Court of Queen's Bench of Alberta

Citation: TAQA Drilling Solutions Inc v Yar Holdings Inc, 2021 ABQB 309

Date: 20210420
Docket: 2003 08740 and 2003 06013
Registry: Edmonton

Between:
2003 08740

TAQA Drilling Solutions, Inc.

Applicant

- and -

Yar Holdings Inc.

Respondent

And Between:
2003 06013

Yar Holdings Inc.

Plaintiff

- and -

**Industrialization and Energy Services Company (TAQA),
TAQA Drilling Solutions, Inc. and Cougar Drilling Solutions Saudi Arabia LLC**

Defendants

**Reasons for Judgment
of the
Honourable Mr. Justice M. J. Lema**

A. Introduction

[1] What is the consequence of **non-compliance with a per-court-order litigation plan**?

[2] One party says that two late-filed affidavits should be disregarded, and a late-notified-of witness should be barred, at a summary trial set for May 5-7, 2021.

[3] The other says non-compliance should be excused, with the first party itself in non-compliance in other respects, sufficient time for cross-examination of the affidavits before the summary trial, and no prejudice to the first party.

[4] I find **no reasonable explanation** for the deadline breaches but also **no prejudice**. The interests of justice are better served by **allowing the affidavits and this witness**, albeit with the deadline-breacher paying **costs**.

B. Litigation plan

[5] On January 11, 2021, I granted a consent order with the following terms (in part):

> The evidence at the Summary Trial may include:
>
> - the **affidavits** … filed in respect of the Actions; …
> - the parties are each entitled to call **three witnesses** …, such witnesses to be particularized as set out below; and
> - such **further and other evidence as may be allowed by the Justice presiding over the Summary Trial**. [para 10]

[6] The parties shall comply with the following litigation schedule leading up to the Summary Trial:

> - the parties shall file an Agreed Statement of Facts and an Agreed Book of Exhibits by December 14, 2020;
> - the parties shall **complete all questioning and respond to all undertakings by January 8, 2021**;
> - the parties may file a supplemental Agreed Statement of Facts and a supplemental Agreed Book of Exhibits for the purposes of the Summary Trial by no later than February 18, 2021; [and]
> - the parties shall **exchange their respective lists of witnesses**, if any, that maybe called for oral evidence at the Summary Trial **by February 26, 2021** ….

C. Law

[7] Litigation plans, even those set by order (consent or otherwise), are not necessarily carved in stone. See, for example, the Alberta Court of Appeal's decision in ***Custom Metal Installations Ltd v Winspia Windows (Canada) Inc***, 2020 ABCA 333, which concerned non-compliance with a consent order setting questioning dates and imposing a strike-pleadings consequence for breach.

[8] The Master struck the party's pleading; Mahoney J. allowed an appeal.

[9] The Court of Appeal up held Mahoney J., rejecting a strict "interpretation of contract" approach where a consent order is inherently procedural i.e. not a substantive resolution of parties' rights:

> **…** ***Gates Estate*** **and** ***BeeTown Honey*** represent a more principled way to address the **true nature of an interlocutory procedural order** than to apply the law that might be relevant, for example, to a **final order such as a consent judgment**: ***Monarch Construction Ltd v Buildevco Ltd*** **(1988)**, 26 CPC (2d) 164 (Ont CA), para 3; or family law cases settling final obligations between the parties, including division of property: ***Rick v Brandsema***, 2009 SCC 10, paras 49-50, [2009] 1 SCR 295. A **discretionary approach** is also more consistent with the interpretation of r 9.15(4)(c) which specifically recognizes "grounds that the Court considers just." [That rule addresses setting aside, varying or discharging interlocutory orders.]
>
> Rule 9.15(4) is clearly discretionary. Once it has been **determined that a consent order is interlocutory and procedural in effect and not in the nature of a final determination on a matter of substance, the Court may determine what is just in the circumstances**. …
>
> We observe that other rules are available that might well have been more appropriate to the circumstances on this record.
>
> Rule 13.5(2) allows the court to **"stay, extend or shorten a time period that is … (b) specified in an order…or (c) agreed on by the parties."** The essence of the order was that the officer would show up for **questioning** on December 17, a date that was **agreed upon by the parties**. The officer missed the deadline for a rather weak but plausible reason, and sought to have the deadline extended. The issue for the court is whether the date should be extended, including consideration of the fact that it was agreed to. In those circumstances, the general rule is found in r 1.5(4) to the effect that a **contravention, non-compliance or irregularity will only be overlooked if terms can be imposed that will eliminate any prejudice to the other party**. The fact that there is a presumptive remedy for contempt in the order does not, in our view, deprive the court of its discretion in r 13.5(2) and 1.5(4). Any **prejudice** to the other party can be remedied by **generous thrown-away costs** and possibly accompanied by an order that **all previously imposed but unpaid costs are to be paid forthwith**. We note that all of ***Gates Estate***, ***Devlin v Boon***, ***BeeTown Honey*** and ***Stoughton Trailers*** could have been dealt with in Alberta under r 13.5(2). See ***Piikani Nation v Kostic***, 2018 ABCA 234 at para 25; ***Cornelson v Alliance Pipeline Ltd***, 2013 ABCA 378 at paras 2, 9-10.
>
> Custom Metal could also have proceeded under r 10.52 asking that the court cite ***Winspia*** in **civil contempt**. This rule provides for a **wide variety of prospective sanctions, including ability to purge the contempt**.
>
> Not surprisingly, the remedies set out for each of the above additional rules are, like r 9.15(4) with respect to an interlocutory procedural consent order,

> **discretionary** and focused on what the court considers **just in the circumstances**. [paras 58-63] [emphasis allowed]

[10] In ***Cornelson v Alliance Pipeline Ltd***, 2013 ABCA 378, the majority upheld a case-management judge's decision **declining to extend time to file an expert report**, emphasizing these factors:

> In arriving at this conclusion the case management judge noted that all the information the expert required was within the appellant's own knowledge, power or control. The valuation of the Phantom Units had been one of the central issues in the lawsuit from its outset, over a decade earlier. He concluded on the evidence before him that either the appellant had delayed in hiring the expert, or the appellant and its expert had delayed in formulating the report. In his view, the appellant had ample time to obtain the report and there was a dearth of information explaining the reason for the delay or the difficulties in preparation.
>
> The case management judge also noted that the **respondent's expert report and valuation had been served in June 2012**. [i.e. approximately 14 months before the QB decision] **No acceptable explanation for the appellant's delay in obtaining and filing a rebuttal report was offered**. In fact, the case management judge found that the appellant's actions regarding its expert report demonstrated, "a complete lack of regard for the court order and the time line agreed to therein of May 31".
>
> The **following criteria are relevant to the exercise of discretion to extend the time for filing**: (1) **the length of the delay**; (2) **the explanation for the delay**; and (3) the **relative prejudice to the parties**. Here the case management judge concluded that the length of the delay was **inordinate** and that **no satisfactory explanation** had been offered for it. On the issue of prejudice, the case management judge recognized the **potential prejudice to the appellant if it was not allowed to file an expert report**. On this evidentiary record, in the **absence of any indication of what the report might contain or what the difficulties were in preparing it, it was reasonable to conclude that any prejudice was just that, potential only**.
>
> In exercising his discretion, the case management judge considered **the inordinate delay in getting the matter on to trial, the cavalier attitude of the appellant in complying with agreed-upon deadlines, and the loss of pre-booked trial time**. In the circumstances, he declined to extend the time for filing the report. Given this record, we see no principled basis to interfere with that exercise of discretion. [paras 4-7] [emphasis added]

[11] In dissent Slatter JA elaborated on **prejudice** and how it might be cured:

> … The case management judge was not referred to R. 1.5(4) which summarizes the **principles for dealing with noncompliance with procedural directions**:
>
> (4) The Court must not cure any contravention, non-compliance or irregularity unless
>
> (a) to do so will cause no irreparable harm to any party,

> (b) in doing so the Court imposes terms or conditions that will
>
> (i) eliminate or ameliorate any reparable harm, or
>
> (ii) prevent the recurrence of the contravention, non-compliance or irregularity,
>
> (c) in doing so the Court imposes a suitable sanction, if any, for the contravention, non-compliance or irregularity, and
>
> (d) it is in the overall interests of justice to cure the contravention, non-compliance or irregularity.

While the **reason for noncompliance is obviously relevant, it is only a part of the test**. The case management judge did not examine the other relevant factors, such as **prejudice to the respondent, and whether it could be cured on terms**: ***Bak v Smith***, 2006 ABCA 188; ***Pagnucco v Sears Canada Inc.***, 2011 ABQB 810 at paras. 9-12, 528 AR 209. While he noted that the late report would disrupt the litigation schedule, he did **not consider the impact that exclusion of the report would have on the overall truth-finding function of the trial judge, and therefore the effect on the overall interests of justice**.

At the time of the application, the case management judge did **not have a copy of the late rebuttal report that was in issue**. … He … concluded that there would be no prejudice to the appellant from its inability to introduce what he assumed would be an unhelpful report. Counsel advises that the appellant **now has the report in hand, and that it will in fact be helpful to its position**. This new information was not available to the case management judge at the time he made his initial order.

Given the **new information now available**, the appeal should be allowed and the issue remitted back to the case management judge for reconsideration. [paras 10-12] [emphasis added]

[12] Tilleman J. reviewed the **basic principles** in ***Desoto Resources Limited v Encana Corporation***, 2010 ABQB 448:

> At the outset of this hearing I was asked to rule on the admissibility of an affidavit filed by Desoto after a Court-imposed deadline. …
>
> The court has the **inherent jurisdiction to control its process**: *De Shazo v. Nations Energy Company Ltd.*, 2006 ABCA 400, 401 A.R. 142 at para. 12; *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725 at para. 15. Imposing schedules and deadlines are mechanisms though which such control may be achieved. In *Stone Sapphire Ltd. v. Transglobal Communications Group Inc.*, 2008 ABQB 397, 451 A.R. 100 at paras. 78-82, Justice Lee recently summarized the case law on court-imposed deadlines. [footnote omitted]
>
> Plaintiff's counsel gave me **no legitimate reason for the late filing of the documents in breach of the Court-imposed deadline**. He acknowledged being aware of the filing deadline, but when asked for the reason that the affidavit was

> filed late, Plaintiff's counsel communicated to me that he was of the country between April 23 and May 21, and that they had not sharpened their minds to the issues until they were preparing the brief for today's application. Upon my further inquiring, Desoto's counsel indicated that he had **not contacted opposing counsel** in the days surrounding the filing deadline **to notify them that an affidavit would be filed late**. Moreover, **no mention was made as to why the Plaintiff did not apply to the Court for extension of the filing deadline**.
>
> … **Plaintiff's counsel did not give reasons why this document or information had not been brought to light before**. Additionally, Plaintiff's counsel did not indicate how it obtained the document, nor are they alleging that the other side withheld this information. …
>
> **Court orders should be followed.** I appreciate there are competing values at play in every case and that it is important that a party be able to **put its best foot forward on a summary judgment application.** However, this must be considered in light of the **serious toll on justice that will occur where parties are permitted to take actions inconsistent with court orders *resulting in prejudice to the other side***. In my view, fairness cuts both ways and from all of the above, it weighs **against admission of the late filed affidavit**. [paras 20 and 22-24, and 26]

[13] In ***Abel v Modi***, 2020 ABQB 530, Ho J. declined to extend an affidavit deadline, emphasizing the **lack of an explanation** for the late filing:

> The first and third sections of the Haji Affidavit contain **information that was available to the Respondents prior to January 31, 2020, being the deadline for affidavit evidence** outlined in the December Consent Order. …
>
> Counsel to the Applicants cited numerous cases that emphasize the **importance of complying with Court orders, including those of a procedural nature. In *Stone Sapphire Limited v Transglobal Communications Group Inc***, 2008 ABQB 397, the Court reviewed case law dealing with **court-imposed deadlines, ultimately directing strict compliance**. This was echoed in ***Desoto Resources Limited v Encana Corporation***, 2010 ABQB 448 which dealt specifically with the late filing of an affidavit.
>
> It is **obviously important that litigants comply with court-imposed deadlines so that matters may proceed in a timely and efficient manner**. This promotes, among other things, fairness and transparency for all parties involved. A party **cannot simply ignore a deadline without reasonable excuse**, **especially without letting the other parties know about the non-compliance as soon as practicable**. In this case, there was no attempt by the Respondents to seek an adjustment of the deadlines or raise the issue with the Court until counsel to the Modi Defendants alerted me to the issue.
>
> There also was **no reason provided as to why the contents of the first and third sections of the Haji Affidavit were filed after the January 31, 2020 deadline**. Because the Respondents did not respect this deadline, the Applicants were **not able to cross-examine Mr. Haji by February 28, 2020 as**

> **contemplated by the December Consent Order or otherwise challenge the Haji Affidavit in a timely manner**. While the Respondents have now offered to make Mr. Haji available for cross-examination, that still introduces **further delay** to this proceeding.
>
> Therefore, the first and third sections of the Haji Affidavit, consisting of paragraphs 2 to 4 and paragraphs 12 and 13, are **struck because of the Respondents' failure to adhere to the terms of the December Consent Order without reasonable excuse**. The information contained in the listed paragraphs was **available to the Respondents prior to the January 31, 2020 deadline** for evidence and **could have been submitted in a timely manner**. [paras 16-20] [emphasis added]

[14] See also ***Cantlie v Canadian Heating Products Inc***, 2014 BCSC 2029 (per Walker J.):

> … I have not lost sight of the express cautions made at para. 16 of *Cannon* [*v Funds for Canada Foundation*, 2011 ONSC 2960 (Strathy J. as he then was)] and generally in *Risorto v. Farm Automobile Insurance Co.*, 72 C.C.L.I. (4th) 60 (Ont. S.C.J.) about the **need for the parties to adhere to case management schedules ordered or directed**. To my mind, **diligence or lack thereof, in failing to comply with court ordered deadlines, reasonable excuse for delay, and prejudice are factors** to be considered in determining **whether to admit affidavits outside previously ordered time limits** together with the instruction from *Cannon* that all parties should have a fair opportunity to put their case forward and to respond. … [para 22] [emphasis added]

[15] In ***Tietz v Cryptobloc Technologies Corp***, 2021 BCSC 186, Wilkinson J. emphasized the dimensions of **case management and detailed timetabling** in ***Cantlie***:

> … the Court in *Cantlie* when **deciding whether to refuse to admit late expert evidence, highlighted the fact that the proceedings were case managed and subject to a timetable which should focus the parties on making decisions on what evidence to lead**. The following language from *Cannon* was endorsed in *Cantlie* at para. 12:
>
> > [17] That being said, class proceedings are **case managed and important motions like certification or summary judgment are invariably subject to a timetable that requires each party to think carefully about the evidence it will produce. It can be unfair, inefficient and expensive for one party – whether through inadvertence, lack of foresight or deliberate tactics – to introduce new and unanticipated evidence at a late stage in the proceedings**. [para 54 of *Tietz*] [emphasis added]

[16] In ***IJGPG v KM,*** 2020 BCSC 673, Jackson J. emphasized the **absence of prejudice** in allowing reliance on late-filed affidavits:

> Rule 10-6(13) confirms the court's **discretion to permit the service of affidavits outside time periods established by the *Rules***. Two of the Three Additional Affidavits were made and, as I understand it, served well before the February hearing dates. While the third affidavit was made very close to the hearing date,

> and although all Three Additional Affidavits were served **outside the time periods required by the *Rules* without any valid explanation** by the respondent for the delay in their service, I am not aware of any **prejudice** that would accrue to the claimant from my consideration of them. Therefore, I am prepared to exercise my discretion to **permit** the respondent to rely on the Three Additional Affidavits. [para 12] [emphasis added]

Application of the case-law guidance here

[17] The key factors here are:

- the parties **agreed on a litigation plan**, including an implicit deadline for affidavits of mid- to late December (stemming from an explicit deadline (January 8, 2021) for completing questioning on affidavits and resulting undertakings), and for identifying witnesses (February 26, 2021);
- that plan **crystallized in early December 2020** (by around December 3), with the parties signing a draft consent order on or about December 7, 2020 (I signed the order on January 11, 2021);
- without giving TAQA any advance notice of new affidavits on the horizon, Yar **announced on March 8, 2021 that it sought to rely on two additional affidavits**. This was two-and-a-half to three months after the implicit affidavit deadline and, in any case, two months after the questioning-and-undertakings deadline of January 8, 2021;
- when it relayed these affidavits (one provided on March 8th, the other the next day), Yar did not:
  - **apologize** for the lateness of these affidavits;
  - offer any **explanation** for its delay in providing them;
  - ask TAQA if it **would agree to an extension** of the affidavit deadline;
  - even **advert to the deadline**; or
  - offer any **accommodations or adjustments** to TAQA (e.g. stating it would be open to any further affidavits from it);
- instead, Yar simply dropped these affidavits on TAQA **out of the blue**, saying "[the deponents] are prepared to be questioned … Please review the affidavits … and … let us know when you are available to question these gentlemen";
- that was **less than courteous**. In light of the parties having agreed, by December 7th, to an effective "no more affidavits after mid- to late December" deadline i.e. to **lay their affidavit cards face-up on the table** by then, I would have expected Yar to advise TAQA, when Yar first became aware of the potential for these new affidavits (and certainly no later than January 27th, when the affidavits were sworn), that it **was considering filing further affidavits**, that (per its "employer consent" evidence and as applicable – see further below) it could not provide them **immediately**, that the affidavits (if obtained) would be **aimed at certain efforts to obtain the contract assignment in question**, and that it would **keep TAQA posted** on that front. That

would at least allowed TAQA to consider whether it could or should explore the need for **further affidavit evidence of its own** i.e. to counter or clarify the anticipated evidence, or even raise with Yar **whether the summary trial should be pushed back**.

In any case, courtesy would at least have required, on service of the affidavits, an **apology** for the delay, an **acknowledgement of the missed deadline**, an **explanation** for the delay, and a **request for an extension** (i.e. not simply "here you go … do you want to cross-examine?"). Otherwise, what was the point of agreeing to these litigation-plan deadlines?

- **delay-wise**, as noted, the affidavits were **sworn on January 27, 2021 i.e. approximately 40 days before they were provided to TAQA**. TAQA asserts, from a December 2020 reference in the one affidavit to the other (i.e. as being the date of the other), that these affidavits were in process (at minimum, were being drafted) since some time in December 2020. Yar did not address this aspect. I find it does not make a major difference here: whether these affidavits were in gear in (to be conservative) late December 2020 or only much closer to January 27, 2021 (when sworn), a substantial period of time elapsed between their emergence and when Yar gave them to TAQA;
- Yar did **not provide any reasonable explanation** for the delay. It simply says that provided them "at the earliest moment permitted by [the employer of the two deponents] (not being sat on by Yar as the TAQA Parties have suggested)." That is effectively no explanation, as Yar does not explain:
  - when it first sought, or otherwise came to consider the idea of, these affidavits;
  - when it first sought, or learned of the apparent need for, the employer's permission;
  - why that permission was in fact needed;
  - when it first asked for that permission;
  - what the employer's "permission grounds" were;
  - what "permission submissions" Yar made, and when, including (depending on the timing) whether Yar relayed the litigation-plan deadlines to the employer;
  - what would have happened if permission had not been granted;
  - whether the affidavit information was only available from these two witnesses;
  - when (specifically) permission was granted; and
  - what (if anything) barred Yar from disclosing the potential for these affidavits to TAQA i.e. in advance of getting whatever green light was needed from the employer;
- on the **witness front**, here too Yar offers **no reasonable explanation**, saying only that the witness, whose status as a *viva voce* witness was announced on March 10, 2021 (i.e. about two weeks late), "**had been on vacation**." With no additional information (e.g. on vacation starting when, where, returning when, what pre-

vacation efforts made to sort this out, what communication efforts were possible during the vacation, and what efforts were made, etc.), that is **no explanation at all**. (I do note that, when announcing this witness, Yar at least adverted to the witness-list deadline (February 26) and apologized for being late);

- as for **prejudice**, I first note that the affidavits are **not extensive**: one has only six substantive paragraphs (on a single page), with no exhibits. It provides evidence about efforts to arrange a certain contract assignment. The other is slightly longer, 25 substantive paragraphs (five pages), with about half a dozen commercial documents and then about 20 letters and emails as exhibits. It is largely aimed at providing the context for the assignment efforts and providing more details of those efforts. As well, the **events** described in the affidavits occurred in **2019 and early 2020** i.e. we are not dealing with late-breaking information here;
- for its part on **prejudice**, TAQA says:
  - allowing the late affidavit and late-notice witness would be "contrary to basic principles of procedural fairness" and would give Yar "an unfair advantage of TAQA";
  - "the implicit rationale behind the [deadlines] was to pre-emptively satisfy **the Court** [emphasis added] that discoveries would be concluded well in advance of the desired trial date [May 5-7, 2021]";
  - the litigation plan [was intended to be] "a framework agreed upon by counsel to safeguard fairness and achieve efficiency";
  - "TAQA should not be prejudiced because Yar failed to obtain the evidence it needed to establish its case within the time permitted under the Litigation Plan";
  - "[i]t is inherently unfair for Yar to comment further on evidence it had in hand from the outset and on a pivotal issue";
  - "Yar should not be allowed to run roughshod over basic and fundamental principles of procedural fairness at TAQA's expense"; and
  - [accordingly] "Yar's flagrant disregard for basic procedural fairness arising from its non-compliance with the Litigation Plan should not be condoned by this Court."
- in all that, TAQA did not point to **particular prejudice** i.e. explain what particular disadvantage it has suffered or will or may suffer if Yar's deadline failures are excused e.g. "If we had **received these affidavits** in late January (when they were sworn), we could have done [X, Y, or Z] that we cannot do now or can only do less effectively or otherwise less than ideally" or "If we had known of the **potential arrival of these affidavits** earlier than we did [March 10th], we could have done [X, Y, or Z] that we cannot do now, etc." Similarly, TAQA did not argue "If we had **known** by the list-witnesses date (February 26) **that this person would be a Yar witness**, instead of learning only on March 10, we would have been able to do [X, Y, or Z] which we cannot do now, etc.";

- TAQA did **not argue, in the alternative**, that **if the failures are excused**, the summary trial should be **adjourned**, with TAQA receiving **thrown-away costs** or on other terms, or seek any **other alternative relief**;
- finally, per Yar (and TAQA did not object to this submission), TAQA has **provisionally agreed to cross-examination dates**, before the summary trial, for the two affiants i.e. in case Yar receives the green light for the late affidavits;
- for its part on **prejudice**, Yar said:
  - "TAQA will not be prejudiced by [the late affidavits or late-notice witness being permitted to testify]", noting that "No evidence of any prejudice has been proferred by the TAQA Parties";
  - a "key question [on prejudice] is "whether the [opposite] party would be '**surprised'** by the [affidavit-tendering party's] reliance upon the disputed evidence in question." On that score, Yar says " … the [two affidavits in question do **not] contain new evidence which would take [TAQA] by surprise; [they] simply depose to direct knowledge rather than hearsay on key events**." (From that, I infer that, at least per Yar, the background and narrative described in those affidavits is already familiar to TAQA. I note here that TAQA did **not assert that the affidavit contents themselves came as a surprise** to it, instead only their **existence**, when they emerged, on March 8, 2021); and
  - (effectively) Yar itself would suffer prejudice (if denied recourse to the two affidavits and the witness), since it (and the Court) would be deprived of the "**best available evidence**" and **lose "the opportunity to challenge the evidence** being proferred by [TAQA]."
- on the **equities** overall, Yar complains, unsuccessfully in my view, that TAQA is being **selective, and thus unfair**, in insisting on litigation-plan compliance here, when other plan deadlines have not been strictly followed i.e. with the parties making informal (plan-not-amended) adjustments. In one case, continued examination of a TAQA witness by Yar was conducted, and undertakings were supplied, after the plan deadlines, in light of the witness's vacation and travel considerations. In essence, that was TAQA disregarding the deadlines, otherwise in its favour there, in light of its witness's timing difficulties i.e. not insisting (for whatever reason) that time had run out on Yar continuing with that examination. In other words, this was TAQA simply being **reasonable and accommodating**.

  The other "non-compliance" here is simply TAQA and Yar taking longer, with **obvious implicit agreement**, to complete the agreed statement of facts and accompanying exhibits. Neither party raised any materials complaints to the other about that process, with them working collaboratively to complete the necessary work, albeit after the plan deadline.

  In both of the instances, the parties were clearly in agreement about what should be done. If either had raised the subject of amending the plan to make it square with how things had played out or were playing out, I infer they would have agreed on the necessary adjustments.

Here we have a different story: Yar seeks extensions of the noted deadlines, and TAQA does not agree.

I do not see inconsistency here: TAQA's earlier cooperativeness on the noted issues **does not foreclose its objections here**;

- Yar also invokes para 10(e) of the consent-order litigation plan (summary-trial evidence may include "**such further and other evidence as may be allowed by the Justice presiding over the Summary Trial**"). This provision comes at the end of a catalogue first listing "**affidavits**" (plus questioning transcripts and undertakings), "**admissions**" in response to notices to admit, "**expert evidence**", and ***viva voce* evidence** from three witnesses (for each party). (It appears the parties forgot to include, in this list, the mandatory Agreed Statement of Facts and any supplementary ASF.)

  I read the catch-all clause as referring to **other types of evidence**, not as addressing the late filing of affidavits. Affidavits as a species of evidence are addressed in para 10(a), with no limitation to any particular time period. The catch-all clause is not a portal, or even potential portal, for post-deadline affidavits; and

- Yar also tries, unsuccessfully in my view, to paint TAQA as additionally unreasonable in **seeking to strike** the two affidavits and exclude the late-notice witness, instead of (at minimum) **scheduling cross-examinations** of the affiants and (possibly) that witness and proceeding with such examinations. I do not fault TAQA for seeking these directions first, particularly given the absence of reasonable explanations from Yar for its late affidavits and late witness-notice.

D. Conclusion

[18] On the **affidavits**, I find that, despite the **absence of a reasonable explanation** for missing the filing deadline, Yar should be permitted to rely on them. Here I emphasize the relatively **narrow cast of the affidavit evidence**, the apparent **lack of "contents surprise"** to TAQA (on this aspect, see ***Withenshaw v Withenshaw***, 2020 NSSC 208, Gabriel J. at paras 38 and 107), TAQA's apparent **ability to conduct sufficient cross-examinations** of the affiants with sufficient time to obtain transcripts and undertaking responses (i.e. **no sign that the summary trial will have to be delayed**), TAQA having **had the affidavits now for about five weeks**, and TAQA's **prejudice submissions effectively being limited to "Yar did not meet the deadline**."

[19] As for the late-notified **witness**, this boils down to Yar being two weeks late with its notice, which still left two months before the trial. With TAQA not pointing to any prejudice "on the ground" arising from this delay, here too I find that the **delay should be excused**.

[20] I infer that the late arrival of these affidavits and the late witness notice disturbed any **peace of mind that the litigation plan had given TAQA** i.e. in approaching the summary trial on the basis of defined affidavit evidence and known witnesses. It may have had to adjust its trial strategy and make other, or additional, preparations.

[21] But TAQA did not provide evidence allowing me to **measure such disruption and inconvenience** and **see how, if at all, it represents a real setback** to it in the upcoming trial.

[22] With these deadline breaches -- **unexplained but causing no measurable prejudice**, it is in the interests of justice – ultimately, in service of arriving at the truth of matters in the upcoming trial – that the best (even if late) evidence be allowed, with the **lack of reasonable explanation to be addressed via costs** (see below).

[23] Accordingly, I **allow the affidavits and the witness despite non-compliance** with the litigation plan.

E. Costs

[24] TAQA asked for, and Yar did not address, costs.

[25] I find that, despite Yar's success here, TAQA is entitled to costs, of $1,000. Here I follow the lead of Newton J. in ***Russell v Mainville***, 2020 ONSC 5584. After finding no prejudice caused by the unexplained late submission of an expert report, he tagged the breaching party with costs, observing:

> **Court orders are not to be ignored**. The failure to retain a defence expert until just prior to the deadline demonstrates a cavalier attitude to court orders. The **failure of the defendants to advise the plaintiffs that a report was forthcoming after the expiry of the deadline and not to announce that a report was being sought until just immediately prior to the second pretrial demonstrates a cavalier attitude to the civil litigation process**. To be efficient, that process requires the cooperation of counsel.
>
> Consequently, **although successful, the above-noted behaviour attracts costs**. Court orders are to be obeyed and strictly enforced. … [paras 19-20] [emphasis added]

Heard on by way of written submissions received April 9, 2021.
Dated at the City of Edmonton, Alberta this 19th day of April, 2021.

M. J. Lema
J.C.Q.B.A.

Appearances:

Colin Feasby, QC and Nathan White
Olser, Hoskin, & Harcourt LLP
for the Applicant TAQA Drilling Solutions Inc.

Richard J. Cotter, QC and Kurtis P. Letwin
Dentons Canada LLLP
for the Respondent Yar Holdings Inc.