C.A. No. 106590

NOVA SCOTIA COURT OF APPEAL

Cite as Nova Scotia Association of Health Organizations v. Nova Scotia (Workers' Compensation Appeal Board), 1994 NSCA 8

BETWEEN:

NOVA SCOTIA ASSOCIATION OF HEALTH ORGANIZATIONS Appellant - and - WORKERS' COMPENSATION APPEAL BOARD AND JENNYLEE MACARTHUR Respondents	Sarah MacDonald for the Appellant Jonathan Davies for the Respondent Workers' Compensation Appeal Board Ian C. Pickard for the Respondent Jennylee MacArthur Application Heard: July 14, 1994 Decision Delivered: July 27, 1994

BEFORE THE HONOURABLE JUSTICE RONALD N. PUGSLEY,
IN CHAMBERS

PUGSLEY, J.A.: **(In Chambers)**

This is an application pursuant to s. 182(1) of the **Workers' Compensation Act,** R.S.N.S. 1989 c. 508, for leave to appeal a decision of the Workers' Compensation Appeal Board made on May 26, 1994.

Section 182(1) provides:

> "An Appeal shall lie to the Appeal Division of the Supreme Court from any final decision of the Appeal Board upon any question as to its jurisdiction or upon any question of law, but such appeal can be taken only by leave of the judge of the Appeal Division, given upon application for leave to appeal which must be made to said judge within thirty days after the rendering of the decision,and upon such terms and conditions as the judge may determine."

The Appeal Board allowed an appeal from a decision of the Workers' Compensation Board delivered on July 27, 1993, in which the Board had refused to extend benefits to the claimant, Jennylee MacArthur.

The Appeal Board, in extending a period of temporary total disability from October 11, 1990 to June 18, 1992, determined that the medical evidence introduced by Ms. MacArthur attributed her condition directly to a work related injury, that had an organic basis, and that there was a causal connection between her work injury and the chronic pain symptomology of which she complained.

The application for leave is brought by the Nova Scotia Association of Health Organizations, a body established by the **Nova Scotia Hospital Association Act**, S.N.S. (1960), c. III as amended by S.N.S. (1974), c. 29.

The appellant is not the claimant's employer, but rather a non-profit independent organization, whose members include all hospitals in Nova Scotia, various clinics and treatment centres, as well as thirty-three long term care facilities. The appellant submits
its members are interested in the outcome of the appeal and therefore it has standing under s. 182 (5) which provides:

> "**Association representing class interest**
> (5) On the hearing of such appeal any association representing a class interest in the result of the case shall be entitled to appeal and be heard."

By consent of the parties, Ms. MacArthur has been added as a respondent to the action.

Counsel for the respondents have raised a number of preliminary objections, including standing respecting the appellant's ability to apply for leave under s. 182(1).

In my view, it is not necessary to determine these questions.

The appellant acknowledges that it does not object to the Appeal Board's extension of the period of temporary total disability, has no objection to the Board paying to Ms. MacArthur full compensation for the extended period, but only takes issue with, what the appellant's suggests, are comments by the Appeal Board that Ms. MacArthur is entitled to extended disability arising out of chronic pain even in the absence of organic injury.

If the decision of the Appeal Board is capable of such an interpretation, the remarks were clearly obiter.

The appellant's position constitutes an acknowledgment that the required "tangible and concrete dispute has disappeared and the issues have become academic" (**Borowski v. Canada (Attorney-General)** (1989), 47 C.C.C. (3d) 1 at p. 9 (S.C.C.)).

Both Ms. MacArthur's counsel, and counsel for the Board, advised the Court their clients would have no interest in appearing on an appeal where the Court would only be asked to decide the moot issue raised by the appellant.

In **Borowski** (supra), Sopinka, J. on behalf of the Court stated at p. 13:

> "The first rationale for the policy and practice referred to above is that the court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a

> fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome... The second broad rationale in which the mootness doctrine is based is the concern for judicial economy...The mere fact, however, that a case raising the same point is likely to recur evenly frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved."

While the Court has a discretion to hear a moot case, this is a departure from the traditional role of the Court.

The comments of Chipman, J.A. on behalf of this Court in the **Children's Aid Society of Halifax v. L.H**. (1989), 90 N.S.R. (2d) 44 at p. 48 are apposite:

> "I conclude that the issue raised in this appeal is moot. I would decline jurisdiction to exercise this court's discretion to hear and decide this appeal because of the absence of an adversarial relationship, concerns for judicial economy and for the court's role in the lawmaking process."

I would accordingly dismiss the appellant's application for leave to appeal and award costs in the amount of $500.00 against the appellant in favour of Ms. MacArthur.

Counsel for the Board did not request costs, and accordingly no costs will be awarded in favour of the Board.

PUGSLEY, J.A.