Citation: Manitoba (Deputy Minister of Finance) v Proutt, 2026 MBCA 37
Date: 20260423
Docket: AI26-30-10348

IN THE COURT OF APPEAL OF MANITOBA

***B E T W E E N**:*

	)	***A. D. Pollock** and*
	)	***J. M. Katz***
DEPUTY MINISTER OF FINANCE	)	*for the Applicant*
	)	
(Applicant) Respondent	)	***S. R. R. Thomson** and*
	)	***J. Standil Margovski***
- and -	)	*for the Respondent*
	)	
BROOKE PROUTT	)	*Chambers motion heard:*
	)	***April 9, 2026***
(Respondent) Applicant	)	
	)	*Decision pronounced:*
	)	***April 23, 2026***

MAINELLA JA

Introduction

[1] The respondent (the taxpayer) moves for leave to appeal an interlocutory order dismissing her motion to dismiss the applicant's (the Deputy Minister) application for delay (see *The Court of Appeal Act*, CCSM c C240, s 25.2(1) [the *Act*]).

[2] For the following reasons, the taxpayer's motion for leave to appeal is denied.

Background

[3] In March 2017, the taxpayer entered into an arrangement with a third party (the seller) whereby she acquired various assets of the seller's heating business. At the time, the seller owed retail sales tax under *The Tax Administration and Miscellaneous Taxes Act*, CCSM c T2 [the *TAMTA*].

[4] On October 25, 2019, the Deputy Minister issued a notice of assessment to the taxpayer for unpaid retail sales tax, penalties and interest in the sum of $377,537.27 pursuant to the *TAMTA*.

[5] The notice of assessment was based on the claim that the taxpayer was a buyer under a sale in bulk without obtaining a bulk sales clearing certificate and therefore became liable for the seller's tax debt under the *TAMTA*.

[6] On November 25, 2019, the taxpayer appealed the notice of assessment to the Tax Appeals Commission (the TAC).

[7] On September 14, 2020, the TAC allowed the taxpayer's appeal and rescinded the notice of assessment in its entirety. The TAC concluded that the taxpayer's acquisition of the assets of the seller's heating business was a secured loan, not a bulk sale.

[8] On December 14, 2020, the Deputy Minister filed a notice of application in the Court of Queen's Bench (as it then was), appealing the TAC's decision (see the *TAMTA*, s 58(b)).

[9] For the next four and one-half years, the Deputy Minister's statutory appeal sat unperfected on the Court's docket. Settlement discussions between the parties occurred without a resolution.

[10] On July 3, 2025, the taxpayer moved to dismiss the Deputy Minister's application for delay (the delay motion) (see MB, *King's Bench Rules*, Man Reg 553/88, r 38.12(1) [the *Rules*]).

[11] After the taxpayer filed the delay motion, the Deputy Minister filed the record for the statutory appeal and his application brief.

[12] In answer to the delay motion, the Deputy Minister filed an affidavit from Valerie Rubletz, a manager within the taxation division of the Department of Finance (the Rubletz affidavit). The Rubletz affidavit sets out facts as to the settlement discussions between the parties while the Deputy Minister's statutory appeal was outstanding, as well as payments made by the taxpayer to the Department of Finance towards the potential tax liability. In his brief on the delay motion, the Deputy Minister made reference to the content of the Rubletz affidavit.

[13] The taxpayer objected to what she considered to be the Deputy Minister placing inadmissible materials before the Court on the delay motion.

[14] The taxpayer moved to strike aspects of the Rubletz affidavit and the Deputy Minister's brief as to reference to any inadmissible statements subject to settlement privilege (see the *Rules*, r 25.11(1)(a)-(c) (the motion to strike)).

[15] On January 15, 2026, a judge of the Court of King's Bench (the motion judge) denied the delay motion (see *Manitoba (The Deputy Minister of Finance) v Proutt*, 2026 MBKB 12 [*KB reasons*]).

[16] In his decision, the motion judge stated that the four-and-one-half-year delay of the hearing of the statutory appeal was "unreasonable" (*ibid* at para 26), but that delay had given rise to no litigation prejudice and minimal non-litigation prejudice to warrant dismissal of the Deputy Minister's application for the statutory appeal.

[17] In the *KB reasons*, the motion judge makes no mention of the motion to strike. The order filed addresses only the dismissal of the delay motion; it does not address the outcome as to the motion to strike.

[18] In her notice of motion for leave to appeal, the taxpayer sets out eleven grounds, which can be summarized into four discrete issues:

1. The motion judge failed to adjudicate the motion to strike materials that set out inadmissible evidence that was subject to settlement privilege.

2. The motion judge failed to apply the correct legal test under rule 38.12 of the *Rules* in deciding whether to dismiss the Deputy Minister's application for delay.

3. In coming to his decision on the delay motion, the motion judge erred by relying on inadmissible evidence that was subject to settlement privilege or was created after the motion to delay was filed.

4. The motion judge erred in his consideration of the relevant factors in dismissing the delay motion.

Discussion

[19] Several matters on this leave motion are not in dispute. The parties agree that the motion judge's order is interlocutory—as opposed to final—such that leave to appeal is required pursuant to section 25.2(1) of the *Act*. It is also agreed that none of the exceptions set out in section 25.2(2) are applicable to this case.

[20] The relevant principles as to the decision whether to grant leave to appeal pursuant to section 25.2(1) of the *Act* are set out in detail in the recent decision of *Nygard v Canadian Broadcasting Corporation*, 2026 MBCA 36 [*Nygard*].

Sufficient Merit

[21] While counsel for the Deputy Minister did not concede that the taxpayer's proposed appeal has arguable merit, to his credit, he did not rest much of his opposition to the granting of leave on that precondition.

[22] I am satisfied that the taxpayer has demonstrated that her proposed appeal has arguable merit (see *ibid* at para 18). In particular, I would highlight that the taxpayer made an unequivocal and timely objection to the admissibility of certain materials presented by the Deputy Minister on the delay motion. The transcript confirms that the motion judge was aware of the objection and said he would address it if it was important. The materials objected to were important, as they were relied on by the motion judge in

coming to his decision on delay. No mention is made by the motion judge in the *KB reasons* as to how he addressed the taxpayer's admissibility objection. A functional review of the *KB reasons* does not provide any further clarity. Indeed, the Deputy Minister calls the motion judge's reasons "opaque" as to how he dealt with the motion to strike.

[23] In my view, issues as to the admissibility and use of contested evidence on the delay motion survive a preliminary examination, as such an appeal has the potential to succeed and change the result.

Sufficient Importance

[24] While I have little doubt that the proposed appeal is important to the parties, as this tax dispute has been outstanding for some time, the critical question in this motion is whether the proposed appeal is of sufficient importance—not just for this case but also in determining other similar disputes that are apt to arise in the future (see *Nygard* at para 19).

[25] There are several important contextual matters to consider in assessing the importance of the proposed appeal.

[26] First, it is trite law that objections on the admissibility of evidence must be adjudicated by a judge unless they are immaterial to the proceeding and that the admissibility of evidence is a question of law (see *Dobrowolski v Dobrowolski*, 2020 MBCA 105).

[27] Second, the law as to the admissibility of information subject to settlement privilege in a commercial setting is well settled and not in doubt (see *Union Carbide Canada Inc v Bombardier In*c, 2014 SCC 35). The same

can be said of the law as to a motion for delay pursuant to rule 38.12 of the *Rules* (see *Delwar v Beausejour (Town of)*, 2025 MBCA 84). Allowing an appeal to proceed in this case will do little to develop the law or resolve any conflict in the jurisprudence.

[28] Third, the relevant appellate structure here is that, if the motion for leave to appeal is denied, the taxpayer will still maintain the ability to challenge the rulings related to the delay motion at a future date (see *Nygard* at para 20).

[29] It is not disputed by the parties that, if the Deputy Minister is unsuccessful on his statutory appeal, the TAC's decision will govern, meaning the taxpayer owes nothing and the taxpayer's proposed appeal of the delay motion will be moot. It is also not disputed that the Deputy Minister's statutory appeal is subject to a deferential standard of review of palpable and overriding error because it is attempting to overturn the TAC's characterization of a business transaction, a matter that is highly fact-driven.

[30] The consequence here of my decision on this motion really amounts to the timing of when the taxpayer's complaints about the delay decision will be heard, if necessary. This is not a situation where, if leave to appeal is denied, a party will lose forever their right to challenge a decision, which has consequences to them.

[31] Finally, I am mindful that interlocutory appeals often "increase the delay, expense and complexity of litigation" (*ibid* at para 14). The Deputy Minister's statutory appeal is ready to be heard save for the filing of the taxpayer's brief. It strikes me that the interests of justice favour having the statutory appeal being heard on its merits, a matter that likely could be heard

and determined well before this proposed appeal. Given that the statutory tax appeal is one where the Deputy Minister bears a significant burden and, thus, may make the taxpayer's proposed delay appeal moot, permitting an interlocutory appeal strikes me as inappropriate.

[32] In summary, I have not been persuaded that there is sufficient importance to this proposed interlocutory appeal to grant leave to appeal.

Residual Discretion

[33] I have considered my residual discretion to grant leave to appeal to address an obvious error in the lower court that has occasioned a miscarriage of justice.

[34] In my view, if the motion judge erred and those errors turn out to be important, the taxpayer will have the remedy of challenging them in this Court by way of a regular appeal where leave to appeal is not required. That is an adequate alternative remedy. This is a situation where there is not a compelling reason for this Court to insert itself into the legal process at an earlier junction than is normal. I am not persuaded that a miscarriage of justice will occur if any error committed by the motion judge is not reviewed at this time.

Disposition

[35] In the result, the motion is denied with costs.

Mainella JA