

**IN THE COURT OF APPEAL OF MANITOBA**

***BETWEEN:***

<b><i>JENNIFER LEIGH SHYMANSKI</i></b>	)	<b><i>R. P. Majewski</i></b>
	)	<b><i>for the Applicant</i></b>
	)	
<b><i>(Petitioner) Respondent</i></b>	)	<b><i>J. R. Stitt</i></b>
	)	<b><i>for the Respondent</i></b>
<b><i>- and -</i></b>	)	
	)	<b><i>Chambers motion heard:</i></b>
<b><i>MARK MICHAEL WALTER SHYMANSKI</i></b>	)	<b><i>April 23, 2026</i></b>
	)	
<b><i>(Respondent) Applicant</i></b>	)	<b><i>Decision pronounced:</i></b>
	)	<b><i>May 5, 2026</i></b>

**PFUETZNER JA**

[1] The applicant moves for leave to appeal an interlocutory order of a judge of the Court of King’s Bench (the motion judge) denying his motion to have the respondent’s family law proceeding dismissed for delay pursuant to rules 24.01 and 24.02(1) of the MB, *King’s Bench Rules*, Man Reg 553/88 [the *KB Rules*] (see *Shymanski v Shymanski*, 2025 MBKB 137 [the *Reasons*]). These rules are reproduced in an appendix to these reasons.

[2] The primary outstanding issue between the parties is the calculation of past and ongoing child support.

**Background**

[3] The parties were married in 2002 and separated in 2013. They have two children—L, born in 2003 and P, born in 2005. L is attending post-

secondary education and remains a child of the marriage. P is now an adult and is working full-time.

[4] The parties executed a separation agreement in 2016 (the agreement). The agreement provided that the applicant pay the respondent off-set child support, which the applicant has continued to pay. The agreement noted that parenting arrangements were unresolved on a final basis at that time and that, if parenting changed from a shared arrangement, a change in child support might be warranted. In addition, the agreement contemplated that either party could notify the other if they intended to seek a variation of child support.

[5] In 2019, the respondent brought a motion before a master (now referred to as an associate judge) for financial disclosure from the applicant. As found by the motion judge, nothing further transpired until 2024, when the respondent successfully sought a further order for financial disclosure, which was granted in August 2024 (the 2024 motion) by the associate judge (see *Reasons* at para 12).

[6] The applicant then filed a motion seeking to dismiss the proceedings for delay pursuant to rule 24 (the delay motion). The delay motion was first heard and dismissed by the associate judge. The applicant appealed to the motion judge, who also dismissed the delay motion.

#### The Motion for Leave to Appeal

[7] The applicant now seeks leave to appeal the motion judge's order under section 25.2(1) of *The Court of Appeal Act*, CCSM c C240. The parties agree, as do I, that this is an interlocutory order for which leave to appeal is

required. It is also agreed that none of the exceptions set out in section 25.2(2) are applicable to this case.

[8] In *Knight v Daraden Investments Ltd et al*, 2022 MBCA 69 at para 22, this Court determined the criteria that must be satisfied by an applicant for leave to appeal an interlocutory order:

1. first, the proposed ground of appeal must have arguable merit;  
and
2. second, the proposed ground of appeal must be of sufficient importance to warrant the attention of a full panel of this Court.

[emphasis in original]

### The Motion Judge's Ruling

#### *Rule 24.02 of the KB Rules*

[9] First, the motion judge considered whether rule 24.02(1) applied. Under that rule, the court must, on motion, dismiss an action “[i]f three or more years have passed without a significant advance”. The motion judge found that it was “apparent that there has been a period of three or more years in these proceedings where there has not been a significant advance in the action” (*Reasons* at para 34).

[10] However, he found that one of the enumerated exceptions to the rule applied. That exception applies where “a motion or other proceeding has been taken since the delay and the moving party has participated in the motion or other proceeding for a purpose and to the extent that warrants the action continuing” (*KB Rules*, r 24.02(1)(e)). The motion judge found that the

applicant participated in the 2024 motion to the extent required by rule 24.02(1)(e): he consented to the order for disclosure (see *Reasons* at para 44), the disclosure was important in the context of the issues between the parties (see *ibid* at para 47), the order was not appealed, and there has yet to be a divorce judgment or final child support order (see *ibid* at para 53).

*Rule 24.01 of the KB Rules*

[11] Next, the motion judge considered rule 24.01(1), which provides that all or part of an action may be dismissed if the court finds “that there has been delay in the action and that delay has resulted in significant prejudice to a party”. The motion judge applied the principles described by this Court in *The Workers Compensation Board v Ali*, 2020 MBCA 122 [*Ali*]. He found that there had been “inordinate and inexcusable delay” (*Reasons* at para 62) on the part of the respondent, as a result of which, prejudice to the applicant was presumed (see *ibid* at para 63).

[12] The motion judge nonetheless determined that the respondent had rebutted the existence of both litigation and non-litigation prejudice. In terms of litigation prejudice, the motion judge found that the quality of the evidence was not “of such a deteriorated state, that a fair trial is not possible” (*ibid* at para 86) with respect to ongoing and retroactive child support.

[13] Turning to non-litigation prejudice, the motion judge considered the interests of the children (who are not parties to the proceeding), but who he said “may be entitled to the receipt of child support” (*ibid* at para 93). While acknowledging that the applicant is “entitled to closure,” the motion judge also found that “this closure ought not be at the expense of” either child (*ibid*).

[14] As an alternative, in the event he was in error in his findings under rule 24.01, the motion judge exercised his residual discretion not to dismiss the action. In *Ali*, Burnett JA wrote that this “residual discretion should only be exercised in exceptional circumstances where there is a compelling reason, and the compelling reason must be clearly articulated” (at para 46). The reason given by the motion judge was that, because the issues before him involved child support, dismissing the action “as a result of delay would impact the third party rights of the child[ren]” (*Reasons* at para 98).

[15] The motion judge also explicitly chose the jurisprudence and processes for determination of child support issues (in particular, retroactive child support) described in *Colucci v Colucci*, 2021 SCC 24 [*Colucci*], *Michel v Graydon*, 2020 SCC 24 and *DBS v SRG*, 2006 SCC 37 [*DBS*], “rather than the application of [rules] 24.01 and 24.02” of the *KB Rules* (see *Reasons* at para 101).

[16] Curiously, however, the motion judge found that the present case did not involve a claim for retroactive support, as no final order was in place and the agreement contemplated an adjustment to child support should the circumstances of the children change (see *ibid* at para 109).

#### Positions of the Parties

[17] The applicant seeks leave to appeal the motion judge’s order, suggesting that it treats child support as an exception to rule 24 of the *KB Rules*, such that unreasonable delay will always be tolerated in favour of the issues being heard on the merits. The applicant advised this Court that he is only seeking dismissal for delay of the respondent’s claim for “old” child support, but not any claim for ongoing support or the petition for divorce.

[18] The applicant takes issue with the emphasis put by the motion judge on the rights of the children in finding that the presumption of prejudice to the applicant was rebutted. He submits that the motion judge misdirected himself by ousting the required analysis under rule 24 in favour of the *DBS* and *Colucci* framework.

[19] While he raised several arguments in support of his motion for leave, the applicant agrees that the fundamental question on which he seeks leave to appeal can be stated as “Did the motion judge err by not dismissing the petition for delay under rule 24.01(1) or rule 24.02(1) where the outstanding issues between the parties are retroactive and ongoing child support?”

[20] The applicant argues that the proposed ground of appeal has arguable merit—it is not frivolous or doomed to fail. Moreover, he submits that it is sufficiently important to be heard by a full panel of this Court, as this Court could clarify the law on an issue that has relevance to other similar cases.

[21] On the other hand, the respondent asserts that there is no merit to the suggestion that the motion judge erred in finding that the exception in rule 24.02(1)(e) was met on the facts.

[22] Regarding the motion judge’s rule 24.01 analysis, the respondent submits that the motion judge properly found that there was no litigation prejudice to the applicant based on the degradation of evidence. As for non-litigation prejudice, she argues that the *DBS* and *Colucci* framework is well established with respect to retroactive child support and was properly considered by the motion judge as part of his analysis. She requests that the

motion be denied with costs and that the matter be returned to the case conference judge in the Court of King's Bench.

### Analysis

[23] The first criterion that the applicant must meet on this motion is the establishment of a proposed ground of appeal with arguable merit.

[24] In my view, there is arguable merit to the submission that the motion judge erred in principle in his general approach to how rule 24 is to be applied to claims for child support.

[25] One potential issue is how rule 24.02(1) applies to past and ongoing claims for child support in determining what constitutes a significant advance in an action where a separation agreement provides for annual financial disclosure and a mechanism for child support to be varied.

[26] It is also arguable that the motion judge erred in how he approached the issue of prejudice. While rule 24.01 would seem to limit consideration only to prejudice affecting a party to the litigation, the motion judge considered prejudice to the interests of the children. As the applicant argues, it appears that some of the legal principles set out in *DBS* and *Colucci* do not neatly mesh with the rule 24 regime.

[27] While it is by no means certain that the proposed ground of appeal articulated in paragraph 19 herein would succeed, I am persuaded that it is not frivolous and "cannot be dismissed through a preliminary examination" (*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 74).

[28] The second criterion of the test for leave to appeal is that the proposed ground of appeal must be of sufficient importance to merit the attention of a full panel of this Court.

[29] In my view, this criterion has also been met. The amendments to rule 24 are still comparatively new, and few cases on how the rules are to be applied to family proceedings have reached this Court. Of those that have, none have addressed the question of how rule 24 applies to claims for child support (see e.g. *Palamar v Palamar*, 2026 MBCA 3, which deals with a different issue).

[30] I have also considered that interlocutory appeals tend to increase the cost and delay associated with litigation. However, in the present case, this concern is tempered somewhat by the fact that, if leave to appeal is denied and the matter proceeds, a trial may be required in any event due to the factual issues in dispute.

### Conclusion

[31] For these reasons, I grant the applicant leave to appeal on the following question:

Did the motion judge err by not dismissing the petition for delay under rule 24.01(1) or rule 24.02(1) where the outstanding issues between the parties are retroactive and ongoing child support?

[32] In the circumstances, I would make no order as to costs.

## APPENDIX

Rules 24.01 and 24.02(1) of the MB, *King's Bench Rules*, Man Reg 553/88, are reproduced as follows:

### **Dismissal for delay**

**24.01(1)** The court may, on motion, dismiss all or part of an action if it finds that there has been delay in the action and that delay has resulted in significant prejudice to a party.

### **Presumption of significant prejudice**

**24.01(2)** If the court finds that delay in an action is inordinate and inexcusable, that delay is presumed, in the absence of evidence to the contrary, to have resulted in significant prejudice to the moving party.

### **What constitutes inordinate and inexcusable delay**

**24.01(3)** For the purposes of this rule, a delay is inordinate and inexcusable if it is in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case.

### **Rejet pour cause de retard**

**24.01(1)** Le tribunal peut, sur motion, rejeter une action, en tout ou en partie, s'il estime qu'elle a fait l'objet d'un retard ayant causé un préjudice important à une partie.

### **Présomption de préjudice important**

**24.01(2)** Lorsque le tribunal estime que le retard dont une action fait l'objet est inhabituel et inacceptable, ce retard est présumé, en l'absence de preuve contraire, avoir causé un préjudice important à la partie ayant présenté la motion.

### **Retard inhabituel et inacceptable**

**24.01(3)** Pour l'application de la présente règle, tout retard est inhabituel et inacceptable lorsqu'il excède ce qui est raisonnable compte tenu des circonstances et de la nature des questions du litige.

**Dismissal for long delay**

**24.02(1)** If three or more years have passed without a significant advance in an action, the court must, on motion, dismiss the action unless

- (a) all parties have expressly agreed to the delay;
- (b) the action has been stayed or adjourned pursuant to an order;
- (c) an order has been made extending the time for a significant advance in the action to occur;
- (d) the delay is provided for as the result of a case conference, case management conference or pre-trial conference; or
- (e) a motion or other proceeding has been taken since the delay and the moving party has participated in the motion or other proceeding for a purpose and to the extent that warrants the action continuing.

**Rejet pour cause de long retard**

**24.02(1)** Lorsqu'au moins trois ans s'écoulent sans que des progrès importants n'aient lieu dans le cadre d'une action, le tribunal la rejette sur motion, sauf dans l'un des cas suivants :

- a) toutes les parties ont expressément accepté le retard;
- b) il a été sursis à l'action ou l'action a été ajournée en conformité avec une ordonnance;
- c) une ordonnance prolongeant le délai pouvant s'écouler avant que des progrès importants n'aient lieu dans le cadre de l'action a été rendue;
- d) le retard découle d'une conférence de cause ou de gestion de cause ou d'une conférence préparatoire au procès;
- e) une motion a été présentée ou une autre instance a été entreprise depuis le retard et la partie ayant présenté la motion ou entrepris l'instance y a participé à des fins ou dans une mesure justifiant la poursuite de l'action.