

CANADA / JUDGMENT

Edenbrook Capital, LLC v. Absolute Software Corporation

2025 BCSC 1469

COURT

Supreme Court of British Columbia

DECIDED

30 July 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCSC 1469 Edenbrook Capital, LLC v. Absolute Software Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Edenbrook Capital, LLC v. Absolute Software Corporation,

2025 BCSC 1469

Date: 20250730

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

(Petitioner's Application to Convert Oppression Petition to an Action,
and Individual Respondents' Application to Strike Affidavit Evidence)

Counsel for the Petitioner:

C. Ferris, K.C.

D. Conklin

J. Mayfield

Counsel for the Respondent, Absolute Software Corporation:

S.K. Boyle

A.C. Luchenko

I. Loten

Counsel for the Respondents, Christy Wyatt, Daniel Ryan and James Lejeal:

T.M. Tomchak

V.A. Luxford

K. Ussher, Articled Student

Place and Date of Hearing:

Vancouver, B.C.

April 14-16, 2025

Supplemental Submissions of the Respondent, Absolute Software Corporation

April 25, 2025

Supplemental Submissions of the Respondents, Christy Wyatt, Daniel Ryan and James Lejeal

April 25, 2025

Supplemental Reply Submissions of the Petitioner

April 28, 2025

Place and Date of Judgment:

Vancouver, B.C.

July 30, 2025

Table of Contents

Overview.. 5

Background Facts to these Preliminary Applications. 8

The Plan of Arrangement 8

Oppression Proceeding. 9

Issues.	11
Legal Background - Oppression Claim..	12
Oppression Proceeding under the BCA Commenced by Petition.	12
Substantive Principles - Oppression.	13
Issue #1: Should the petition be converted to an action?.	14
The Parties' Positions.	14
Motion to Convert Petition to Action: Legal Principles / Applicable Test	18
Discussion and Findings - Motion to Convert to Action.	22
Are there triable issues?.	22
The undesirability of multiple proceedings.	25
The desirability of avoiding unnecessary costs and delay.	25
Whether the particular issues involved require an assessment of credibility.	25
The need for the court to have a full grasp of the evidence.	25
Whether it is in the interests of justice that there be pleadings and discovery.	25
The Potential for a Hybrid Procedure.	26
Respondents' Preliminary Issues.	26
Issue #2: If not converted to trial, should hybrid procedures be ordered?.	28
Document Disclosure in Certain Categories.	28
In-Court Cross Examination on Affidavits at Petition Hearing.	30
Oral Discoveries Not Ordered.	31
Summary Judgment/Summary Trial Applications Permitted.	31
Conclusion: Hybrid Procedures.	32
Issue #3: Should portions of Edenbrook's affidavit evidence be struck out?.	32
Law re Striking out Affidavit Evidence Preliminarily.	34
Findings - Application to Strike Edenbrook's Affidavit Evidence.	35
Hearsay and Relevancy Objections.	35
Opinion Evidence Objections.	36

Objections of Impermissible Conclusions/Argument and Speculation/Hyperbole/Inflammatory Language. 37

Asserted Improper Reply Affidavit Evidence. 38

Summary - Decision on Admissibility Objections. 38

Comment on Petitioner's Damages Claim.. 38

Conclusion and Orders Made. 39

Schedule A RELIEF SOUGHT IN THE AMENDED PETITION.. 41

Overview

- [1] These Reasons decide two preliminary applications in this proceeding.
- [2] The petitioner, Edenbrook Capital, LLC ("Edenbrook"), has commenced the within petition proceeding seeking pursuant to s. 227 of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA], among other things, a declaration that the affairs of the respondent Absolute Software Corporation ("Absolute") were conducted, and that the powers of the respondents Christy Wyatt, Daniel Ryan, and James Lejeal (the "Individual Respondents") were exercised, in a manner oppressive and unfairly prejudicial to Edenbrook as a shareholder of Absolute (see relief sought in amended petition, at Schedule A). Edenbrook also seeks an order compensating Edenbrook for the fair value of the Absolute common shares sold by Edenbrook in early July 2023 (see Schedule A).
- [3] The allegations in Edenbrook's oppression petition relate, broadly speaking, to certain conduct of Absolute leading up to an arrangement provided for in a plan of arrangement involving Absolute and Crosspoint Capital Partners, LP ("Crosspoint") which was approved by this Court on July 4, 2023, pursuant to the BCA.
- [4] In its amended petition, Edenbrook contends that "Absolute's affairs were conducted, and the powers of the Individual Respondents were exercised, in a manner that was contrary to Edenbrook's reasonable expectations and was oppressive to and unfairly prejudiced Edenbrook's interests by harming and reducing Absolute's value" (amended petition, part 2, para. 15).
- [5] Edenbrook's petition emphasizes two decisions made by Absolute which preceded court approval of the plan of arrangement: (1) an amendment to Absolute's credit agreement leading up the plan of arrangement (para. 15(a)), and (2) a 10% dissent condition made part of the arrangement agreement. Regarding the dissent condition, Edenbrook submits at part 2, para. 15(b) of its amended petition:

Absolute also agreed in the Arrangement Agreement to a condition that Crosspoint could decline to complete the Arrangement if a shareholder holding more than 10% of Absolute's common shares validly exercised dissent rights in respect of the Arrangement.

- [6] Edenbrook contends that the combination of these two events caused oppression, as submitted at para. 15(b) of its amended petition:

This [dissent] term, coupled with the Second Amendment to the Credit Agreement, effectively prevented Edenbrook (as a holder of more than 10% of Absolute's common shares) from exercising dissent rights in respect of the Arrangement. Edenbrook believed, and expressed in a public letter to the Company, that Absolute should have revised the terms of the proposed transaction and provided more disclosure regarding the Credit Agreement. Edenbrook was not, however, prepared to try to prevent the Arrangement from closing because doing so would have likely had dire consequences for Absolute in light of its amended Credit Agreement, and thus for Edenbrook's investment in the Company. Accordingly, Edenbrook did not want to risk voting against the Arrangement or seeking to challenge its fairness at the final order hearing.

- [7] The amended petition pleads, at para. 16, that "[t]he Respondents are therefore responsible for compensating Edenbrook for the actual fair value of the Absolute common shares sold by Edenbrook in early July 2023, over and above the price per share received by Edenbrook for such sale."
- [8] On this preliminary hearing, interlocutory relief is sought by Edenbrook converting the petition to an action, and by the Individual Respondents striking parts of Edenbrook's affidavit evidence. Specifically:
- (a) Edenbrook seeks an order directing that this petition be converted to an action and referred to the trial list, or alternatively an order for hybrid procedures in this oppression petition proceeding (in the terms set out in Schedules A and B of the notice of application filed October 9, 2024, respectively); and
 - (b) The Individual Respondents seek, by way of cross-application, orders striking a considerable amount of the affidavit #1 of J. Brolin filed by Edenbrook in this proceeding, and the entirety of the affidavit #2 of J. Brolin (or alternatively substantial portions of it), on the ground the impugned evidence is unnecessary, vexatious, and/or contains inadmissible evidence (notice of application filed October 10, 2024, para. 1).
- [9] Absolute, in response to the application to convert, also raised, and invited the Court to consider, several "preliminary issues", described further below. Some of the arguments made before me on this preliminary application could tend to prematurely draw this Court into a consideration of the merits of this petition. However, I decline to engage in a consideration of, or express views on, the merits of the petition on these applications.
- [10] Despite the number and nature of issues argued on these applications, these applications are not a hearing on the merits.
- [11] Since the applications are preliminary in nature, I will not be making any findings of fact. In deciding them, I make no factual findings binding on any other judges or presiders hearing any matters in this proceeding.

- [12] The principles in *Cepuran v. Carlton*, 2022 BCCA 76, govern the application to convert the petition to an action. In my view, *Cepuran* instructs that courts should strive to adjudicate a petition proceeding in a summary fashion, where possible to do so in a fair manner. Under *Cepuran*, there is a strong pull toward the summary process, unless fairness clearly dictates otherwise.
- [13] *Edenbrook* relies on *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 [BCE], in support of its request for a full trial of this petition. However, while BCE calls for consideration of context, and highlights the "fact-specific" nature of oppression proceedings (paras. 59, 62), it does not follow that such considerations militate strongly in favour of adjudication by way of a full trial -- instead, there must be good reason to do so. To do otherwise would risk frustrating the BCA's objective of determining such proceedings, by default, in a summary process.
- [14] It also does not follow that since oppression is an equitable remedy and context is required, this leans toward conversion to an action and a full trial. Instead, the assessment of an appropriate procedure tilts instead toward a summary adjudication.
- [15] Doing so is consistent with two core concepts emanating from *Cepuran*: striving to achieve adjudicative fairness, and respecting the legislature's preference in the BCA for summary determination. As held in *Hryniak v. Mauldin*, 2014 SCC 7 at para. 24, "undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes" (emphasis in original).
- [16] Having regard to these broad considerations, for the reasons which follow, I find that the petition should not be converted to an action. Instead, it shall be determined with hybrid procedures pursuant to R. 16-1(18) of the Supreme Court Civil Rules, with document production made by *Absolute* in categories which I identify below, and cross examination of certain witnesses on their affidavits at the petition hearing. I further apply to this proceeding Rules 9-6 and 9-7, with appropriate modifications as necessary for a petition proceeding, to permit a merits-based preliminary application to be made (subject to any limitations established by law) prior to the petition hearing.
- [17] In their cross-application, the Individual Respondents challenge a substantial amount of *Edenbrook's* evidence. I find that the impugned affidavit evidence is not clearly inadmissible -- since the admissibility issues raised are arguable -- and decline to strike it preliminarily; these issues may be revisited at any merits hearing in this proceeding. Save and except for any paragraphs (or portions thereof) of the impugned affidavit evidence which *Edenbrook* has agreed should be removed, the Individual Respondents' application is otherwise adjourned generally and may be reset at the same time as the petition hearing or any other merits hearing in this proceeding, subject to any further order of the Court: see *Stubbington v. British Columbia (Child Welfare)*, 2025 BCSC 839 at para. 111(c).

Background Facts to these Preliminary Applications

The Plan of Arrangement

[18] The plan of arrangement is described by the Individual Respondents at para. 6 of their written submissions as follows:

On July 27, 2023, Crosspoint Capital Partners, LP ("Crosspoint") completed a take-private transaction of Absolute whereby an affiliate of Crosspoint acquired all of the issued and outstanding shares in the capital of Absolute (the "Shares", the holders of which are the "Shareholders") by way of a statutory plan of arrangement (the "Plan of Arrangement"), approved by the Shareholders and the holders of RSUs, PSUs, deferred share units ("DSUs"), and Options (collectively, the "Incentive Securities") of the Company and this Court (the "Arrangement"), pursuant to an arrangement agreement entered into between Absolute and Crosspoint on May 10, 2023 (the "Arrangement Agreement"), and the Shares were delisted from the Toronto Stock Exchange (the "TSX") and the Nasdaq Global Market (the "NASDAQ"). The value of the Arrangement is approximately \$657 million USD.

[Emphasis in original.]

[19] Edenbrook describes the arrangement as involving a take-private transaction whereby an affiliate of Crosspoint acquired all issued and outstanding shares of Absolute for a price of \$11.50 USD per share.

[20] It is not at issue that Absolute applied and, on July 4, 2023, obtained an order from this Court approving a plan of arrangement pursuant to the BCA.

[21] On July 5-6, 2023, Edenbrook says that in response to Absolute's conduct, which it complains of in this proceeding, it sold all of its Absolute common shares. In particular, Edenbrook says it sold 5,078,589 U.S.-listed shares for prices between \$11.40-\$11.43 USD and 428,400 Canadian-listed shares for \$15.23 CAD per common share, for total compensation net of commissions of \$62,724,172 USD (Edenbrook written submissions at para. 39).

Oppression Proceeding

[22] On September 12, 2023, Edenbrook filed this oppression petition.

[23] Edenbrook alleges that the affairs of Absolute were conducted in a manner that was oppressive and unfairly prejudicial to Edenbrook during the months leading up to a statutory plan of arrangement approved by this Court in Action No. S-233790, Vancouver Registry (the "Arrangement").

[24] Edenbrook alleges (in its written submissions at para. 5) that:

Shortly before seeking approval of the Arrangement from its shareholders and this Court, Absolute:

- (a) created a potential liquidity crisis for the Company by accelerating its repayment obligations in respect of a \$275,000,000 USD loan (the "Term Loan") by four years, and agreeing to repay the Term Loan immediately if the Arrangement did not proceed (the "Loan Acceleration"); and

- (b) entered into an arrangement agreement with Crosspoint (the "Arrangement Agreement") that included a term allowing Crosspoint to refuse to complete the Arrangement if a shareholder holding more than 10% of Absolute's common shares exercised dissent rights (the "Dissent Condition").

[Emphasis in original.]

- [25] Edenbrook argues that "[t]ogether, the Loan Acceleration and Dissent Condition effectively prevented Edenbrook (then a holder of over 10% of Absolute's common shares) from exercising its dissent rights with respect to the Arrangement" (para. 6).

- [26] In its written submissions (paras. 43-44), Edenbrook contends that:

The Loan Acceleration and Dissent Condition together placed the Company in a position where it was required to either proceed with the sale to Crosspoint or face the prospect of having to immediately repay the Term Loan, which it did not have sufficient capital to do and would potentially trigger a self-imposed liquidity crisis and insolvency proceedings.

This mechanism essentially forced the sale of the Company at below fair value, compromising the Company's ability to maximise value for long-term shareholders like Edenbrook.

- [27] Johnathan Brolin, a representative of Edenbrook, has made two affidavits in this proceeding.

- [28] The corporate respondent, Absolute, filed a petition response on December 20, 2023, denying that any such oppression or unfair prejudice occurred, and maintaining that the board of Absolute acted in accordance with the plan of arrangement approved by this Court and in the best interests of the company.

- [29] The Individual Respondents filed the Individual Respondents response on December 20, 2023, repeating and relying on the Absolute response and denying any personal liability.

- [30] Absolute relies in its petition response on the affidavits of James Lejeal, Christy Wyatt, and Daniel Ryan (who are the Individual Respondents).

- [31] At the time of her affidavit, Ms. Wyatt was the president, chief executive officer, and a member of the board of directors (the "Board") of Absolute.

- [32] At the time of his affidavit, Mr. Lejeal was the chief financial officer of Absolute.

- [33] At the time of his affidavit, Mr. Ryan was a director on the Board of Absolute, and was previously chairman of the Board from December 2013 to 2023.

- [34] Edenbrook filed its application for an order to convert the amended petition to an action and have it referred to the trial list on October 9, 2024. The next day, the Individual Respondents filed their application to strike Edenbrook's affidavit evidence.

[35] I am advised that Absolute has not to date produced an unredacted copy of the credit agreements, in this proceeding or publicly, to which the allegations in this oppression proceeding relate. Edenbrook submits that "[t]he Respondents have produced no documents at all underlying either the Loan Acceleration or the Dissent Condition or any meeting minutes, notes, or memoranda considering these terms" (Edenbrook reply submissions at para. 7).

Issues

[36] The following issues arise on these preliminary applications:

1. Should the petition be converted to an action (Edenbrook's application)?
2. If not, should hybrid procedures be ordered in this petition proceeding (Edenbrook's application)?
3. Should portions of the petitioner's affidavit evidence be struck out (Individual Respondents' application)?

Legal Background - Oppression Claim

Oppression Proceeding under the BCA Commenced by Petition

[37] An oppression proceeding may be commenced pursuant to s. 227 of the BCA:

Complaints by shareholder

227 (1) For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

- (2) A shareholder may apply to the court for an order under this section on the ground
- (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
 - (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

[Emphasis added.]

[38] The legislature's use of the word "apply" in s. 227 of the BCA -- that is, an application is to be filed -- means that an oppression proceeding is commenced by way of the summary procedure of a petition.

[39] Rule 2-1(2)(b) of the Rules states:

Commencing proceedings by petition or requisition

- (2) To start a proceeding in the following circumstances, a person must file a petition or, if Rule 17-1 applies, a requisition:
- (b) the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court;

[Emphasis added.]

Substantive Principles - Oppression

- [40] The legal principles regarding the law of oppression are set out in BCE. I do not intend here to summarize all the applicable principles with respect to oppression, but I note that BCE states that there are two related inquiries in a claim for oppression:
- [68] (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?
- [41] The reasonable expectations inquiry has two aspects, as stated in 1168556 B.C. Ltd. v 1164429 B.C. Ltd., 2024 BCSC 1727 [1168556 B.C.]:
- [79] Thus, there are two aspects to determining the "reasonable expectations" of the shareholder. These involve subjective and objective considerations, as follows:
 - a) What were the expectations of the shareholder? This is an evidentiary issue going to the subjective expectations of the complainant.
 - b) Were these expectations reasonable? This requires an objective analysis of the complainant's expectations to determine their reasonableness.

[Emphasis in original.]

- [42] The Court in BCE also held that:

- (a) Oppression is an equitable remedy. It seeks to ensure fairness -- what is "just and equitable" (para. 58);
- (b) Like many equitable remedies, oppression is fact-specific (para. 59); and
- (c) "In the context of whether it would be 'just and equitable' to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations": para. 62.

- [43] Proof of a claimant's reasonable expectations can be informed by various factors, including general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders: BCE at paras. 70-83.
- [44] However, in my view, it does not necessarily follow from BCE that an oppression proceeding involving a significant transaction must be attended by full rights of discovery and a full trial. To approach the issue in this way would not give due weight to the legislative intent in the BCA for summary process as a default, nor the proper approach to a conversion application as held in Cepuran.

Issue #1: Should the petition be converted to an action?

The Parties' Positions

- [45] Collectively, over 300 pages of written submissions were provided for these two applications (as well as certain handed up tables). I do not attempt to summarize all the various arguments here; I instead provide a summary of their positions on this issue below.
- [46] Edenbrook submits that the petition should be converted to an action because (paras. 2-3, written submissions):

The Oppression Proceeding is replete with complex triable issues, conflicting factual records requiring an assessment of credibility, and significant gaps in the Respondents' evidence. At the final hearing, the Court will consider evidential and legal issues concerning corporate finance, public company disclosure obligations, corporate restructuring, duties arising on a proposed plan of arrangement, and the interaction between arrangement and oppression proceedings.

Edenbrook requires discovery rights and viva voce evidence to fairly present its case, and the Court will require a full grasp of all of the evidence and the benefit of cross-examination to determine the issues. Hybrid procedures will not be sufficient to enable a just resolution. The value of Edenbrook's claim is potentially in the tens of millions of dollars, justifying any added cost of a trial.

- [47] Edenbrook argues that "[h]ere, a trial is both necessary and desirable to resolve the Oppression Proceeding"; and notes that "[c]onsistent with this, the Supreme Court of Canada's decision in BCE was made on a complete evidentiary record following a trial" (para. 86).
- [48] Absolute opposes conversion to a full trial and argues at para. 6 of its written submissions:

Edenbrook seeks to complicate matters at issue, add items that do not appear in its Amended Petition and tender evidence for the specific purpose of creating conflicts to support converting this matter. This is impermissible. There are far fewer matters at issue than Edenbrook submits and indeed far fewer points of conflict. No meaningful case has been made for why lesser procedures such as cross-examination would not suffice.

[49] Absolute also raises issues going to the merits of this petition and argues that "several preliminary issues must be taken into account in determining the appropriate procedure in this case" (para. 5). It submits that the "circumstances also give rise to numerous bars to Edenbrook's claim, which are relevant to whether the Amended Petition should be converted to an action". I discuss some of these below. However, among other things, Absolute argues that "Edenbrook's allegations simply do not give rise to oppression at law" (para. 7). Further, it argues that the Dissent Condition is a "a market-standard provision pursuant to which if Shareholders holding 10% or more of the Shares exercised Dissent Rights, Crosspoint had the option not to close the Arrangement (or proceed)" (para. 7) -- although I add I am unable to, and do not, assess the merit of this "market-standard" assertion on this preliminary application, nor make any comment about that.

[50] Absolute also argues, at para. 10 of its written submissions, that:

Edenbrook gestures vaguely to matters with no relation whatsoever to the Dissent Condition and that would, if established, be actionable by all Shareholders and indeed the Company. However, no derivative claim or class action has been advanced. Both would require a preliminary application that Edenbrook could not overcome and, more fundamentally, Edenbrook has no interest in the best interests of Absolute or its other Securityholders, only in maximizing its own value.

[51] Absolute contends that "Edenbrook is a sophisticated investor with a history of seeking extensive discovery in litigation in the United States" (para. 2) and argues, at para. 59, that Edenbrook has engaged in:

tactics that the process contemplated in our statute deliberately seeks to avoid; exposing good faith business decisions to litigation by individual shareholders seeking to maximize only their position would proliferate meritless and costly strike suits.

[52] Absolute contends that the petition record is already comprehensive; that Edenbrook's description about gaps in evidence are overstated; that Edenbrook's credibility concerns should be viewed with skepticism; and that Edenbrook has introduced issues that are not relevant to the proceedings. It submits that "Edenbrook has not elected to commence a derivative action or class action in relation to its allegations" (para. 73). It argues Edenbrook has failed to identify any bona fide triable issues or material conflicts in the evidence requiring a trial to be resolved.

- [53] Absolute argues the factors in *Cepuran* militate against conversion to an action or implementing hybrid procedures. It contends that the interests of justice "weighs most heavily in favour of dismissing the Conversion Application given the deficiencies with Edenbrook's claim and its continuing disregard for the proper procedures of this Court" (para. 135).
- [54] The Individual Respondents adopt the submissions of Absolute with respect to the preliminary issues. They argue there are a number of preliminary issues that bar Edenbrook from advancing its claim.
- [55] They also argue that "Edenbrook seeks to delay and obfuscate this matter by converting it to an action or alternatively using hybrid procedures" (para. 2). They argue, at para. 88, that: converting the Amended Petition to an action would result in unnecessary time and expense, and would be prejudicial to the Individual Respondents. This is particularly so as only five out of the 31 "triable issues" raised in the Edenbrook's Notice of Application relate to the Individual Respondents. These few issues can be adjudicated on the existing evidentiary record before the court, and should be. Moreover, to the extent that Edenbrook claims further evidence is required on issues where the Respondents bear the burden of proof, the Individual Respondents are satisfied with the evidentiary record as it stands.
- [56] They argue, at para. 106, that the triable issues in this case can all be decided on the current evidentiary record:

With respect to the alleged triable issue identified at subparagraph 45(a)(v) of the Notice of Application, details pertaining to the information Absolute provided to shareholders regarding its financial performance and ability to service its debt has been provided in the affidavits of the Individual Respondents and in the documents in the record.

[Emphasis in original.]

- [57] They argue that "[t]he nature of the claims against the Individual Respondents is important context in weighing the prejudice that they will face if the Conversion Application is successful"; and that "the evidentiary record is sufficient for the court to determine that there is no oppressive conduct as alleged, and in any event, the alleged oppressive conduct is not attributable to the Individual Respondents" (para. 132).
- [58] Focussing on the petition proceeding as it relates to the allegations against them personally, the Individual Respondents argue, at para. 136:

The allegations made against the Individual Respondents are serious, and they have been outstanding for well over a year. The Individual Respondents have also faced inappropriate personal attacks, and while Edenbrook has agreed to strike certain of those, the Individual Respondents have nevertheless had to endure those allegations. Edenbrook proposes to drag the Individual Respondents - individuals - through a lengthy trial, when only 5 out of the 31 alleged "triable issues" relate to them. This is prejudicial and unnecessary when the evidentiary record is

sufficient to answer the allegations against them.

- [59] On the third day of the hearing of these preliminary applications, Edenbrook handed up to the Court two documents entitled: "Summary of Gaps in Respondents' Evidence" and "Affidavit Evidence of the Individual Respondents in Response to Impugned Paragraphs of Brolin #1 - Comparison Table".
- [60] The Individual Respondents objected to Edenbrook's reliance on these documents, handed up on the last day of the hearing. The Court gave leave for supplemental submissions to be received from the respondents about them.
- [61] Absolute submitted these documents should be disregarded, and in any event do not assist Edenbrook. The Individual Respondents submit, among other things, that the Comparison Table is an unfair and misleading characterization of the state of the evidence.
- [62] Having given the respondents an opportunity to respond in writing to these charts, I exercise my discretion to allow, and have considered, these two charts, together with the respondents' supplemental written submissions.

Motion to Convert Petition to Action: Legal Principles / Applicable Test

- [63] The "BCA contemplates a speedy resolution of oppression claims by way a petition proceeding on affidavits": *Weisstock v. Weisstock*, 2022 BCSC 209 at para. 32, quoting *Nielsen v. Nielsen*, 2015 BCSC 1622 at para. 20. That "is so even if there are some disputed facts": *Nielsen* at para. 17. This is at least in part because, as explained in *Nielsen*:
- [18] Oppressive conduct on the part of the company towards a shareholder is prejudicial. Equally, allegations of oppressive conduct that lack merit can be prejudicial to the company. Both should be dealt with summarily if possible.
- [64] The "modern approach to civil procedure" within a petition proceeding "allow[s] the trial courts to tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits": *Cepuran* at para. 159, citing *Hryniak*; see also R. 16-1(18) and R. 22-1(4).
- [65] *Cepuran* holds that the following approach must be taken:
- [160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

- [66] A main factor in this analysis is whether there is a "triable issue", which is described as a disputed issue of fact or law, which is not bound to fail: *Cepuran* at paras. 140, 146; *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160 at para. 80 [Beedie].
- [67] It makes sense that not all petition proceedings which raise triable issues need to be converted to an action: adjudication of a disputed issue of law may well not require a full trial; and, for some disputed facts, cross examination on an affidavit may suffice to do justice when, for example, credibility is at issue.
- [68] I add that the parties referred me to a substantial number of prior cases which addressed requests to convert petitions to an action. For its part, Absolute argues among other things that "Edenbrook has failed to refer to a single case where an application to convert an oppression proceeding involving a public company was granted" (para. 11). While reference to prior caselaw is helpful, each case turns on its own facts and circumstances, and I find none of these prior cases deal with circumstances equivalent to those which are before me.
- [69] For example, in *New Great Land Developing Ltd. v. 1034113 B.C. Ltd.*, 2023 BCSC 2207 [New Great], an oppression petition was converted to an action. The Court observed that prior cases have found mere cross examination on affidavits insufficient when "a disputed oral agreement is foundational to the claim" (para. 68) and there were gaps in the evidence. In *New Great*, the Court found that conversion to an action was required, since the:
- [70] agreement at issue was not clearly drafted and had 'a number of uncertainties and ambiguities in the clauses relied on by both parties,' which required 'ascertaining the parties' intentions' with respect to certain crucial clauses in dispute and for which 'the surrounding circumstances or factual matrix are thus of considerable relevance in this case'
- See also *Taj Park Convention Centre Ltd. v. Sher-A-Punjab Community Centre Corporation*, 2022 BCSC 473 [Taj Park].
- [70] The Court in *New Great* found that since the "parties dispute[d] the terms of an oral agreement credibility will be a critical issue", and, noting the number of disputes that needed to be resolved, held that conversion to an action was required: paras. 73, 74.
- [71] In *Phaneuf v. 0896459 B.C. Ltd.*, 2022 BCSC 1706, the Court converted a BCA petition to an action where the petition sought to rectify the articles of incorporation of companies based on an allegation that they fail to accurately record a prior agreement: paras. 3, 78.
- [72] Here, unlike *New Great*, there is no alleged agreement between the petitioner and the corporate respondent that requires interpretation. There is no dispute over the articles of incorporation, nor is there a claim for rectification: *Phaneuf* at para. 3. It does not appear there is any disputed issue of contractual interpretation calling for an assessment of the factual matrix for interpretation purposes: *Taj Park* at paras. 49, 58. There do not appear to be any significant disagreements regarding any financial arrangements that existed between the parties, attended by serious credibility issues and evidentiary gaps that need to be resolved: *Capital Now Inc. v. Munro*, 2023 BCSC 197; *New Great* at para. 45.

[73] Phaneuf states, at para. 47, three issues which arise where a petition is sought to be referred to the trial list:

1. Is the proceeding one that was properly initiated by petition?
2. If so, does the proceeding raise triable issues?
3. If so, should the triable issues be determined by referring the petition to the trial list or by hybrid procedures within the petition proceeding?

[74] The following factors should be considered in deciding whether to convert a petition to an action (New Great at para. 40, citing Terasen Gas Inc. v. Surrey (City), 2009 BCSC 627):

- a) the undesirability of multiple proceedings and the desirability of avoiding unnecessary costs and delay;
- b) whether the particular issues involved require an assessment of the credibility of witnesses;
- c) the need for the court to have a full grasp of the evidence; and
- d) whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute.

[75] The starting point is that oppression proceedings should be conducted through a summary procedure, and that legislative intention is relevant, as Cepuran explains:

[158] It should be kept in mind that the starting point for those matters that are properly brought by way of petition is that the Rules contemplate that a summary procedure will be appropriate: Conseil scolaire at paras. 29-30. This is different than the starting point for an action. There should be good reason for dispensing with a petition's summary procedure in favour of an action. The mere fact that there is a triable issue is no longer a good reason.

[163] I do agree with the PGT that where an enactment authorizes a petition proceeding, the statutory context will often be an important factor in determining whether a hybrid petition procedure should be adopted to assist in deciding contested issues, rather than referring the matter to trial.

[Emphasis added.]

[76] Cepuran also holds that the Court should apply R. 1-3 when making an assessment of whether a trial should be ordered, or whether hybrid procedures will suffice:

[166] At a minimum, when considering whether to order the use of hybrid procedures within the petition proceeding itself, or to refer the matter to trial, the court will need to be mindful of the object of the Rules set out in R. 1-3: to secure the just, speedy and inexpensive determination of every proceeding on its merits, and so far as can be achieved, in ways that are proportionate to the amount involved, the importance of the issues, and the complexity of the proceeding.

[77] In my view, these principles must also be informed by Hryniak. The Court therein held that the "principal goal [is] . a fair process that results in a just adjudication of disputes" and "the best forum for resolving a dispute is not always that with the most painstaking procedure": para. 28.

[78] In my view, the principle of proportionality, discussed in Hryniak, which informs the choice of adjudicative procedure, must also be informed by legislative intent. Here, through the BCA's choice of a petition procedure, the legislature has signalled that conversion to an action should be done only when considered necessary, putting emphasis decidedly on the side of the use of petition procedures as a legislative preference.

Discussion and Findings - Motion to Convert to Action

Are there triable issues?

[79] A triable issue is an issue of fact or law that is not bound to fail: Phaneuf at para. 54, citing Beedie at para. 80; see also Phaneuf at para. 59.

[80] A number of issues are advanced by Edenbrook as triable issues.

[81] But, Edenbrook's petition does not challenge the decision of this Court of July 4, 2023, that the arrangement provided for in the plan of arrangement is fair and reasonable, and instead Edenbrook's focus is Absolute's preceding conduct. The amended petition states, at part 3, para. 54:

Edenbrook is not challenging the determination on July 4, 2023 by the Supreme Court of British Columbia that the Arrangement was fair and reasonable. Rather, Edenbrook pleads that the conduct of Absolute and of the Individual Respondents leading up to the Arrangement -- -- in particular, Absolute and the Individual Respondents agreeing to the Second Amendment, and then agreeing to provisions in the Arrangement Agreement that effectively prevented Edenbrook from exercising dissent rights -- was oppressive and unfairly prejudicial to Edenbrook's interests and impaired the fair value of Absolute and its issued and outstanding common shares.

[82] Further, Edenbrook's petition does not make a claim for an alleged misrepresentation by Absolute or the other respondents.

[83] In response to Edenbrook's pleaded claim for oppression, Absolute's response to amended petition pleads, among other things, that it acted in the best interests of the company in the circumstances (paras. 67, 70):

Absolute's Board acted at all material times, including when entering into the agreements and amendments that facilitated the Arrangement, in the best interests of Absolute.

The Company acted in accordance with its best interests in connection with the Arrangement and all surrounding actions, agreements and negotiations. Valid commercial reasons exist for Absolute's actions and must be viewed in the context of the entire circumstances and events leading to the Arrangement.

[84] The respondents' affidavit evidence, opposing this petition, refers to the 2023 amendments to the credit agreements. In addition, the respondents' evidence addresses the dissent condition. For example, Ms. Wyatt's affidavit #1 states that it "was not inserted in order to specifically preclude Edenbrook, or any Shareholder, from exercising dissent rights":

Mr. Brolin appears to take issue with the condition in the Arrangement Agreement that if holders of more than 10% of the Company's common shares validly exercised dissent rights in respect of the Arrangement, Crosspoint could elect not to proceed with the transaction. This term was required by Crosspoint in order to provide for reasonable transaction certainty, and was conceded by the Company as part of eliciting the best available consideration for Shareholders. It was not inserted in order to specifically preclude Edenbrook, or any Shareholder, from exercising dissent rights, and in fact the term did not have such effect. To the best of my knowledge, Edenbrook did not ask if Crosspoint would waive this condition.

[85] Similarly, as to the Dissent Condition Issue, the Individual Respondent Mr. Ryan in his affidavit #1 deposes that the "Special Committee did not discuss the shareholdings of any particular shareholder, including Edenbrook, in conjunction with assessing this 10% threshold":

The Arrangement provided for dissent rights, and the agreement with Crosspoint provided that was a condition precedent (which could be waived by Crosspoint) that the aggregate number of shares held by Shareholders that have validly exercised dissent rights in connection with the Arrangement could not exceed 10% of the outstanding shares. My recollection is that the Special Committee viewed the 10% threshold as within customary market terms, and reasonable middle-ground approach in the circumstances and taking into account the very balanced overall terms negotiated. I have reviewed the Brolin Affidavit and I understand that he is of the view that this threshold prevented Edenbrook from exercising its dissent rights. The Special Committee did not discuss the shareholdings of any particular shareholder, including Edenbrook, in conjunction with assessing this 10% threshold.

[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?

In my view, the above question is a disputed issue of mixed fact and law and Edenbrook is not bound to fail -- it is a triable issue.

[87] I am satisfied the triable issue I have identified has been pleaded in the amended petition.

[88] I decline on this preliminary application to adjudicate the respondents' preliminary issues on this application to consider whether this triable issue is bound to fail.

[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")?

[90] I am not persuaded that Edenbrook's list of in excess of 30 issues (at para. 84 of Edenbrook's written submissions) are all triable issues. Nor do the 34 issues listed in Schedule A to its written submissions (entitled "Gaps and Conflicts in the Evidentiary Record") raise additional triable issues. Many of the issues are not specifically pleaded as grounds of oppression, and some in any event, are simply variations on the theme of, or subsumed by, the triable issue which I have identified.

[91] I do not accept that the question of Edenbrook's reasonable expectations, on its own, is a triable issue requiring a full trial.

The undesirability of multiple proceedings

[92] This factor is not applicable.

The desirability of avoiding unnecessary costs and delay

[93] This factor militates against a trial, and toward a summary procedure, in a hybrid process if appropriate.

Whether the particular issues involved require an assessment of credibility

[94] To the extent that determining what happened may require a credibility assessment, I find that in-court cross examination on affidavits will likely be sufficient to fairly do so.

The need for the court to have a full grasp of the evidence

[95] This factor again can be achieved if witnesses are cross examined in court on their affidavits, such that if credibility issues must be decided, it can be done justly.

[96] In my view, BCE's call for context does not default toward a trial; instead, the converse is true post-Cepuran: there is a strong pull toward the summary process of a petition proceeding, with hybrid procedures where necessary.

Whether it is in the interests of justice that there be pleadings and discovery

[97] I do not see the need for pleadings and oral discovery to do justice in this case, having in mind the legislature's preference for a summary process.

[98] The plan of arrangement concerned a significant transaction, and I acknowledge that the amount at issue can at times militate in favour of conversion to action: New Great at para. 61.

[99] Nevertheless, the size of the transaction at issue here is but only one factor.

The Potential for a Hybrid Procedure

[100] I must consider whether hybrid procedures would save time and expense while maintaining the Court's ability to make a fair and just determination: New Great at para. 64.

[101] The Court must be cautious, when seeking to craft a fair procedure, to avoid a situation of "diminishing returns", where "the summary process is expanded to allow the filing of additional lengthy affidavits, cross-examination on affidavits and a broader scope of cross-examination, selective document disclosure, and other features of the trial process" at which point "the process that looks like a trial, should be trial": New Great at paras. 39, 65, citing Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc., 2009 BCSC 1701.

[102] However, as discussed further below, in my view hybrid procedures are sufficient for the fair and efficient adjudication of this oppression proceeding.

Respondents' Preliminary Issues

[103] Absolute advanced, on this application, five preliminary or merits-based issues -- asserted substantive defects to this petition proceeding -- and contends the existence of preliminary issues are "relevant to process" (Absolute's written submissions at para. 84).

[104] First, Absolute submits that "Edenbrook's claims do not amount to oppression" (para. 88). It submits, among other things, "[t]he oppression remedy is not designed to compensate shareholders for unrealized profit Expectations" and "[a]n oppression claim relating to the compensation approved pursuant to a statutory plan of arrangement for a public company is even less likely to succeed" (paras. 89-90).

[105] Absolute also submits, at para. 91:

A derivative action would have entitled Edenbrook to the trial procedure it now seeks, should leave have been granted. Edenbrook should not be permitted to flout the legislative intent of the leave requirement in the BCBCA.

[106] Second, Absolute submits that Edenbrook does not have standing. Absolute argues "Edenbrook is barred from seeking a court determination of the 'fair value' of the Shares after electing not to exercise the Dissent Rights granted by Absolute in the Plan of Arrangement, and instead electing to sell its Shares" (para. 16(c)).

[107] Third, "Absolute submits that Edenbrook's claim is an impermissible attack on the Court's approval of the Arrangement and/or is res judicata" (para. 95).

[108] Fourth, Absolute submits that Edenbrook's claims were released in the plan of arrangement (para. 104).

- [109] Fifth, Absolute argues that Edenbrook's claims are unsupported by evidence. (para. 108).
- [110] These issues all go the merits of this oppression proceeding and I decline to decide these preliminary issues on these applications. In my view, considering them would prematurely draw the Court into the merits of the petition proceeding, which would be undesirable at a preliminary stage.
- [111] Further, I decline to place any weight on this application on Absolute's submission that Edenbrook is an activist shareholder, which should somehow inform how the Court should assess these applications. These assertions have no bearing on the conversion application, and I make no comment or findings in this regard. Simply put, the BCA provides a right to commence an oppression proceeding, in legally permissible and appropriate circumstances (see s. 227); Edenbrook has commenced an oppression proceeding, and, despite Absolute's perspective about, or asserted characterizations of, Edenbrook, on which I place no weight for the purposes of these applications, this petition proceeding should be decided according to law, including pursuant to the applicable provisions of the BCA.
- [112] I do not find that the existence of these preliminary issues militates for or against a trial of this petition proceeding.
- [113] That Absolute has identified preliminary issues will, however, inform my consideration of potential hybrid procedures, to the extent I consider it may be fair and appropriate in the circumstances to order that the summary trial or summary judgment rules are applicable to this petition proceeding.

Issue #2: If not converted to trial, should hybrid procedures be ordered?

- [114] In my view, hybrid procedures should be ordered.
- [115] The court has flexibility when deciding what hybrid procedures are appropriate in the circumstances, as stated in *Ai Kang Capital Inc. v. Xing*, 2024 BCCA 175:
- [37] Judges faced with applications to convert petitions into actions now have considerable flexibility in deciding what procedures are most appropriate. They may find that the summary procedure traditionally available for the hearing of a petition is adequate; equally, they may find that the arguable issues are sufficiently pervasive and complex as to require full-scale trial procedures. However, they are not limited to choosing one option or the other. They can also choose hybrid procedures. Rules 22-1(4)(a) and (b) allow a judge to order examination or cross-examination of witnesses, either before the hearing or in court. Rule 22-1(4)(c) provides a judge with the ability to make order for limited discovery of documents. Rule 22-1(4)(e) gives a court flexibility in the types of evidence it chooses to receive. Judges at first instance, in short, have broad discretion as to the procedures they adopt and the manner in which they tailor them to a case.
- [116] In my view, the following hybrid procedures are appropriate and should be ordered.

Document Disclosure in Certain Categories

- [117] In my view, the triable issue I have identified can be fairly and adequately adjudicated in a summary process if there is some prior disclosure by the respondent Absolute and there is the ability to test the evidence of the main affidavits with cross examination on affidavits during the petition hearing.
- [118] In my view, document disclosure in certain categories will likely assist to provide further context for the allegations made in this petition.
- [119] Documents should be produced by Absolute related to the triable issue I have identified regarding the Credit Agreement Amendment Issue and the Dissent Condition Issue.
- [120] As well, the amended petition pleads a meeting between Edenbrook and Absolute on February 28, 2023 (referred to at part 2, para. 28 of the amended petition). The evidence suggests the meeting occurred between Mr. Brolin (of Edenbrook) and Ms. Wyatt (of Absolute). There appears to be a dispute in the affidavit evidence about what was said at that meeting. I find that disclosure by Absolute of any documents that relate to what was said between the parties at this meeting would provide additional factual context and likely assist in the fair and just adjudication of this proceeding.
- [121] I am not persuaded, on the pleadings and evidence filed, that other factual disputes require document disclosure in order to do justice in this case.
- [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.
- [123] I am not persuaded that document production in any other categories are required in the circumstances. For example, several other allegations pleaded in the amended petition concern things that were said or done by Absolute to the knowledge of Edenbrook, leading up to when the arrangement closed, that in my view do not specifically require document production by Absolute (beyond the categories I have identified) in order to fairly adjudicate this oppression claim.
- [124] The document disclosure order does not preclude the assertion of privilege over a document falling within the scope of production order. Claims of privilege over documents in the categories ordered to be disclosed shall be assessed (and adjudicated if necessary) in the usual way, if and as they may arise.
- [125] More generally, nothing in this order requires production of documents in this proceeding which is not permitted by law.

[126] The Individual Respondents contend that an order to produce documents would constitute a "fishing expedition" (Individual Respondents' submissions, para. 124). However, I do not find that metaphor analytically useful in this context. In my view, the documents ordered to be produced are necessary in order to fairly adjudicate the pleaded allegation in this claim under the BCA and do justice in this case in a hybrid summary procedure petition.

In-Court Cross Examination on Affidavits at Petition Hearing

[127] Further, in my view there should be in-court cross examination on the affidavits of Ms. Wyatt, Mr. Lejeal, and Mr. Ryan (the Individual Respondents) and of Mr. Brolin (the representative for the petitioner Edenbrook). This can occur during the petition hearing.

[128] To the extent that credibility may be at issue in the adjudication of this oppression claim, a determination of credibility can be made with in-court cross examination on affidavits, with document disclosure by Absolute, in advance of the hearing, in the categories I have ordered.

[129] Further, and relatedly, to the extent there may be conflicts in the affidavits on certain points, that can be explored through cross examination.

[130] The amended petition pleads that the Individual Respondents "personally benefitted significantly from the Arrangement" (para. 63). Portions of the Individual Respondents' affidavit evidence speaks to the topic of remuneration. I do not regard Edenbrook's assertion of personal benefit to the Individual Respondents to require a trial of this proceeding, and this assertion, if and to the extent it may be relevant to the pleaded claim in the oppression proceeding, can be adequately canvassed in cross examination after the document production I have ordered has taken place.

[131] I do not accept the Individual Respondents' position that, "if the court decides to order cross-examination that there should be one representative for the Petitioner and one representative for the Respondents" (written submissions, para. 141). As stated above, I find that all Individual Respondents should be cross examined on their affidavits.

[132] However, I find that Mr. Brolin should also be cross examined on his affidavits at the petition hearing.

Oral Discoveries Not Ordered

[133] In my view, oral discoveries of the respondents are unnecessary, and document disclosure and cross examination on affidavits are sufficient to achieve fairness in the context of the legislative intent expressed in the BCA.

[134] Absolute did not seek document disclosure, nor discovery, of Edenbrook in the event hybrid procedures were ordered, and I do not make any such order in these Reasons.

Summary Judgment/Summary Trial Applications Permitted

[135] Rule 16-1(18) permits the Court to order that any of the Rules apply to a petition proceeding:

Powers of court

(18) Without limiting the court's right under Rule 22-1 (7) (d) to transfer the proceeding referred to in this rule to the trial list, the court may, whether or not on the application of a party, apply any other of these Supreme Court Civil Rules to a proceeding referred to in this rule.

[136] I further apply Rules 9-6 and 9-7, with any appropriate modifications as necessary for a petition proceeding, to permit merits-based preliminary applications to be made (subject to any limitations established by law) prior to the petition hearing.

Conclusion: Hybrid Procedures

[137] There is merit to the Individual Respondents' argument that they "are entitled to have these issues [arising in this petition] resolved without unnecessary delay" (para. 136) and Absolute's argument to similar effect. That is because doing so implements the legislature's clearly spoken intent that corporate disputes of this nature be resolved by default in a summary petition procedure, with a full trial being the exception, not the rule.

[138] I am cognizant of the comments in Phaneuf, citing Boffo at para. 50, relied on by the petitioner (Edenbrook's submission at para. 85) that:

[72] the Court ought to be cautious in creating a hybrid proceeding that permits the parties the benefits of certain pre-trial and trial mechanisms but denies them others since there is "a very real risk of diminishing returns where the summary process is expanded to allow the filing of additional lengthy affidavits, cross-examination on affidavits and possibly a broader scope of cross-examination, selective document disclosure, and other features of the trial process". As Ballance J. observed, "at some point, the process that looks like a trial, should be a trial".

[139] However, I am satisfied that the tailored hybrid procedures I have identified can result in a fair and just adjudication of this oppression petition, likely in a more efficient way than a trial, and in a manner that is consistent with the intent of the legislature. The parties are at liberty to apply for further orders or directions as to the hybrid procedures I have ordered: *Royal Bank of Canada v. British Columbia*, 2016 BCSC 2195 at para 59.

Issue #3: Should portions of Edenbrook's affidavit evidence be struck out?

- [140] The Individual Respondents seek to strike out substantial portions of the petitioner's affidavit evidence contained in the Affidavit #1 of J. Brolin ("Brolin #1") and the entirety of the Affidavit #2 of J. Brolin ("Brolin #2") (or alternatively substantial portions of Brolin #2). The Individual Respondents also challenge the admissibility of a document appended to Brolin #1, Exhibit "F", referred to as the Absolute Timeline, which the Individual Respondents contend does not fall into the business records exception and is inadmissible.
- [141] Edenbrook agreed that some portions of the impugned evidence should be removed, but the majority of the impugned evidence still remains at issue.
- [142] The Individual Respondents' consolidated chart of impugned evidence, provided to the Court, indicates that in excess of 50 paragraphs (or portions thereof) of Brolin #1 and Brolin #2 are impugned as well as the entirety of Brolin #2.
- [143] The Individual Respondents contend that they "seek to improve the efficiency of the proceedings by removing inadmissible evidence from the record so that this matter may proceed expeditiously to resolution": written submissions at para. 2.
- [144] Broadly speaking, the objections to admissibility are made on the following grounds:
- a) irrelevant evidence;
 - b) hearsay;
 - c) conclusions of fact or law and legal argument;
 - d) opinion evidence;
 - e) speculation;
 - f) hyperbolic and inflammatory language; and
 - g) improper reply
- [145] In its application response filed November 7, 2024, Edenbrook consented to removing several paragraphs or portions of paragraphs, without prejudice to its right to raise the facts set out in those paragraphs at discovery, trial, and/or in supplemental affidavits (application response dated November 7, 2024, part 1). The challenge to that part of Edenbrook's affidavit evidence is no longer at issue on the Individual Respondents' application.
- [146] The Individual Respondents contend that the "balance of the evidence that [they] seek to strike is unnecessary, frivolous, and vexatious" (para. 24).
- [147] The Individual Respondents submit I should first decide their application to strike certain of Edenbrook's affidavit evidence, then, from what evidence remains, decide Edenbrook's application to convert the petition to an action (or for hybrid procedures).

Law re Striking out Affidavit Evidence Preliminarily

- [148] This Court "has the jurisdiction to strike portions of affidavits which contain passages which are inadmissible": *McMahon v. Harper*, 2017 BCSC 2328 at para. 108, citing *Chamberlain v. School District #36 (Surrey)*, 60 B.C.L.R. (3d) 311, 1998 CanLII 6723 (S.C.), at para. 15.
- [149] However, the "unusual step of striking out portions of affidavits prior to the hearing on the merits should be taken only where the material is clearly not relevant and where it would be prejudicial to the other party to not strike it out before the hearing": *Braaten v. Kelowna (City)*, 2022 BCSC 2105 at para. 29, citing *Evans Forest Products Ltd. v. British Columbia (Chief Forester)*, [1995] B.C.J. No. 729 at para. 8, 1995 CarswellBC 3021 (S.C.).
- [150] The "same principle applies to an interlocutory application to strike out affidavits that are said to be inadmissible for reasons other than irrelevance". That is, "portions should be struck out on an interlocutory application only where the material is clearly inadmissible, including where nothing is to be gained by considering admissibility in the context of resolving the substantive dispute": *Braaten* at para. 30.
- [151] There is also support for the proposition that it is not appropriate to rule on admissibility until all of the evidence has been heard: *Taheri v. Hosseini*, 2023 BCSC 801 at paras. 40-43.
- [152] The Court in *McMahon* elaborates that:
- [109] The mischief of including inadmissible "evidence" in affidavits is that it requires the opposing party to determine how to respond, lengthens the time required for the court and the parties to review and consider affidavits, and risks the decision-maker falling into legal error by relying on inadmissible material. The chambers hearing process is poorly suited to making rulings on admissibility of passages in affidavits. As a result, usually the court simply chooses not to give any weight to the inadmissible passages, without any formal order regarding the inadmissible passages.
- [153] I apply a "clearly inadmissible" standard to the Individual Respondents' objections to admissibility on this preliminary application.

Findings - Application to Strike Edenbrook's Affidavit Evidence

- [154] I find that the Individual Respondents' preliminary objections to admissibility do not impact or inform my conclusions with respect to Edenbrook's application.
- [155] That is because, I find that all of the Individual Respondents' remaining preliminary evidentiary objections are arguable -- the clearly inadmissible standard has not been met -- and so this impugned evidence should not be struck at this stage. Only the impugned parts which the petitioner agreed to withdraw will be removed.

[156] I do not intend to catalogue individually in these Reasons each objection to, and submissions about, each impugned paragraph of the affidavit evidence. Instead, I provide these overall comments on the grounds of objection advanced by the Individual Respondents to Edenbrook's evidence.

Hearsay and Relevancy Objections

[157] Edenbrook argues the business records exception or party statement exception to the hearsay rule applies to impugned evidence objected to on hearsay grounds, and also that the impugned evidence is not hearsay since it is not tendered for the truth of its contents. As stated at para. 73 of its reply:

none of the statements that the Respondents allege to be hearsay are in fact hearsay: all are tendered for the fact that the statement was made, not for the truth of its contents.

[158] Edenbrook's responses to hearsay objections, including the hearsay exceptions relied on, are arguable. Further, it is premature to assess the merits of Edenbrook's assertion as to the purpose of the impugned evidence. Arguments on the merits of the petition have not been fully made yet, which makes it challenging to decide evidentiary purpose arguments related to hearsay objections preliminarily: *Stubbington* at paras. 61-62, citing *McEwan v. Canadian Hockey League*, 2022 BCSC 1104 at para. 83.

[159] Similarly, relevancy objections are difficult to assess before the arguments on the merits of the petition are made. I find that the objections based on relevance are premature to assess at this time and are not clearly inadmissible: *Braaten* at para. 29. This is particularly so in this oppression proceeding, in which the "subjective expectations of the complainant" are relevant: 1168556 B.C. at para. 79.

[160] In my view, the Individual Respondents' hearsay and relevance objections are arguable and the impugned evidence is not clearly inadmissible.

Opinion Evidence Objections

[161] Some objections to Mr. Brolin's affidavit evidence are on the basis it is impermissible opinion evidence.

[162] There is a general test for the admissibility of lay opinion evidence: see e.g., *Graat v. The Queen*, [1982] 2 S.C.R. 819 at 837, 1982 CanLII 33; *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2013 BCSC 1042 at paras. 16-18.

[163] The application of this general test for admissibility of lay opinion may depend on the nature of factual matters arising in a case. For example, in *Huebner v. PR Senior Housing Management Ltd., D.B.A. Retirement Concepts*, 2021 BCSC 837 at paras. 36-37, statements about "whether a facility was understaffed, staff were overworked or hallway clutter formed a safety risk to residents" were found to be "within the realm of ordinary experience" and admissible lay opinion evidence.

[164] It may at times be difficult to determine whether asserted lay opinion in affidavit evidence is clearly inadmissible, in advance of a full merits hearing: Stubbington at para. 83. This is such a case.

[165] In my view, the asserted opinion evidence is not clearly inadmissible, and I decline to strike it on that basis.

Objections of Impermissible Conclusions/Argument and Speculation/Hyperbole/ Inflammatory Language

[166] Additionally, and relatedly, I do not find the impugned evidence clearly inadmissible at this stage for these reasons. I acknowledge that some portions of Mr. Brolin's evidence are, facially, arguably not of a factual nature and may ultimately be found to constitute impermissible legal argument; for example, para. 25 of Brolin #2 states in part:

It is not remotely reasonable that Absolute would give away shareholder rights for no consideration being granted to public shareholders.

[167] However, to the extent any portions of Mr. Brolin's evidence may be found, at the merits hearing of the petition, to be impermissible legal conclusion or legal argument (e.g., whether something done was "contrary to Edenbrook's reasonable expectations": Brolin #1 at para. 80), such evidence may simply be disregarded: McMahon at para. 109.

[168] I add that both parties, in their affidavits, appear to include evidence which arguably has legal overtones, including the use of phraseology of "reasonable" in their affidavit evidence, which arguably could have a legal connotation. For example, while expressing no view as to its admissibility or weight, I note Ms. Wyatt's Affidavit #1 deposes, in part, at para. 11:

I am aware of my duties to Absolute and I acted in accordance with those duties. Neither I nor any member of the Board acted in a manner that was unfair to, or disregarded of, the reasonable expectations Shareholders.

[169] In my view, this Court is capable of disregarding inadmissible legal argument in the guise of evidence (or evidence constituting inadmissible speculation, hyperbole, or inflammatory language) at a merits hearing, as appropriate.

Asserted Improper Reply Affidavit Evidence

[170] The assessment of whether an affidavit amounts to improper reply is often best left to the judge hearing the case on the merits after assessing the evidence in full: Braaten at para. 37.

[171] I find on this preliminary application that Edenbrook's affidavit evidence challenged as impermissible reply evidence is not in my view clearly so, and I would not strike it out on this application: Braaten at paras. 35-38.

Summary - Decision on Admissibility Objections

[172] I find that the Individual Respondents' admissibility objections at issue are arguable, and so none of the remaining impugned evidence shall be struck at this stage.

Comment on Petitioner's Damages Claim

[173] Edenbrook submits that "the value of this claim is potentially in the tens of millions of dollars" (para. 97). Absolute argued that Edenbrook has not tendered any "admissible evidence in support" of its damages claim (although did refer to para. 91 of Brolin #1, providing evidence about its sale of shares, and Brolin #2 para 60). The Individual Respondents submit that para. 78 of Brolin #1 (where Mr. Brolin states among other things he does not believe "Absolute achieve[d] full value for the common shares that Absolute agreed Crosspoint would purchase for US\$11.50") contains inadmissible opinion evidence about valuation.

[174] As to the complexity and significance of this claim, I have considered the evidence that the arrangement was a substantial transaction, and that Edenbrook held in excess of 10% of Absolute's shares. However, this is not, on its own, a basis to convert this petition to an action.

[175] Further, nothing in these Reasons makes a determination about or expresses any view on whether, or to what extent,

- (a) impugned evidence filed by Edenbrook constitutes admissible opinion evidence on the issue of damages, and
- (b) whether Edenbrook may be permitted in this proceeding to file and rely on further affidavit evidence, not yet filed, on the issue of damages.

Conclusion and Orders Made

[176] On the application to convert, I have found that Edenbrook's petition raises a triable issue.

[177] Hybrid procedures, but not a trial full trial, shall be ordered (though not all hybrid procedures proposed in Schedule B of Edenbrook's notice of application).

[178] The Individual Respondents' remaining objections to Edenbrook's affidavit evidence raise arguable and not clear issues of inadmissibility and so do not result in the striking out of disputed affidavit evidence at this preliminary stage.

[179] For these reasons, I order:

1. The application for conversion of this petition to an action and to refer it to the trial list, in para. 1 of Edenbrook's notice of application filed October 9, 2024, is dismissed;
2. With respect to para. 2 of Edenbrook's notice of application, hybrid procedures are ordered in this petition proceeding pursuant to Rule 16-1(18) and Rule 22-1(4), as follows:

- a. Absolute shall disclose documents in the categories I have identified in these Reasons pursuant to R. 7-1, being: (i) the Credit Agreement Amendment Issue, (ii) the Dissent Condition Issue, and (iii) what was said between Edenbrook and Absolute at the meeting on February 28, 2023. If the parties cannot agree on the time period for production of documents, they have liberty to apply for an order with respect to timing;
- b. The witnesses so identified in these Reasons shall be cross examined on their affidavits in court at the hearing of the petition on its merits; and
- c. Rules 9-6 and 9-7 shall apply to this proceeding, with such modifications as appropriate to this being a petition proceeding;
3. The parties are at liberty to apply for further orders or directions as to the hybrid procedures I have ordered; and
4. The Individual Respondents' notice of application filed October 10, 2024, to strike affidavit evidence, is adjourned generally, and may be reset at the same time as the petition hearing, subject to any further order of the court.

[180] Costs of both applications shall be in the cause.

"Stephens J."

Schedule A

RELIEF SOUGHT IN THE AMENDED PETITION

PART 1: ORDERS SOUGHT

1. A declaration that Edenbrook Capital, LLC ("Edeubrook") is an appropriate complainant to apply under section 227 of the Business Corporations Act, SBC 2002, c. 57, as amended (the "BCA") for the relief sought;
2. A declaration that the affairs of Absolute Software Corporation ("Absolute" or the "Company") were conducted, and that the powers of Christy Wyatt, Daniel Ryan, and James Lejeal (the "Individual Respondents") were exercised, in a manner oppressive and unfairly prejudicial to Edenbrook as a shareholder of Absolute;
3. An order under section 227(3) of the BCA that the Respondents compensate Edenbrook for the fair value of the Absolute common shares sold by Edenbrook in early July 2023, over and above the price per share received by Edenbrook for such sale;
4. Pre-judgment and post-judgment interest on all amounts claimed herein pursuant to the Court Order Interest Act, RSBC 1996, c. 79, as amended;
5. Costs of this proceeding; and
6. Such further and other relief as this Honourable Court may deem just.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/25/14/2025BCSC1469.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/edenbrook-capital-llc-v-absolute-software-corporation-2025>

Prepared on 25 October 2026 · Esheria