Citation: Delwar v Beausejour (Town of), 2025 MBCA 84
Date: 20250922
Docket: AI24-30-10097

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner
Mr. Justice James G. Edmond

B E T W E E N*:*

ALIZA DELWAR	)	
	)	***K. D. Toyne***
(Applicant) Appellant	)	*for the Appellant*
	)	
- and -	)	***M. G. Tramley*** *and*
	)	***M. Intertas***
THE TOWN OF BEAUSEJOUR and THE RURAL MUNICIPALITY OF BROKENHEAD	)	*for the Respondent Town of Beausejour*
	)	
	)	***M. C. Ross***
(Respondents) Respondents	)	*on a watching brief*
	)	*for the Respondent*
- and -	)	*RM of Brokenhead*
	)	
THE DIRECTOR OF THE ENVIRONMENTAL APPROVALS BRANCH, THE MINISTER OF ENVIRONMENT, CLIMATE AND PARKS, and THE GOVERNMENT OF MANITOBA	)	*Appeal heard:* ***April 9, 2025***
	)	
	)	*Judgment delivered:* ***September 22, 2025***
	)	
(Respondents)	)	

PFUETZNER JA

[1] The issue on this appeal is how the courts in Manitoba should approach delay in proceeding with an application for judicial review.

[2] The applicant appeals the motion judge's order dismissing, on the basis of a nearly twenty-one-month delay, her application for judicial review of a decision (the decision) of the minister of the Environment, Climate and

Parks (now Environment and Climate Change) (the minister) to uphold the issuance of a licence to build and operate a water treatment plant (the licence). She also appeals the motion judge's dismissal of her motion to amend her notice of application.

[3] The applicant argues that the motion judge erred in finding that the starting point to calculate the delay was the date of the decision and that he erred in finding that the respondent, the Town of Beausejour (the town), was prejudiced by the delay.

[4] In my view, the motion judge made no reversible errors in exercising his discretion to dismiss the application for judicial review on the basis of delay. While the public interest in the finality of the decision is properly considered as a separate factor apart from prejudice to the town, this minor error by the motion judge had no material effect on the outcome.

[5] For the reasons that follow, I would dismiss the appeal.

Background

[6] In November 2020, the director of the Environmental Approvals Branch (the director) issued the licence to the town, allowing it to replace its water supply and treatment system. The existing system was constructed in the 1950s and could no longer meet the town's water requirements.

[7] The applicant appealed the director's decision to the minister under section 27(1) of *The Environment Act*, CCSM c E125. The minister determined that the appeal should be dismissed, and the Lieutenant Governor

in Council approved the decision. The applicant was notified of the dismissal on April 13, 2021.

[8] On January 10, 2023, nearly twenty-one months later, the applicant filed a notice of application for judicial review of both the decision and the director's issuance of the licence. The application was returnable on March 29, 2023, and was adjourned *sine die*. The director filed the record relevant to the issuance of the licence in May 2023.

[9] On November 21, 2023, the town gave notice that it intended to bring a motion to dismiss the application for delay pursuant to rule 38.12(2) of the MB, *King's Bench Rules*, Man Reg 553/88 [*King's Bench Rules*]. The motion was filed on February 5, 2024.

The Motion Judge's Decision

[10] On May 8, 2024, the motion judge allowed the motion. In his brief oral reasons, he considered rule 38.12(2) and the following factors: the subject matter of the litigation, the complexity of the issues between the parties, the length of the delay, the explanation for the delay, and prejudice to the other litigants.

[11] As for the subject matter of the litigation, the motion judge noted "that the context . . . involve[d] a major infrastructure project . . . for a town and its residents and businesses" in respect of which "more than $12,000,000" had already been invested "as a result of funding from three levels of government."

[12] While he acknowledged that the environmental concerns raised by the applicant were complex, the motion judge found that the fundamental issue between the parties was not, and he described the issue as "simply an application for judicial review challenging the reasonableness of an administrative decision."

[13] The motion judge found the applicant's delay to be "inexplicable and inordinate," noting that it took her "nearly two years" after the decision was made to file the application and that "two years under the circumstances [was] a significant delay." Further, he found that "the explanation for the delay was regrettably not satisfactory under the circumstances."

[14] Finally, in considering the factor of prejudice, the motion judge stated that "[t]he town and ultimately the residents of the town . . . would be significantly prejudiced." He noted that construction of the water treatment plant had proceeded under the "lawfully obtained" licence, that $12.4 million had been expended and that the "project [was] nearly fully constructed".

Issues

[15] This appeal raises the following issues:

(1) What is the starting point for the calculation of delay in a judicial review application? Is it the date of the administrative decision under review or the date that the application for judicial review is filed with the Court of King's Bench?

(2) What length of delay justifies the dismissal of an application for judicial review for delay?

(3) What are the roles of prejudice and the public interest as considerations in a motion to dismiss an application for judicial review for delay?

Analysis

[16] As observed by Cameron JA in *Springfield Taxpayers Rights Corp v Rural Municipality of Springfield*, 2023 MBCA 57 [*Springfield*], a decision made pursuant to rule 38.12 of the *King's Bench Rules* is discretionary. An appellate court must approach the decision with deference and cannot interfere with it "unless the motion judge misdirected himself or the decision is so clearly wrong as to amount to an injustice" (*Springfield* at para 13).

[17] With that in mind, I now turn to the first issue.

Starting Point for the Calculation of Delay

[18] Rule 38.12(1) of the *King's Bench Rules* states:

Motion **38.12(1)** The court may on motion dismiss an application for delay.	**Motion** **38.12(1)** Le tribunal peut, sur motion, rejeter une requête pour cause de retard.

[19] Rule 38.12(2) provides a non-exhaustive list of factors that a court may consider when deciding a motion pursuant to rule 38.12. It states:

Grounds **38.12(2)** On hearing a motion under this rule, the court may consider,	**Motifs** **38.12(2)** Lorsqu'il entend une motion en vertu de la présente règle, le tribunal peut tenir compte :
(a) whether the applicant has *unreasonably delayed in obtaining a date for a hearing* of a contested application;	a) de la question de savoir si le requérant a *retardé excessivement la fixation d'une date pour l'audition* d'une requête contestée;
(b) whether there is a reasonable justification for any delay;	b) de la question de savoir s'il existe des motifs valables pour tout délai;
(c) any prejudice to the respondent; and	c) de tout préjudice causé à l'intimé;
(d) any other relevant factor.	d) de tout autre facteur pertinent.

[emphasis added]

[20] The applicant argues that the starting point should be the date she filed the application. In the alternative, she submits that the motion judge should have found that she had a reasonable justification for any delay. The town submits that the motion judge correctly identified the starting point as the date that the applicant was notified of the decision and that the motion judge properly rejected her explanation.

[21] A plain reading of rule 38.12(2)(a) suggests that the starting point to calculate delay is the date the application was filed, running until the date for a hearing. However, in the context of judicial review applications, Manitoba courts have found that the relevant period of time runs from the date of the

underlying administrative decision or the date the decision was known to the applicant.

[22] In *Springfield*, this Court did not provide explicit commentary on the starting point for the calculation of the period of delay pursuant to rule 38.12. However, Cameron JA, for the Court, accepted the motion judge's calculation of delay based on a date related to the underlying event giving rise to the application—that is, the date that the applicant became aware of a peat moss processing plant and yet delayed in filing an application seeking an order of *certiorari* quashing development permits issued by the respondent rural municipality.

[23] In *Coombs v Magellan Aerospace Ltd*, 2018 CarswellMan 802 (MBQB) [*Coombs*], Master Clearwater (now Senior Associate Judge Clearwater) directly commented on the determination of the starting point to calculate delay for a judicial review application in Manitoba. She noted at paragraph 3 that *Coombs* was

> not a case in which the respondents are alleging there has been an inordinate or unreasonable delay in proceeding since the application for judicial review was filed. Rather, the respondents' position is that the unreasonable delay in this case was in filing the application in the first instance.

[24] Master Clearwater held that the twenty-nine-month delay to bring the judicial review application without any reasonable explanation was unreasonable (see *ibid* at para 13). See also *Manitoba Association of Health Care Professionals v Manitoba Labour Board*, 2016 MBQB 158 [*MAHCP*], where the Court stated that "the clock started running" (at para 14) in respect of an application for judicial review when the Labour Board issued two

certificates after counting the representation votes made by two unions' eligible employees.

[25] Significantly, despite the wording of rule 38.12(2)(a), these cases accepted that the period for the calculation of delay in respect of judicial review was not the date the application was filed until a hearing date was obtained.

[26] In contrast, Manitoba jurisprudence considering applications for relief other than judicial review has found that the starting point for the calculation of delay is the date the application was filed, running until a hearing date is obtained. For example, see *Estate of William Charles Gorrie*, 2023 MBKB 66 (application to remove executors and to provide an accounting); *Gamble v Karpluk*, 2023 MBKB 39 (application to revoke letters of administration and to admit a photocopy of a will to probate); *Manitoba Lotteries Corporation v Dominion Construction and Development Inc*, 2004 MBQB 112 (application to set aside findings of an arbitrator filed twenty-nine days after the arbitrator rendered his decision); and *Laing v Sekundiak*, 2013 MBQB 17 [*Laing*], *REH v Ross*, 2004 MBQB 228, and *Thorogood v Victoria General Hospital*, 2002 MBQB 211 (applications to file a statement of claim after the expiry of the limitation period).

[27] In Ontario, pre-legislative amendment case law contemplated the period of delay being calculated from the date of the impugned administrative decision (see *Toronto District School Board v Child and Family Services Review Board*, 2019 ONSC 7064 at para 24 [*TDSB*]). This jurisprudence will be discussed further in connection with the second issue on the appeal, as will the *Judicial Review Procedure Act*, RSO 1990, c J.1 [the *Ontario Act*], which

now legislates a time limit of thirty days for the filing of an application for judicial review.

[28] In light of the Manitoba jurisprudence, I reject the argument that the motion judge erred in finding that the time period for calculating delay began when the applicant was advised of the decision. Moreover, as I will explain, there are sound policy reasons relating to finality and certainty that require consideration of the lapse of time between the date of the administrative decision and the filing of the application for judicial review.

[29] I am also not persuaded that the motion judge made any reversible errors in failing to find that the applicant provided a reasonable justification for the delay.

Length of Delay That Justifies the Dismissal of an Application for Judicial Review for Delay

[30] In Manitoba, courts have not expressly stated a period of delay that justifies the dismissal of an application for judicial review. In this context, rule 38.12 of the *King's Bench Rules* has only been judicially considered three times in Manitoba. In *Springfield*, a delay of fifteen months; in *MAHCP*, a delay of seventeen months; and in *Coombs*, a delay of twenty-nine months, were all found to be unreasonable and inordinate. Of course, the reasonableness of a delay depends not just on its length, but also on the other factors that a court should consider, including the subject matter of the proceeding, the complexity of the issues between the parties, the explanation for the delay and the prejudice to the responding party.

[31] In my view, this Court can take guidance from the Ontario jurisprudence pre-dating the amendments to the *Ontario Act*, which developed timelines for applications for judicial review at common law. The Ontario Divisional Court consistently held that a delay of more than six months to commence an application for judicial review was excessive and could warrant dismissal of the application for delay (see *TDSB* at para 24; *Ransom v R*, 2010 ONSC 3156 at para 15).

[32] Notwithstanding this, courts in Ontario still retained discretion to decide motions to dismiss for delay. Indeed, the Divisional Court stated "more than simply the length of delay is relevant on a motion to dismiss for delay. This discretionary exercise requires the court to consider as well the reason for the delay and the impact of the delay on the parties and others" (*Canadian Pacific Railway Company v Teamsters Canada Rail Conference*, 2023 ONSC 2928 at para 26, citing with approval *Canadian Chiropractic Association v Dr Barry McLellan, Coroner*, 2011 ONSC 6014 at para 15).

[33] As previously indicated, the *Ontario Act* was amended effective July 8, 2020 to establish a thirty-day time limit within which applications for judicial review must be brought. However, the court retains discretion to extend the time.

[34] The pertinent sections of the *Ontario Act* provide:

Time for bringing application **5** (1) Unless another Act provides otherwise, an application for judicial review shall be made no later than 30 days after the date the decision or matter for which judicial review is being sought was made or occurred, subject to subsection (2).	**Délai de présentation de la requête** **5** (1) Sauf disposition contraire d'une autre loi, toute requête en révision judiciaire est présentée au plus tard 30 jours après la date à laquelle a été prise la décision ou est survenue la question à l'égard de laquelle la révision judiciaire est demandée, sous réserve du paragraphe (2).
Extension **5** (2) The court may, on such terms as it considers proper, extend the time for making an application for judicial review if it is satisfied that there are apparent grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay.	**Prorogation** **5** (2) La Cour peut proroger, aux conditions qu'elle estime appropriées, le délai fixé pour présenter une requête en révision judiciaire si elle est convaincue qu'il existe des motifs apparemment fondés pour accorder le redressement et qu'aucune personne touchée par la prorogation ne subira de préjudice grave.

[35] Where a Manitoba statute regulates judicial review or provides a statutory appeal to either this Court or to the Court of King's Bench, a thirty-day time limit on instituting proceedings is generally mandated. Examples include the MB, *Court of Appeal Rules (Civil)*, Man Reg 555/88R, r 11; *The Labour Relations Act*, CCSM c L10, s 128(3); *The Health Sector Bargaining Unit Review Act*, CCSM c H29, s 25(2); *The Human Rights Code*, CCSM c H175, s 50(2); *The Municipal Assessment Act*, CCSM c M226, s 62(2) ("not later than 21 days"); *The Social Services Appeal Board Act*, CCSM c S167, s 23(2); *The Manitoba Public Insurance Corporation Act*, CCSM c P215, s 187(3); *The Securities Act*, CCSM c S50, s 30(3); *The Public*

Utilities Board Act, CCSM c P280, s 58(2)(b) (“within one month”); *The Expropriation Act*, CCSM c E190, s 44(1) (“within 40 days”); *The Liquor, Gaming and Cannabis Control Act*, CCSM c L153, s 140(2); *The Surface Rights Act*, CCSM c S235, s 48(4)(b) (“within one month”); and *The Farm Practices Protection Act*, CCSM c F45, s 13.

[36] These relatively short periods of time—ranging from twenty-one to forty days—appear designed to balance the need for finality of the decisions of lower courts and tribunals against the right of affected parties to have the decision reviewed. In my view, the adoption, by way of legislation, of a brief time window for the filing of judicial review applications with the courts would be a welcome step in Manitoba and would promote certainty and efficiency for both administrative decision makers and the general public.

[37] In the absence of a statutorily mandated time frame, I would adopt the jurisprudence previously applied in Ontario. In my view, a delay in excess of six months to file an application for judicial review would, in most cases, be excessive. However, the courts must ultimately retain discretion on such motions and could find a lesser period of delay to be excessive or a longer period of delay to be justified—depending, in each case, on the particular circumstances.

[38] In the present case, I am not persuaded the motion judge made any error in finding that the nearly twenty-one month delay was “inexplicable and inordinate”.

Prejudice and the Public Interest as Considerations in a Motion to Dismiss an Application for Judicial Review for Delay

[39] Rule 38.12 of the *King's Bench Rules* is nearly identical to the former rule 24.01 dealing with motions to dismiss an action for delay, which is reproduced below:

Motion **24.01(1)** The court may on motion dismiss an action for delay.	**Motion en vue du rejet d'une action** **24.01(1)** Le tribunal peut, sur motion, rejeter une action pour cause de retard.
Grounds **24.01(2)** On hearing a motion under this rule, the court may consider,	**Motifs** **24.01(2)** Lors de l'audition d'une motion présentée en vertu de la présente règle, le tribunal peut prendre en considération ce qui suit:
(a) whether the plaintiff has unreasonably delayed the prosecution of the action;	a) si le demandeur a retardé déraisonnablement l'instruction de l'action;
(b) whether there is a reasonable justification for any delay;	b) s'il existe une justification raisonnable pour un retard;
(c) any prejudice to the defendant; and	c) tout préjudice causé au défendeur;
(d) any other relevant factor.	d) tout autre facteur pertinent.

As discussed in *Parkinson v Winnipeg Regional Health Authority*, 2025 MBCA 82 [*Parkinson*], rule 24.01 was substantially overhauled in 2017 (see *Court of Queen's Bench Rules, amendment*, Man Reg 130/2017, s 9). However, rule 38.12 was not.

[40] The approach to motions to dismiss an application for delay mirrors the traditional approach to motions to dismiss an action for delay under the former rule 24.01 and is set out in *Law Soc of Man v Eadie*, [1988] 6 WWR 354 at 359, 1988 CanLII 206 (MBCA) [*Eadie*]:

> Amongst the matters which should be taken into account on a motion such as this are:
>
> (i) the subject matter of the litigation;
>
> (ii) the complexity of the issues between the parties;
>
> (iii) the length of the delay;
>
> (iv) the explanation for the delay; and
>
> (v) the prejudice to the other litigant.

See also *Springfield* at para 16.

[41] As I have indicated, these were the factors considered by the motion judge. While rule changes have given way to a new approach in respect of motions under the revised rule 24.01, rule 38.12 remains as it has been for decades. In my view, the motion judge made no error in choosing to consider the *Eadie* factors.

[42] This appeal provides an opportunity for this Court to provide some direction in respect of the fifth *Eadie* factor—prejudice—on an application to dismiss a judicial review application for delay. I will also comment on the relevance of the broader public interest in the timely review of administrative decisions.

[43] In *Parkinson*, this Court recently adopted the language of "litigation" and "non-litigation" prejudice to describe the different types of prejudice that are to be considered on a motion to dismiss an action for delay under r 24.01.

[44] As Mainella JA stated in *Parkinson*, "[t]he historical Manitoba jurisprudence" looked at "prejudice as being either inherent or specific" (at para 149). In *Laing*, Mainella J (now Mainella JA) discussed the issue of prejudice on a motion to dismiss for delay, quoting Hamilton JA in *Fegol v National Post Co*, 2007 MBCA 27 at para 9: "Prejudice can be actual or inherent in nature and both must be assessed as to whether it is significant or minor in nature. Depending on all of the circumstances, inherent prejudice alone can justify the dismissal of a claim" (at para 132).

[45] Regrettably, the exact nature of what constitutes "inherent" prejudice is rather nebulously described in the jurisprudence. It has been found to include "a deterioration in the quality of the evidence" (*Bodykevich v University of Manitoba* (1997), 120 Man R (2d) 299 at para 17, 1997 CanLII 22968 (MBQB) [*Bodykevich*], quoting *Stechkewich v Freeth* (1991), 77 Man R (2d) 76 at para 20, 1991 CanLII 11970 (MBQB)) as a result of "the mere effluxion of time" (*Bodykevich* at para 10), as well as "the sense that, with litigation lingering in the future, the credit worthiness of the defendant may have been adversely affected" (*Pankhurst v Matz*, 1991 CanLII 2712 at 2 (MBCA)).

[46] In *Jacobson Estate v Freed* (1994), 97 Man R (2d) 197 at para 8, 1994 CanLII 16823 (MBCA), Huband JA stated:

> It is true that "inherent prejudice" may be broader than the question of whether a fair trial is still available, although its availability will be the major factor. It has been noted in some cases that, quite aside from the question of whether a fair trial is possible, the defendants should not be left with the threat of litigation hanging over their heads indefinitely.

[47] Since the design of the new rule 24.01 was "heavily influenced by the experience in Alberta" (*Parkinson* at para 149), Mainella JA concluded that it was best to categorize concerns about prejudice in the same manner as the Alberta practice of distinguishing between "litigation prejudice" and "non-litigation prejudice".

[48] In my view, the advantages of this approach are clear. The Alberta jurisprudence—in particular, the leading case of *Humphreys v Trebilcock*, 2017 ABCA 116—provides helpful, specific definitions of litigation and non-litigation prejudice, complete with examples. Litigation prejudice is described as follows (*ibid* at para 130):

> There is no doubt that the passage of time may impair a moving party's ability to defend its interests at the trial of an action. "Delay may compromise the fairness of a trial". The unavailability of crucial witnesses – death, impairment or disappearance – may diminish the strength of the moving party's case. The passage of time may also have impaired a prospective witness' ability to access stored data. A potential witness' mental health may have declined and place the person in a position where he or she no longer can retrieve material in a memory bank. Or a party may have lost exhibits. This may be attributable to disastrous fires or floods or mistakes made by movers or document managers.
>
> [footnotes omitted]

[49] Turning to non-litigation prejudice, the Court stated that "a moving party may suffer significant prejudice even if his or her ability to defend an action is not seriously infringed by the failure of the [non-moving] party to press an action ahead with reasonable diligence" (*ibid* at para 132). The Court went on to provide three examples of non-litigation prejudice (see *ibid* at paras 134-36).

[50] In *Ouellette v Law Society of Alberta*, 2021 ABCA 99, the Alberta Court of Appeal provided a succinct definition of non-litigation prejudice stating, "Prejudice exists even if the delay may not diminish the ability of the respondent to defend its interest in the litigation. Prejudice measures the adverse impact delayed resolution may have on other legitimate interests of the respondent" (at para 91) [footnote omitted].

[51] Non-litigation prejudice includes, without limitation, stress, reputational damage, the inability to earn a livelihood and meet financial obligations, impacts on legitimate professional, business or other interests, delayed retirement, and the inconvenience of litigation and delayed resolution (see also *Jordan v de Wet*, 2024 ABKB 462 at para 75; *Recycling Worx Solutions Inc v Hunter*, 2023 ABKB 51 at para 104; *Tiger Calcium Services Inc v Sazwan*, 2019 ABQB 665 at para 47).

[52] Whether one uses the nomenclature of litigation versus non-litigation, or specific versus inherent, at the end of the day, prejudice is still prejudice. The Alberta approach and the traditional Manitoba approach are merely different ways to describe and categorize the kinds of prejudice that commonly occur when legal proceedings are delayed. The type of prejudice that may arise in any particular proceeding will depend on the circumstances.

[53] In the present case, the proceeding is an application for judicial review. It strikes me that what may be called litigation prejudice would be less likely to arise in a delayed application for judicial review, which takes place based solely on the record that was before the administrative tribunal. Concerns regarding the degradation of evidence, including witnesses' memories, would rarely occur.

[54] On the other hand, non-litigation prejudice appears to have more relevance to judicial review. The types of prejudice that would commonly arise from delay in pursuing an application for judicial review include the inability of interested parties to plan their affairs and negative fallout from reliance on what was rightfully believed to be a binding administrative decision.

[55] For example, and as I previously discussed, in *Coombs*, the applicants delayed filing a notice of application for judicial review for twenty-nine months. The Court held that there was clear inherent prejudice to the respondent, "particularly given the consequences a review of [the Human Rights Commission's] decision could have on the larger labour relationship between the parties" (at para 12). While the Court referred to this as inherent prejudice, it would also fall under the rubric of non-litigation prejudice. In my view, nothing turns on the nomenclature.

[56] In the present case, the applicant argues that the motion judge was overly focussed on the issue of prejudice to the town when there was none. She asserts that any unsuccessful party in litigation is "prejudiced" by losing, but that is not what is contemplated by the jurisprudence. She maintains that the town suffered no prejudice from the potential judicial review application

being outstanding as the town went ahead and constructed the water treatment plant as planned.

[57] The motion judge took into account the following facts as part of his consideration of prejudice: "[t]he construction has occurred under the current licence, which was lawfully obtained"; "[t]he expenses incurred . . . for 12.4 million dollars"; "[t]he cost to delay and/or cease operations, albeit temporarily"; "the project is nearly fully constructed"; and "the town has very little discretion because of the funding commitments with other levels of government".

[58] In my view, the motion judge made no error in considering these highly relevant aspects of non-litigation prejudice to the town.

[59] This brings me to the following question. How should a court consider the public's interest in its analysis pursuant to rule 38.12? Is this factor considered at the same time as prejudice to the respondents, or is it a separate consideration?

[60] The motion judge appears to have briefly considered prejudice to the public's interest resulting from the delay simultaneously to his consideration of prejudice to the town. He stated, "The town and ultimately the residents of the town in which government officials serve would be significantly prejudiced." In addition, he considered the town's "accountability to ratepayers to provide something as important as clean and safe drinking water."

[61] There is no doubt that the interest of the public can be an important consideration for courts in motions to dismiss an application for judicial

review for delay. In Sara Blake, *Administrative Law in Canada*, 7th ed (Toronto: LexisNexis, 2022), the author discusses the unique nature of judicial review applications and their role in reviewing administrative decision making. She states (at ch 7, s 7.07):

> Effective public decision making requires that judicial review be commenced without delay to ensure the stability, efficiency and reliability of public administration. The public uncertainty and potential chaos caused by delays are an anathema to these public-interest needs.

[62] As I will explain, in circumstances where public interest is relevant to a motion to dismiss an application for judicial review for delay, courts in Manitoba should consider the public's interest as a distinct and separate factor from prejudice to a respondent.

[63] Rule 38.12(2)(c) of the *King's Bench Rules* permits a court to consider "any prejudice to the respondent", clearly indicating that the prejudice to be considered here relates solely to a respondent. While this does not preclude prejudice to the public interest from being considered under rule 38.12(2)(d) ("any other relevant factor"), it does mean that the public's interest should not be considered simultaneously to prejudice to a respondent pursuant to rule 38.12(2)(c). Unless the public at large (e.g., a collective group of residents from a town or association) is listed as a party to the application, consideration of their interests should not fall under this prejudice category.

[64] Other provinces have made different choices in their civil rules and have specifically expanded the consideration of prejudice beyond the parties to the proceeding.

[65] For example, in Saskatchewan, rule 3-56(3) of *The King's Bench Rules* (Saskatchewan), permits a court to refuse an application for judicial review for delay if it "(a) would be likely to cause substantial hardship to or substantially prejudice *the rights of any person*; or (b) would be detrimental to good administration" [emphasis added].

[66] Similarly, in British Columbia, the *Judicial Review Procedure Act*, RSBC 1996, c 241, s 11(b), states that a court can bar an application for judicial review for delay if it "considers that substantial prejudice or hardship will result to *any other person affected by reason of delay*" [emphasis added].

[67] As previously discussed, section 5(2) of the *Ontario Act* requires a court to find "that no substantial prejudice or hardship will result to *any person affected by reason of the delay*" [emphasis added] before allowing an extension of the thirty-day period to file an application for judicial review.

[68] In light of the language of rule 38.12(2)(c) of the *King's Bench Rules*, consideration of the public interest should not be done simultaneously to consideration of prejudice to a respondent but, rather, as a separate and distinct factor pursuant to rule 38.12(2)(d), which expressly provides motion judges with the discretion to consider additional factors as they see relevant.

[69] What is encompassed within the public interest in these circumstances?

[70] Consideration of the public interest can broadly go to the "individual and institutional interest in the finality of administrative decisions and the timeliness of any [judicial] review" (*Blot Interactive Inc v Ontario Media Development Corporation*, 2022 ONSC 4189 at para 23). It can also more

narrowly go to the public's interest in a specific project that forms the basis of judicial review, as is the case in the present appeal.

[71] Most of the decisions discussing the public interest in the timely review of administrative decisions centre on motions to extend statutory limitation periods to file an application for judicial review. Notwithstanding that the factual circumstances of those cases differ from the present appeal, their comments on the importance of finality and certainty remain applicable here as they highlight the relevance of the potential impacts of delay on the public interest.

[72] In *Turnagain Holdings Ltd v Environmental Appeal Brd*, 2002 BCCA 564, the British Columbia Court of Appeal commented on prejudice to the public interest, stating at para 27:

> If non-economic factors are brought into the consideration of the balance of prejudice, the scale weighs even more heavily in favour of the government respondents. Had the chambers judge quashed the decision of the Environmental Appeal Board, set aside the decision of Mr. Munro, and remitted the complaint for a new hearing, his order would have had serious consequences for the reasonable administration of Crown land because of the uncertainty it would introduce into public administration of Crown resources. As the House of Lords noted in ***O'Reilly v. MacKinnon***, [1983] 2 A.C. 237 (H.L.) at 280-1:
>
> > *The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers* for any longer period than is absolutely necessary in fairness to the person affected by the decision.
>
> [emphasis added]

[73] In *Canada (Attorney General) v Larkman*, 2012 FCA 204, Stratas JA recognized the importance that administrative decisions can have to the public interest, stating at para 88:

> Often decisions or orders resolve important questions that impact many members of the public. Often decisions or orders make it possible for other matters to go ahead in the public interest. In these situations, the need for finality and certainty is heightened. For example, soon after a decision on an environmental assessment is made, the government, the proponent of the project and the wider public need to know quickly whether the decision is final. An all-too-liberal approach to the granting of an extension of time can interfere with this, allowing applications for judicial review to pop up like a jack-in-the-box, long after the parties have received the decision and have relied upon it.

See also *WSCC v Petersen*, 2016 NWTCA 1 at para 39.

[74] In *Lachance v Solicitor General of Ontario*, 2024 ONSC 975, the Court considered the thirty-day statutory limitation period in effect in the *Ontario Act*, but also commented broadly on the impact of delay in applications for judicial review of government action. The Court stated (at para 25):

> Governmental and tribunal decisions often involve real time issues. Peoples' lives are affected. Unlike most civil actions that tend to involve historical issues for which damages or other remedies are claimed, an application for judicial review can affect and delay implementation of government action. Expenses may be incurred by government or individuals while waiting for judicial review proceedings. There is an institutional interest in ensuring timeliness and finality to governmental decisions. *Taylor v. Pivotal Integrated HR Solutions*, 2020 ONSC 6108, at para. 45.

[75] I would adopt these comments and apply them to the present appeal. The public interest at stake here includes the interest of the residents of the town in having access to the new water treatment plant and the interests of the taxpaying public that has funded its construction.

[76] To summarize, consideration of the public interest in an application for judicial review can be an important factor for courts to include in their analyses on motions to dismiss an application for delay. However, based on the language of rule 38.12(2) of the *King's Bench Rules*, as well as other comparable provincial rules, such consideration is best done pursuant to rule 38.12(2)(d). That is, courts should consider the public interest as an "other relevant factor" where the facts of the case require them to do so. While there may be some overlap, courts should attempt to refrain from considering public interest simultaneously to their consideration of prejudice to the respondent from the delay.

[77] In the present appeal, the motion judge appeared to consider the factors of the public interest and prejudice to the respondents together. Despite this, any error on the part of the motion judge is not material and had no impact on the outcome of the motion to dismiss. In my view, the motion judge was entitled to give weight to the interest of the public in the certainty and finality of the decision.

[78] In light of my conclusion regarding the motion to dismiss for delay, there is no need to consider the ground of appeal raised by the applicant regarding her motion to amend the notice of application.

Disposition

[79] In conclusion, the motion judge's decision to dismiss the application for judicial review on the basis of delay did not result from any material misdirection, nor was it so clearly wrong as to amount to an injustice.

[80] I would dismiss the appeal with costs.

Pfuetzner JA

I agree: Cameron JA

I agree: Edmond JA