

“Providing Skills for Adjudication and Determination of Appeals”

Justice Maureen Crane-Scott, JA



What does “adjudication” mean?

Adjudication refers to the process of resolving a dispute or a question or of deciding a case. In the legal arena, when a question or dispute arises which requires adjudication or decision, a court or tribunal adjudicates or decides by:

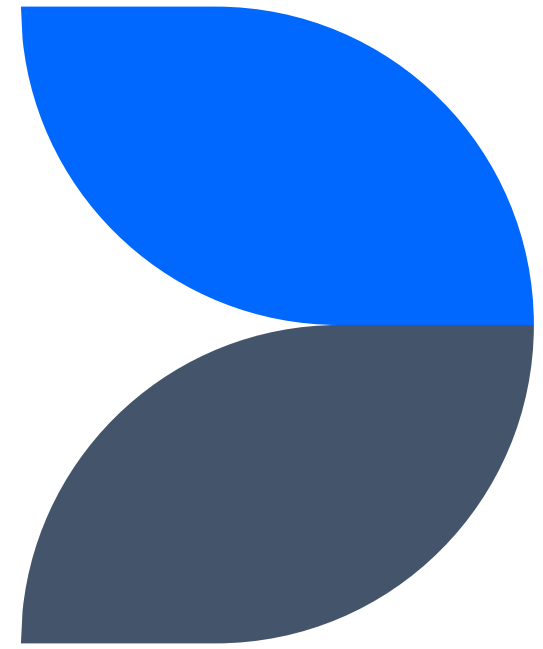
- (i) understanding the background and how the dispute or question arose;
- (ii) analyzing the laws which govern the subject matter of the dispute or question to be determined;
- iii) making findings (of mixed fact and law) by applying the law to the facts of the case in order to arrive at a decision on the question or the matter in dispute; and
- (iv) Setting out in writing the “reasons for decision” (i.e. the logical steps (based on the law) which led the court or tribunal to its ultimate decision.)

Outline

- ❖ Understanding the enabling statutory environment and the Tribunal's Jurisdiction;
- ❖ Preparing for the appeal
- ❖ The Hearing
- ❖ Arriving at a decision
- ❖ Providing Reasons for Decision

1. Understanding the enabling Statutory Environment and the Tribunal's Jurisdiction

An Overview of the National Health Insurance Ordinance, Ch. 8.10 and its various Regulations



The enabling Statutory Environment ⁽¹⁾

- ❑ The Appeal Tribunal is a creature of law. It owes its legal existence to:
 - i) the enabling Ordinance, i.e. the **National Health Insurance Ordinance, Chapter 8.10**; and
 - (ii) the **National Health Insurance (Appeals) Regulations, 2010** made under the Ordinance

- ❑ The enabling Ordinance is supplemented and supported by numerous Regulations made under the law-making authority conferred on the Minister by the Ordinance itself.

The enabling Statutory Environment ⁽²⁾

- ❑ The long title to the NHI Ordinance declares its intended purpose and objects in the following terms:

“An Ordinance to establish a National Health Insurance Plan whereunder persons are provided with health care services; To establish a National Health Insurance Board; And for connected purposes.”

The enabling Statutory Environment (3)

- ❑ The NHI (Appeal) Regulations identify a 4-level hierarchy for determining disputes or “**questions**” which arise in connection with the Plan.
- ❑ The 4-levels (in ascending order) are:
 - 1) The CEO - (sub-regulation 3(2))
 - 2) The Board - (sub-regulation 3(2))
 - 3) The Appeal Tribunal - (Regulation 6)
 - 4) The Supreme Court - (Regulations 8, 9 and 10)

The enabling Statutory Environment (4)

The Supreme Court: *In addition to* the jurisdiction to hear an appeal from the Tribunal on a question of law as provided by regulation 8, the Supreme Court also has jurisdiction:

- ☐ To hear and determine an application made by an aggrieved person or the Board for “leave to appeal” to the Supreme Court –(**Regulation 9**)
- ☐ To hear a “case stated” on a question of law referred by the Tribunal - (**Regulation 10**)
- ☐ Appeals and references to the Supreme Court are governed by rules of court to be issued under section 16 of the Supreme Court Ordinance - (**Regulation 11**)

The enabling Statutory Environment ⁽⁵⁾

- ❑ The NHI (Appeals) Regulations, 2010 came into force on 10 April 2010.

- ❑ Broadly, the Appeal Regulations establish a dispute resolution mechanism for determining questions and disputes about the operation of the National Health Insurance Plan. They make provision for the following matters:
 - ❑ Part I -**Questions**;
 - ❑ Part II- **Appeals**;
 - ❑ Part III- **Review of Decisions**; and
 - ❑ Part IV-**Miscellaneous matters**.

The enabling Statutory Environment ⁽⁶⁾

- ❑ Arguably **Part I** is one of the most important Parts of the NHI (Appeals) Regulations.
- ❑ Under the broad heading “**QUESTIONS**”, **Part I** sets out, *inter alia*, the *types* of “**questions**” (i.e. subject matter) to which the dispute resolution mechanism established in the Regulations applies.
- ❑ **Part I** also sets out a *hierarchy* for determining disputes; and further sets out the “**procedures**” to be followed when a “**question**” arises for determination in relation to the Plan.

The enabling Statutory Environment (7)

- ❑ Sub-regulation 3(1) identifies the types of “**questions**” which are to be susceptible to the dispute resolution mechanism established under the Ordinance.
- ❑ The “questions” which arise for determination should be connected to:
 - ❑ (a) **registration;**
 - ❑ (b) **contribution;**
 - ❑ (c) **eligibility to receive benefit;**
 - ❑ (d) **benefits; or**
 - ❑ (e) **claims.**

The enabling Statutory Environment ⁽⁸⁾

❑ Keep in mind that any one or more of the following Regulations may have a bearing on the “**question**” to be determined:

- 1) National Health Insurance (**Registration**) Regulations, 2009;
- 2) National Health Insurance (**Contribution**) Regulations, 2009
- 3) National Health Insurance (**Eligibility**) Regulations, 2009
- 4) National Health Insurance (**Benefit**) Regulations, 2010
- 5) National Health Insurance (**Claims**) Regulations, 2010
- 6) National Health Insurance (**Overseas Referral Process**) Regulations, 2010

The enabling Statutory Environment ⁽⁹⁾

❑ Sub-regulation 3(1) also sets out the “***procedure***” which is to be followed for resolving “questions” which have arisen in connection with the Plan:

- 1) The “**question**” is to be considered in the first instance by the Chief Executive Officer (“CEO”).
- 2) After the CEO has made the necessary inquiry, the CEO has 2 options. He may either:
 - (i) determine the question himself or
 - (ii) refer the question to the Board if he considers it more expedient to do so.

The enabling Statutory Environment (10)

- ❑ Members of the Tribunal should become familiar with the procedural requirements in the (Appeals) Regulations as this will enable members of the Tribunal to:
 - (i) Identify any procedural missteps which may have occurred at the early stages of the process before the CEO and the Board;
 - (ii) understand the background to the dispute and how the “**question**” under sub-regulation 3(1) arose;
 - (iii) identify the issue for the Tribunal’s determination;
 - (iv) determine what jurisdiction the Tribunal is required to exercise in each case; and
 - (v) know what documents or other materials should be before you before the Tribunal can set about its work.

The Tribunal's jurisdiction ⁽¹⁾

❑ The Tribunal's jurisdiction to decide a “question” arises in either of **two (2)** distinct ways:

1) *It has **jurisdiction to decide a referred question** as provided under the proviso to sub-regulation 3(3); and*

2) *It has ***appellate jurisdiction*** under regulation 6.*

❑ *Our specific focus this afternoon is on the Tribunal's ***appellate jurisdiction** under regulation 6.*

The Tribunal's jurisdiction (2)

❑ *The Tribunal becomes seized of its appellate jurisdiction when:*

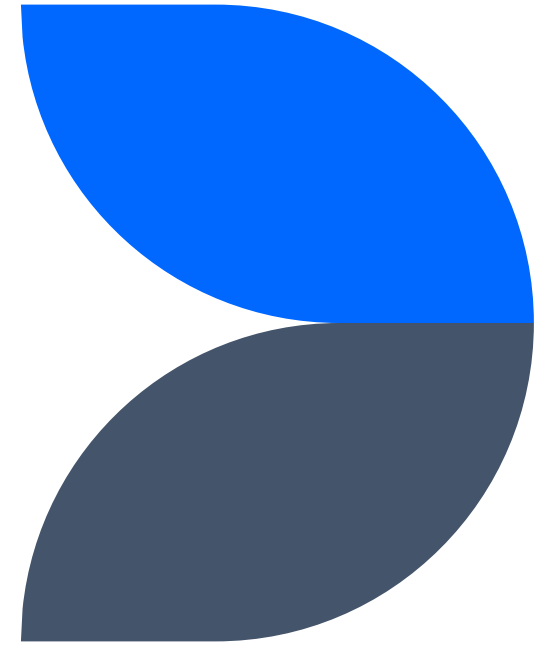
- i. A “**question**” has arisen under sub-regulation 3(1) which the CEO has inquired into and decided;*
- ii. The CEO's decision on the “question” has been notified to a person who (being aggrieved) has applied under sub-regulation 3(2) for the “question” to be referred to the Board;*
- iii. The Board has, in accordance with sub-regulation 3(3), subsequently decided the “question” and given its written decision specifying the reason on which its decision is based;*
- iv. The aggrieved person (having been notified under regulation 4 of the Board's decision and of his right to appeal) has filed a notice of appeal in accordance with regulation 6;*
- v. The notice of appeal is filed within the 21-day statutory deadline and has been referred to the Tribunal by the Board's “**notice of referral**” in accordance with sub-regulation 6(5).*

The Tribunal's jurisdiction ⁽³⁾

- ❑ The 21-day deadline in sub-regulation 6(2) for appealing a decision of the Board has implications for the Tribunal's jurisdiction to hear appeals.
- ❑ A person who has failed to appeal within the time-frame allowed by statute loses his right to appeal. **See R v Lesser (1940) 27 Cr. App. R. 69**
- ❑ The Chairman has a statutory discretion to extend the time for appeals where the 21-day deadline is missed.
- ❑ The discretion to extend time must be exercised judicially. **See Privy Council decision Rodriguez Jean Pierre v. The King, [2023] UKPC 15.**

2. Preparing for the appeal

Getting down to business



Preparing for the appeal

(1)

- ❖ The Tribunal has no Secretariat or Registry, and it is the Board which has administrative responsibility for ensuring that the Tribunal has what it needs to begin its work. The basic necessities may include:
 - (a) hard copies/electronic copies (if available) of the Ordinance and Regulations which govern the NHI Plan;
 - (b) individual copies of the appellate record, comprising: (i) the notice of referral; (ii) the filed notice of appeal; (iii) the written reasons of the Board on the “question” prepared in accordance with sub-regulation 3(3); (iv) the CEO’s inquiry report and findings prepared in accordance with sub-regulation 3(2); (v) any other materials and supporting documents relevant to the appeal. [*Consider the use of *Dropbox Business account*]
 - (c) a conference room or other suitable venue where “in-person hearings” or other meetings can be held. [*Consider “remote hearings” using *Zoom* or *MS Teams*]

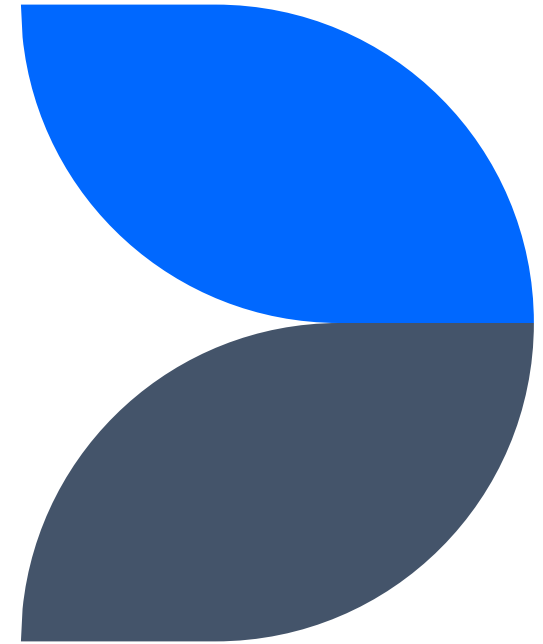
Preparing for the appeal (2)

Tips and Suggestions to assist Tribunal in preparing for the appeal:

- ❖ Consider the use of a *Dropbox Business Account*;
- ❖ Consider use of “remote hearings” using platforms like *Zoom* and *Microsoft Teams*;
- ❖ Members could consider holding a preliminary meeting to discuss the upcoming appeal;
- ❖ Consider holding an informal Case Management Conference (CMC) with the parties to give directions for the conduct of the hearing;
- ❖ Obtaining written submissions from the parties in advance of hearing;
- ❖ Consider the use of verbatim transcription services

3. The Hearing

Some random thoughts and suggestions



The Hearing

(1)

- ❑ *The traditional “In-person hearing” -vs- the “Remote hearing.”*
- ❑ Tribunal hearings will be less formal than occurs in a court of law.
- ❑ Establish an appropriate dress code for litigants and publish guidance as to how the Tribunal should be addressed during hearings.
- ❑ The Tribunal cannot properly sit without assistance of a court clerk.
- ❑ If written submissions are filed in advance of the hearing, pre-reading the submissions will enable the Tribunal to focus the discussion during the hearing and to clarify and narrow the issues requiring determination on the appeal.

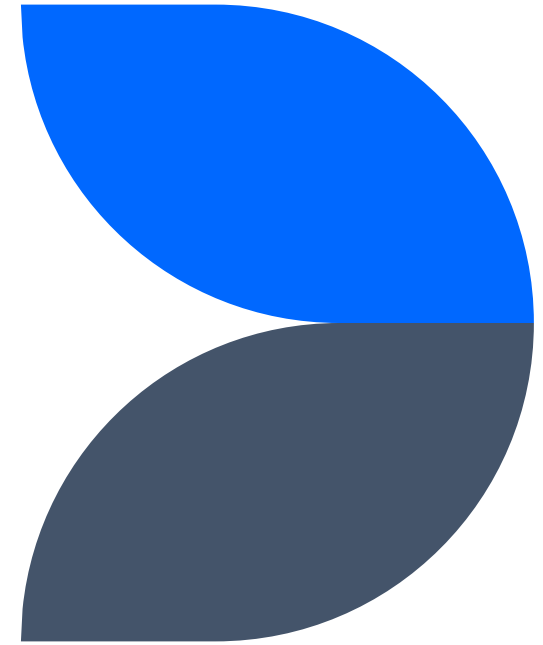
The Hearing

(2)

- ❑ At the end of the hearing, the Chairman will inform the parties that the Tribunal's decision is reserved.
- ❑ The Chairman will also advise the parties that they will be notified in due course of the date when its decision will be handed down.
- ❑ **“Remote hearings”** can be just as effective as **“in-person hearings”**. There can be challenges sometimes with persons dropping out of the on-line session, but these difficulties are easily overcome.

4. Arriving at a decision

Decision-making Techniques



Arriving at a decision

(1)

- ❑ There are different methods of decision-making: there is no right way or wrong way for a court or tribunal to arrive at a decision;
- ❑ One method is for the Chairman to convene an early meeting of the panel shortly after the hearing to discuss and arrive at an agreed position as to how the appeal should be disposed of. The Chairman then prepares written Reasons for Decision which are circulated for consideration and sign-off by the others.
- ❑ This method involves a ***collaborative or inclusive approach*** to decision-making. It also has the advantage of giving the Chairman (as the person who will write the written Reasons for Decision) a sense of direction. After the meeting he/she can thereafter prepare the Tribunal's Reasons confident in the knowledge that the decision has been agreed.

Arriving at a decision

(2)

- ❑ Another approach is for the Chairman to prepare and circulate draft Reasons for Decision for feedback and approval of the other members. This approach has some disadvantages as it is not initially inclusive of the other members and one or other of the members may disagree with the reasons and the disposition of the appeal which has been proposed. This can cause delays in the decision-making process as people can harden their individual positions and can sometimes even generate a dissenting opinion. This will be unhelpful to the adjudication process envisaged by the Ordinance.
- ❑ The better approach is for the Tribunal members to meet shortly after the hearing to discuss the appeal and to seek to arrive at an early consensus as to the disposition of the appeal. This approach will undoubtedly assist the Chairman to prepare the written reasons for decision much more quickly, confident in the knowledge that Tribunal has determined the “question” and the other members are already agreed.

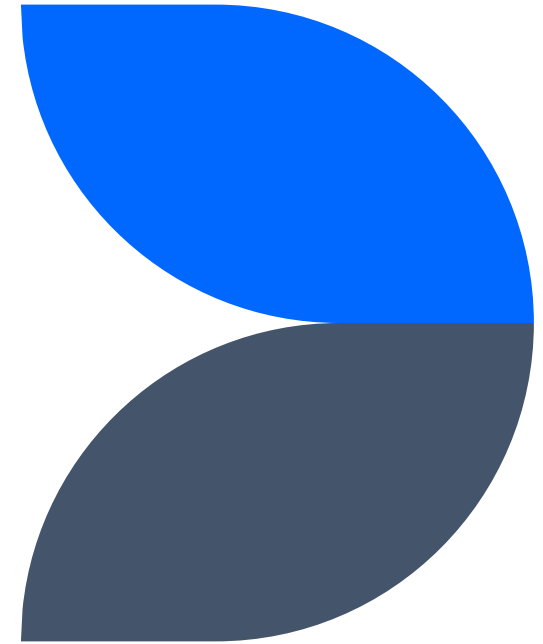
Arriving at a decision

(3)

- ❑ Tribunal members must not lose sight of sub-regulation 6(5) which provides that after the Tribunal determines the appeal, its decision is transmitted to the Board which is mandated to “confirm or revise” its own earlier decision in line with the Tribunal’s decision.
- ❑ If the collaborative approach to decision-making which I described is employed, I am confident that it will lead to more timely adjudication of “questions” on appeal. This will in turn inure to the more efficient administration of the Plan.

5.Reasons for Decision

Tips and Suggestions



Reasons for Decision

(1)

- ❑ Tribunal's paramount task is to determine the “question” which initially arose before the CEO and which has since been referred for determination by way of an appeal from a decision of the Board.
- ❑ In the course of the adjudication process the Tribunal will have the **additional task** of considering various grounds of appeal identified in the Notice of Appeal which the appellant believes will persuade the Tribunal that the Board's decision on the “question” is wrong

Reasons for Decision

(2)

Why are grounds of appeal placed before the Tribunal?

- ☐ Grounds of appeal provide the appellant an opportunity to place before the Tribunal suggested errors of law and/or of fact by the Board which the appellant suggests, should lead the Tribunal to conclude that the Board's decision on the "question" is erroneous and should not be allowed to stand.
- ☐ It is usual for properly crafted grounds of appeal to identify errors in the Board's reasoning such as considerations or material which the Board either: (a) failed to take into account, or (b) ought not to have taken into account when it decided the question.

Reasons for Decision

(3)

- ❑ In addition to keeping a close eye on the initial “question” which has arisen for its determination, it will also be for the Tribunal to examine the suggested errors of the Board outlined in the grounds as part of its task of adjudicating and determining the appeal.
- ❑ If a ground of appeal has no merit, the appellant who raised the ground is entitled to an explanation from the Tribunal as to why the ground cannot succeed.

Reasons for Decision

(4)

- ☐ Reasons need not be very lengthy
- ☐ Written Reasons should, however, provide a logical reasoned opinion relative to the “question” referred for adjudication.
- ☐ If the appeal is allowed in the light of the appellants ground of appeal, the Decision should clearly indicate that the ground has succeeded.
- ☐ If the ground is rejected, the appellant should be told why the ground had no merit.

Reasons for Decision

(5)

- ☐ The Tribunal's Reasons for Decision should be in a format which is easy to read.
- ☐ The Reasons should also enable the interested parties to follow the logical steps which the Tribunal took to adjudicate or decide the "question" which the Board referred to it for adjudication on the appeal.
- ☐ There should also be some discussion of the applicable law and as well as findings of mixed law and fact which led to the Tribunal's conclusion on the "question" for decision.
- ☐ In short, the decision must be clear enough to indicate to the Board why the Tribunal has agreed or disagreed with the Board's decision on the "question" and why its decision should either be confirmed or revised.

Reasons for Decision

(6)

**Deciding a
hypothetical “question”
Appendix I**

Concluding Remarks

- ❑ **Adjudicating disputes or questions is a process.**
- ❑ **The process on an appeal involves a number of steps:**

- (i) understanding how the dispute or question arose;
- (ii) understanding the issues raised in the grounds of appeal and how they relate to the dispute or question;
- (iii) analyzing the law which governs the subject matter of the dispute or question which is to be decided;
- (iv) making findings by applying the law to the facts of the case so as to adjudicate or determine the particular question or dispute; and
- (v) Setting out in writing reasons for decision or the logical steps (based on the law) which led to its ultimate decision.



***Thank you for
your attention!***

Justice Maureen Crane-Scott, JA