of documents related to the First Amendment, and I do not decide at this time whether it should be produced, with liberty for Edenbrook to re-apply.

[48] Item 12 was not pursued on this application.

Items 13 and 15

[49] Items 13 and 15 seek:

13. Emails or correspondence with Crosspoint regarding its concerns with the First Amendment, which concerns appear to have informed the Second Amendment, as noted by Perella Weinberg in its May 10, 2023 presentation to Absolute's Board.

...

15. Emails or correspondence with Crosspoint regarding the Second Amendment sent on May 7, 2023, or any internal discussion of informing Crosspoint of the Second Amendment.

[50] Absolute submits for both these Items that "[r]esponsive records have been produced." I am not satisfied on this application that there has been a failure to list responsive documents for these categories.

Items 14 and 16

[51] Items 14 and 16 seek:

14. Any correspondence between Absolute and Perella Weinberg or BSP leading up to or following Perella Weinberg's "urgent" request on May 6, 2023 for a meeting "re: the loan amendment", following a call Perella Weinberg received from BSP, or any internal emails or notes in relation to this meeting. This email does not introduce the loan amendment as a new concept but Absolute has not produced any prior correspondence with Perella Weinberg or BSP on this topic.

...

16. Any correspondence between Absolute and “King” (who appears to be a representative of BSP) or notes of those discussions.

[52] Given the unbounded time frame associated with these Items, disclosure of documents in these categories may be impacted by my decision above regarding the production of documents regarding the First Amendment, and I do not decide at this time whether they should be produced, with liberty for Edenbrook to re-apply.

[53] I do note the potential overbreadth of these demands, due to their lacking any timeframe.

Item 17

[54] Item 17 seeks:

17. Documents or correspondence following Lejeal's May 7, 2023 email to various people at Absolute providing a “quick update” regarding negotiations with Crosspoint and a to-do list for a “workflow” to rigorously evaluate our current forecast regarding the Credit Agreement. Absolute has produced no documents relevant to this workflow or evaluation of its current forecast, with the possible exception of one slide from a CFO presentation, titled “BSP Debt Covenant Forecast: Net Leverage Ratio” (the “Forecast Slide”). This email was sent one day before Absolute finalized the Second Amendment.

[55] Absolute submits: “Responsive records have been provided. Absolute has not identified documents underlying the email identified in connection with this request.”

[56] This request relates to a May 7, 2023 email written by the respondent James Lejeal that has been produced by Absolute and which refers to, among other things, “our BSP covenant”, and asks to “kick off a workflow” [Compendium Tab 12]. There appears to be evidence in support of the existence of potential documents with respect of the subject matter of item 17.

[57] However, I find this request—which would appear to be for any “[d]ocuments or correspondence following” a May 7, 2023 email—vague in its scope, and I decline to consider granting an order in these terms, with liberty to Edenbrook to re-apply with a revised request.

Items 18, 19, and 21

[58] Items 18, 19 and 21 seek:

18. Documents underlying the Forecast Slide, such as notes, reports, or emails.

19. Documents underlying Perella Weinberg's May 7, 2023 email setting out "talking points on the BSP amendment to the extent that Greg raises the topic on the call today". As noted above, this email raises a number of items that presumably informed the Second Amendment, including plans that had been "in place since March to pay down a small portion of the loan to ensure covenant compliance", an anticipated need to address the covenant issue again, and the notion that BSP was "not in the credit going forward". Absolute has produced no documents underlying these statements, such as prior correspondence with Perella Weinberg or internal analyses.

...

21. Documents explaining why changes to the terms of the Second Amendment were made on May 7 and 8, 2023, leading up to finalization of the amendment. These terms appear to have shifted significantly but Absolute has produced no discussion of these changes, including any internal emails or notes, or correspondence between Perella Weinberg and BSP (which are presumably documents within Absolute's control if not possession, as Perella Weinberg was acting as its agent).

[59] Absolute submitted, among other things that requests 18 and 19 could potentially seek "any and all documents in Absolute's possession that broadly relate to its financial position". In their reply submissions, Edenbrook submitted that it "does not seek to expand the Credit Agreement Issue into a 'wholesale investigation of Absolute's broader financial condition and reasons for entering into the Arrangement itself'" (but "to the extent that any of these facts also relate to the reasons why Absolute agreed to the Second Amendment, relevant documents are producible").

[60] These requests 18 and 19 use the word "underlying", which I find is unclear in the context of these document demands. I find request Items 18 and 19 to be vague in this respect and decline to consider granting an order in these terms, with liberty to Edenbrook to re-apply with a revised request.

[61] For item 21, Absolute submits that "[r]esponsive records have already been provided." I am not satisfied on this application that there has been a failure by Absolute to list responsive documents to item 21.

Items 20, 22, and 23

[62] These Items seek:

20. Internal emails or notes regarding the discussion about the Credit Agreement that appears to have occurred on the evening of May 7, 2023 between representatives of Absolute and Crosspoint.

...

22. Internal or external emails, notes, or other documents regarding a potential "pivot to a different buyer" that was communicated to BSP in the course of negotiating the Second Amendment.

23. Correspondence between Absolute and BSP regarding an agreed upon 5-day cushion to cure a default. A May 8, 2023 email from Blakes to Goodwin Law indicates that "BSP and Absolute have additionally agreed that if for some reason the deal with Crosspoint falls apart, Absolute has a 5-day cushion to cure the resulting default". Absolute does not appear to have produced any correspondence with BSP to that effect.

[63] Absolute submits that "[r]esponsive records have already been provided". I am not satisfied on this application that there has been a failure to list responsive documents to these categories.

Items 24–27

[64] Items 24–27 read as follows:

24. Emails or correspondence on May 8, 2023 providing a copy of the Second Amendment to Crosspoint. This appears to have been sent by Absolute's U.S. counsel, and would thus be a document within Absolute's control if not possession.

25. Documents underlying the minutes of the Special Committee's May 9, 2023 meeting at which Wyatt provided "an update on the amendment to the credit agreement with [BSP] and the negotiation process with BSP", including any notes or presentations prepared by Wyatt.

26. Any documents in the "Box Folder" in addition to Perella Weinberg's May 10, 2023 presentation. A May 10, 2023 email from Perella Weinberg notes that their presentation was uploaded to the Box Folder but it does not appear that Absolute has produced this folder or any other documents within it.

27. Correspondence regarding BSP pulling back its financing commitment to Crosspoint, to the extent this is related to the reasons for the Second Amendment and Absolute has a copy. A May 9, 2023 letter from Crosspoint to Absolute notes that BSP pulled back its commitment to Crosspoint. Absolute has produced no other documents to that effect.

[65] Item 24 was not pursued by Edenbrook at this hearing.

[66] I find item 25 to be vague (again, using the word “underlying”) and decline to consider granting an order in these terms, with liberty to Edenbrook to re-apply with a revised request.

[67] I find item 26 is overbroad, seeking “[a]ny documents in the ‘Box Folder’”.

[68] Item 27 seeks “[c]orrespondence regarding BSP pulling back its financing commitment to Crosspoint” and relies on a May 9, 2023 letter produced by Absolute in which Crosspoint states that Absolute was provided a copy [Compendium, Tab 33]. There is evidence of the likely existence of such a letter in Absolute’s possession, and it is referenced in a letter which is within the scope of the categories of documents ordered to be produced. As such, I find for item 27, being “[c]orrespondence regarding BSP pulling back its financing commitment to Crosspoint” referred to in the May 9, 2023 letter, any such document(s) in Absolute’s possession should be listed by Absolute.

Item 28

[69] Item 28 seeks:

28. Any additional text messages regarding the Credit Amendments. Absolute has produced a handful of isolated text messages, without indicating the author or recipient or the reasons for redactions. These text messages appear to be exchanges between representatives of Crosspoint and Perella Weinberg, although this is unclear. Edenbrook cannot see the context of these messages or whether there were any preceding or subsequent messages. It is surprising that someone at Absolute would send a handful of text messages on the Issues to external parties but no internal messages.

[70] Absolute submits that “[r]esponsive records have already been provided.”

[71] Given the unbounded time frame associated with these Items, this item may be impacted by my decision above regarding the production of documents related to the First Amendment, and I do not decide at this time whether they should be produced, with liberty for Edenbrook to re-apply.

Items 29–33: Dissent Condition Issue and Other Requests

[72] Items 29–32 relate to the Dissent Condition Issue.

[73] Absolute submitted for Items 29 to 31 that “[r]esponsive records have already been provided.”

[74] I am not satisfied on this application that there has been a failure to list responsive documents to Items 29–31.

[75] I find Item 32 is overly broad, seeking the “index to the virtual data room used by Absolute and Crosspoint and any documents uploaded to it, other than the First Amendment”.

[76] Item 33 sought production of all drafts of the plan of arrangement.

[77] Given the unbounded time frame associated with Item 33, this Item may be impacted by my decision regarding the production of documents regarding the First Amendment, and I do not decide whether they should be produced, with liberty for Edenbrook to re-apply.

Edenbrook’s Request in NOA #1 for Affidavit of Documents

[78] Edenbrook also sought in NOA #1, as alternative relief, an order that Absolute “serve an affidavit verifying the List of Documents” (at para. 1(b)).

[79] In *Araya v. Nevsun Resources Ltd.*, 2019 BCSC 262 at para. 19, the court stated the principles governing when an affidavit verifying a list of documents may be ordered. These were summarized in *Besler v. British Columbia (Minister of Public Safety and Solicitor General)*, 2026 BCSC 241:

[40] ... Under Rule 7-1, such an order may be made where documents significant to a party’s claim or defence have been omitted without adequate explanation, where there are plain and obvious gaps suggesting the document search was insufficient, where there has been unwarranted delay in delivering a list of documents, or where a party has demonstrated a dilatory or casual attitude to production that raises concern about the completeness of disclosure. The fact that counsel has managed the listing and production process does not displace the requirement that the party itself be able to

verify that its lawyer was given full access to all potential sources of relevant documents. Nor does the size or complexity of a case preclude such an order; even in large or document-intensive proceedings, the court may require a verifying affidavit where it is not satisfied that document searches have been diligent or that material omissions have been adequately explained.

[80] I do not find that circumstances have been demonstrated with respect to the First Amendment documents that merit ordering an affidavit of documents. The parties have been in a disagreement in regard to para. 2(a)(i) of the Order. An affidavit will not be ordered where there has been a genuine dispute about what is producible: *Grandmaison v. Berkenbos*, 2018 BCSC 1329 at paras. 30, 36.

[81] Nor do I find an affidavit of documents is merited in respect of other categories of documents sought by Edenbrook on this application.

[82] Edenbrook's request for an affidavit of documents is therefore dismissed.

NOA #2: Privileged Documents Application

[83] NOA #2 is Edenbrook's challenge to every document over which privilege has been claimed in Part 4 (Schedule D) of Absolute's list of documents. Absolute initially did not provide an itemized list of documents over which privilege is claimed, but added an itemized Part 4 privilege list in its amended list of documents on May 8, 2026.

[84] From the evidence before me, it appears that some of the disputed documents have been substantially redacted.

[85] Edenbrook seeks an order that Absolute deliver to me copies of all documents in Schedule D of its amended list of documents, including unredacted copies of all documents that Absolute has produced with redactions, "so that the Court may assess the validity of Absolute's privilege claims" and an order that Absolute produce an amended list of documents relisting all documents which the Court determines are not privileged.

[86] At this hearing, Absolute and Edenbrook both assented to me, as case management judge, reviewing the documents over which privilege is claimed to determine the validity of the claim, even though I am also the hybrid trial judge.

[87] Absolute's position is that I, as case management judge, can and should review the approximately 100 Schedule D documents to verify the validity of the claim of privilege from the face of the documents and information about the senders and recipients.

[88] At this hearing Edenbrook's first position is that the court should order Absolute to deliver an affidavit in support of its privilege claims—something I will return to below. While an affidavit of documents was not sought as relief in NOA #2, Edenbrook relies on para. 1(b) of its NOA #1 seeking an order that Absolute “serve an affidavit verifying the List of Documents”.

Edenbrook's Request for an Order that Absolute Provide an Affidavit

[89] Edenbrook submitted that the court should order Absolute to provide an affidavit substantiating its claims to privilege.

[90] This court has observed that “[t]here is a delicate balance in claims of solicitor-client privilege. Sufficient evidence must be provided to support the asserted claim, but not so much evidence that the confidentiality of the communications is lost”: *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at para. 29 [*Bilfinger*]. In *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180 [*Keefer Laundry*], the court stated: “With respect to Legal Advice Privilege, it should often be possible for the client to swear an affidavit regarding the communication”: at para. 88.

[91] While there are cases where the party asserting a challenged claim of privilege files an affidavit to substantiate the privilege (see e.g. *Bilfinger* at para. 30; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at para. 17 [*Camp*]), Absolute has chosen not to do so in this case. The extent of the evidence I have about the documents over which

privilege is claimed is Absolute's amended list of documents which in Schedule D of Part 4 describes the author, recipients, and date of each such document.

[92] Edenbrook relies on caselaw, including *Bilfinger* at para. 53 and *Legacy A&B Properties Inc. v. Custodio*, 2025 BCSC 2683 at para. 37. None of these cases involved the court ordering a party, in the first instance, before documents have been reviewed by the court, to file an affidavit supporting privilege claims: see e.g. *Bilfinger* at para. 54. In *Bilfinger*, the court had reviewed certain documents and concluded that Bilfinger was required to obtain an English translation of the documents and then "provide opposing counsel with any further affidavit evidence it thinks it is able to provide, identifying the nature of the privilege asserted over these documents, if it remains asserted": at para. 53. In *Bilfinger* the party asserting privilege had already filed an affidavit to substantiate its claims of privilege: para. 50.

[93] Assuming that Edenbrook's request for relief requiring Absolute to deliver an affidavit substantiating its claims of privilege is captured in the relief sought in NOA #2 or NOA #1, I am not satisfied on the authorities provided to me that I can or should at this time order Absolute to deliver an affidavit supporting the validity of its claims of privilege in the documents in Part 4.

Request for Court Review of Absolute's Privileged Documents

[94] The *Rules* state that the court has a discretion to review a document over which privilege has been claimed to determine the validity of a claim of privilege. Rule 7-1(20) states:

Inspection of document by court

(20) If, on an application for production of a document, production is objected to on the grounds of privilege, the court may inspect the document for the purpose of deciding the validity of the objection.

See also *Bilfinger* at para. 36; *Keefer Laundry* at para. 73.

[95] The "party asserting privilege has the onus of proving it on a balance of probabilities for each document": *Bilfinger* at para. 32; *Camp* at para. 66.

[96] In *Keefer Laundry*, the court stated:

[75] There may be occasions when a party cannot provide the information required to establish privilege without revealing the privileged information itself. In such cases, it is entirely appropriate for the court to review the documents themselves to determine the question of privilege. However, parties should be discouraged from relying on the court to review documents as a method of saving the parties the time and trouble of preparing the evidence necessary to establish the basis for privilege.

[97] In *Ralmax Properties Ltd. v Pt. Ellice Properties Ltd.*, 2021 BCSC 2454 [*Ralmax*], Justice Saunders stated that “the practice in British Columbia is for the court to engage in a document-by-document review only when the affidavit evidence leaves the court in doubt” (at para. 11). Justice Saunders then notes:

[12] In my view, to justify the diversion of scarce judicial resources to the examination of purportedly privileged documents, the party resisting disclosure on the basis of privilege must in the first instance satisfy the court on affidavit evidence that *prima facie* grounds for a claim of privilege are made out, recognizing that there are limits on what may be disclosed without waiving privilege. In the case of claims of privilege over communications with third parties such as accountants, the affidavit evidence must describe how the relationship of the third-party to the client, or the solicitor, or the circumstances in which the communication was made, brings each communication within the scope of the privilege as described in *Bilfinger* and *Redhead*. If the affidavit evidence establishes *prima facie* grounds, the court may then proceed to exercise its jurisdiction under Rule 7-1(20).

See also *1155201 BC Ltd. v. NV Highway Properties Ltd.*, 2022 BCSC 1100 at para. 12; *Ross v. Bragg*, 2020 BCSC 337 at para. 10. In *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCSC 813, rev’d on other grounds 2016 BCCA 471, the court stated: “a review [to assess the validity of a party’s claim of privilege] is permitted by Rule 7-1(20), but should generally be undertaken only where the affidavit evidence leaves the court in doubt”.

Findings: Edenbrook’s Application for Court to Review Absolute’s Part 4 Documents

[98] The considerations looked at when determining whether the court should review documents over which privilege is asserted to verify a claim of privilege include: the number of documents; considerations of efficiency; the importance of

the claims in the context of the case; the affidavit evidence adduced in support of the claim of privilege; and whether a party “appears confident that this Court will be able to determine the asserted claims of privilege simply by looking at the documents themselves”: *Bilfinger* at paras. 39-45; *Keefer Laundry* at paras. 73, 77.

[99] In *Bilfinger*, Justice Griffin (then of this court) stated: “Based on the parties’ agreement that they do not object to the trial judge reviewing the documents over which privilege is claimed, I see no need to consider referring the application to another judge”: at paras. 14, 45. See also *Camp* at para. 21 (“the willingness of the defendant to make the Privileged Documents available for my review renders unnecessary any determination of whether such review is appropriate in the face of Mr. Hanman’s affidavit”).

[100] In *Keefer Laundry*, the court exercised its discretion to review 18 documents “in an effort to bring a just, speedy, and inexpensive determination of this dispute, and in the hope that it might be apparent on the face of the documents whether they are privileged by Legal Advice Privilege”: at para. 77.

[101] In this case, I am the case management judge. There are applications set for October 13–15 and 19, 2026, before me, and the merits hearing is currently scheduled to begin February 8, 2027. While not dispositive, this militates in favour of an efficient determination of Edenbrook’s challenge to Absolute’s claims of privilege, if possible.

[102] In my view, the court has a discretion to review a document to validate a claim of privilege under R. 7-1(20), and an agreement by the party asserting privilege that the court should review all of its Part 4 documents to validate its claims of privilege is not on its own necessarily evidence on which a court might, without more, choose to exercise its discretion to do so. Relatedly, this Court in *Keefer Laundry* “discouraged” parties to litigation “from relying on the court to review documents” to validate claims of privilege (para. 75).

[103] Nevertheless, despite the relatively larger number of documents at issue in this case compared to the cases I have mentioned, I am satisfied it is appropriate,

and exercise my discretion under R. 7-1(20), to review Absolute's privilege claim for validity (subject to any further order or directions of the court), having regard to the evidence about these documents contained in the amended list of documents, and noting that it is the position of both parties that I should do so. I add that this process has been followed in *Camp*, and *Bilfinger*; see also *Acciona Wastewater Solutions LP v. Greater Vancouver Sewerage and Drainage District*, 2026 BCCA 62 at paras. 7 and 16 (where an assigned case management/trial judge had reviewed a sample of documents over which privilege had been claimed).

Process for the Rule 7-1(20) Review

[104] Counsel proposed that I take a binder of all the listed documents over which Absolute asserts privilege and review them following the submissions made at this hearing. I declined to do so at that time.

[105] In *Donell v. GJB Enterprises Inc.*, 2012 BCCA 135, the Court of Appeal supported the comments by Gray J. in *Keefer Laundry* at paras. 74 and 75 that an open process is preferable.

[106] In my view, similar considerations expressed in *Keefer Laundry* should inform the process which in my view should be followed under R. 7-1(20) in the circumstances of this case.

[107] In my view, while not necessary in every case, at least in the first instance in this case, the court should review and hear submissions on the documents over which privilege is claimed in open court with all parties present. At that time, submissions may be made by Absolute on a document as it is reviewed with the court (without revealing the privileged information), with an opportunity for Edenbrook's counsel to make submissions in response to Absolute's submissions to the court during the hearing (without being provided copies of the documents over which Absolute asserts privilege).

[108] To be clear, nothing in these Reasons directs or compels Absolute, during the Rule 7-1(20) review hearing, to divulge to Edenbrook information over which privilege has been asserted, or to waive privilege.

[109] I add that, in *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, the court commented on the process with respect to judicial review of documents over which privilege has been asserted, as follows:

(4) Judicial Workload

22 It is suggested that the need to examine many records could place an undue burden on the reviewing judge. It is not obvious that disclosure to the requester's counsel will necessarily reduce that workload. In any event, there are techniques available to help reduce the volume of information that must be reviewed. At a minimum, for example, the 459 pages could be organized in categories that exhibit common characteristics relevant to the solicitor-client privilege. Nor do I see how an increase in judicial workload or other administrative considerations make absolutely necessary disclosure to the requester's counsel for the purpose of arguing the judicial review application. Convenience is not a reason to release information subject to a claim of solicitor-client privilege.

[110] My impression, from certain redacted documents produced by Absolute contained in the condensed book, is that at least some of the documents over which Absolute asserts privilege may have common redactions. Further, it seems that, given the names of authors and recipients in the list of documents, it may be possible to categorize the documents in Part 4 in such a way that "exhibit common characteristics relevant to the solicitor-client privilege" (*Goodis* at para. 22), for a ruling on such categories, to potentially make the process of privilege review more efficient. I add that in *Acciona Wastewater Solutions LP*, the court was asked to rule on a subset of documents over which privilege was asserted: para. 16.

[111] I therefore direct that Absolute make efforts to categorize its Part 4 documents in some way, and consider whether (as in *Acciona Wastewater Solutions LP*) a subset of the Part 4 documents could be presented to the court for review, to facilitate the just, speedy and inexpensive determination process of adjudicating Edenbrook's challenge to Absolute's claims of privilege.

[112] The parties may book a one-day hearing before me, in consultation with Supreme Court Scheduling, for the purpose of an in court R. 7-1(20) review.

Conclusion and Orders

[113] In NOA #1, for the reasons given, I do not grant para. 1 in the terms sought, but I do order as follows:

1. Paragraph 2(a)(i) of the Order is interpreted to include the First Amendment, and Absolute shall deliver an amended list of documents accordingly.
2. Absolute shall also list any further document(s) in its possession in category Item 27.
3. Edenbrook has liberty to re-apply for production of documents in the other categories I have referred to in these reasons.
4. the relief sought in para. 1(b) of NOA #1, seeking an affidavit verifying the List of Documents, is dismissed.

[114] In NOA #2, I do not grant the relief as sought, but I direct that:

1. Edenbrook's NOA #2 may be set down before me for a one-day hearing, to receive submissions from the parties and consider the validity of the objections to production of the documents on grounds of privilege, under R. 7-1(20), subject to any further order or directions of the court.
2. Absolute shall make efforts to categorize the Part 4 documents, and consider whether a subset of the Part 4 documents could be presented to the court for review.
3. The Parties may request, in consultation with Supreme Court Scheduling, a one-day hearing before me in NOA #2.

[115] Costs of NOA #1 shall be in the cause, and costs of NOA #2 shall be determined when it is ultimately disposed of, subject to any further order of the Court.

“Stephens J.”