TRIBUNAL WATCH ONTARIO – SURVEY

Summary of Survey Responses for the Licence Appeal Tribunal

February 8, 2022

https://tribunalwatch.ca/

ABOUT THIS SURVEY

Tribunal Watch Ontario is a public interest organization with a mission to monitor Ontario's adjudicative tribunal system, advocate for adjudicative independence, and promote access to justice. We monitor new appointments to ensure that candidates are selected following a competitive process. We advocate for appointment and reappointment processes that are inclusive, transparent, merit-based, and free from political influence. We also advocate for dispute resolution processes that are fair, expert, timely and accessible.

In 2021, Tribunal Watch Ontario circulated a brief survey to users of Ontario's tribunals. In soliciting responses, Tribunal Watch wrote: "[We are] interested in your experience with Ontario's adjudicative tribunals. The following survey was designed for persons – lawyers and others – advocating on behalf of clients in disputes requiring resolution by an Ontario adjudicative tribunal during the period from April 1, 2019 to March 31, 2021. We have chosen this time period because it will allow us to compare the survey results with the data reported by the tribunal in its annual reports for the two fiscal years. The results of the survey will be made available to all interested parties."

ABOUT THE LICENCE APPEAL TRIBUNAL

This Report is about the responses related to the Licence Appeal Tribunal (LAT). LAT is one of 14 tribunals in the Tribunals Ontario cluster. It has two main divisions which function separately. The original LAT is the General Service division (LAT-GS), which resolves appeals from persons affected by licensing and compensation decisions made by various regulatory bodies. The most common cases involve liquor licences, new home warranty claims, medical suspension of driver's licences and impoundment of motor vehicles. LAT's identity is focused upon laws that protect consumers and the public, and ensure the integrity of the regulated businesses and occupations.

The Automobile Accident Benefits Service division (LAT-AABS) started in 2016, with the transfer of jurisdiction for these auto insurance disputes from the Financial Services Commission of Ontario. It receives applications regarding disputes about an insured person's entitlement to, or amount of, a statutory motor vehicle accident benefit.

LAT-AABS has a much bigger caseload than LAT-GS, and this is reflected in the Survey responses, since all or almost all of them appeared to relate to the auto insurance side of LAT. In Tribunals Ontario's 2020-2021 Annual Report, the statistics showed LAT-AABS having received over 15,600 appeals in 2020-2021, with 556 hearings held, 664 decisions rendered, and 13,011 cases settled or withdrawn. Except for the number of hearings held, these numbers were all increases from the previous three years.

In contrast, LAT-GS received only 483 appeals in 2020-2021, with 245 hearings held and 147 decisions rendered. This drop in caseload from previous years was explained in the Annual Report by the following note: "Due to the pandemic and the provincial

emergency orders, the LAT-GS saw a substantial decrease in *Ontario New Home Warranties Plan Act* appeals and *Liquor Licence Act* appeals."

While LAT-GS appeared to meet or exceed the numerical performance standards for timeliness, LAT-AABS continued to fall far short, as shown by this excerpt below, with the tribunal's explanatory notes at the bottom. Furthermore, the most recent statistics, from Tribunals Ontario's Open Data portal, show a huge increase in the number of active cases at LAT-AABS. The third quarter of 2021-22 (December 31) had 15,206 active cases, compared to 9,571 one year earlier, and 2,097 five years ago (December 31, 2016).

Table 3: LAT-AABS Performance Measures

Performance Measures	Target	2020-2021 Actual	2019-2020 Actual	2018-2019 Actual
A case conference will take place within 3 months of receipt of an appeal/application*	80%	1%**	1%	6%
An order/report will be issued within 30 days of the conclusion of the case conference	80%	87%	31%	65%
A hearing will take place within 3 months of a case conference	80%	11%**	7%	30%
A decision will be issued within 3 months of the conclusion of the hearing	80%	29%**	21%	39%
An appeal/application will be resolved within 9 months	80%	72%	76%	90%

Notes:

***Tribunal data indicates most hearing events are scheduled approximately 21 weeks from time of receipt. Scheduling hearing events earlier often results in significant rescheduling requests due to availability of parties and time required to gather pertinent supporting information. During this initial period, parties are also afforded time to resolve matters through settlement discussions.

****LAT was unable to meet all of its performance measures due to increases in the number of appeals/applications received and resource challenges. LAT is actively working to address this issue in the next fiscal year.

SURVEY RESULTS: What's working? What's not working?

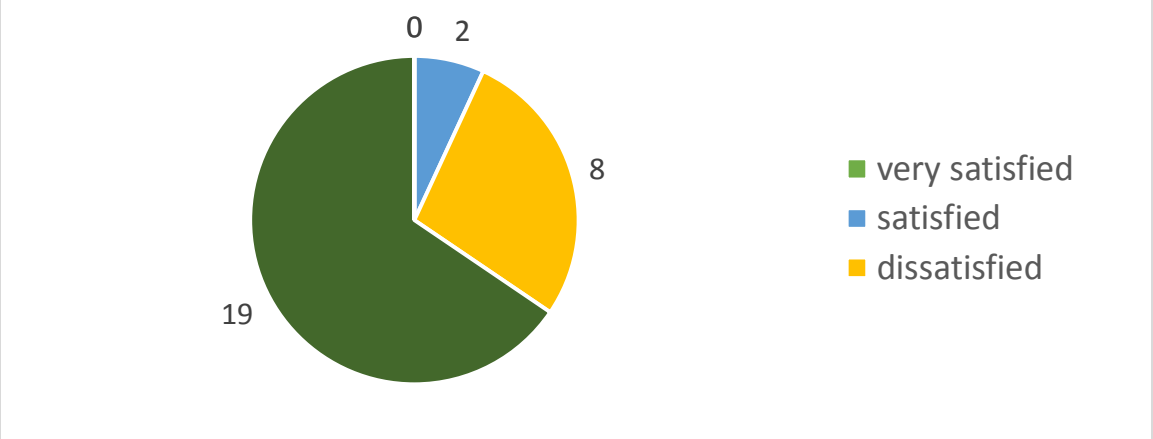
This survey was conducted between May and November 2021 and asked respondents to consider their interaction with LAT between April 1, 2019 and March 31, 2021.

There were 29 responses related specifically to LAT. While this is a relatively small number, this is not intended to provide data for scientific analysis. There are some recurring comments that add valuable context to the major concerns already evident in the Annual Report statistics. There are also some common themes in the responses and comments that indicate significant issues that should be investigated, monitored and addressed.

Generally, a majority of the respondents were dissatisfied with LAT. All the comments related to the auto insurance side of the tribunal (LAT-AABS), and it is likely that all or almost all of the respondents were users of that division of LAT.

There seemed to be two main areas of concern: extremely long delays, and lack of confidence in many of the respondents in the expertise and/or impartiality of the mediators and adjudicators.

QUESTION 1: During the survey period, how satisfied were you with the timeliness of the processing from initial application or response to final resolution?



The most serious and consistent complaint focussed on the timeliness of LAT's processes. Only 2 of the 29 respondents were satisfied in this area.
One element of the extended timelines is related to delays in scheduling case conferences, which appear to be taking 6 months or more, with only 1% of cases having case conferences scheduled within the 3-month target (as noted in the Annual Report). Other respondents cited sudden and unexpected cancellation of hearings.

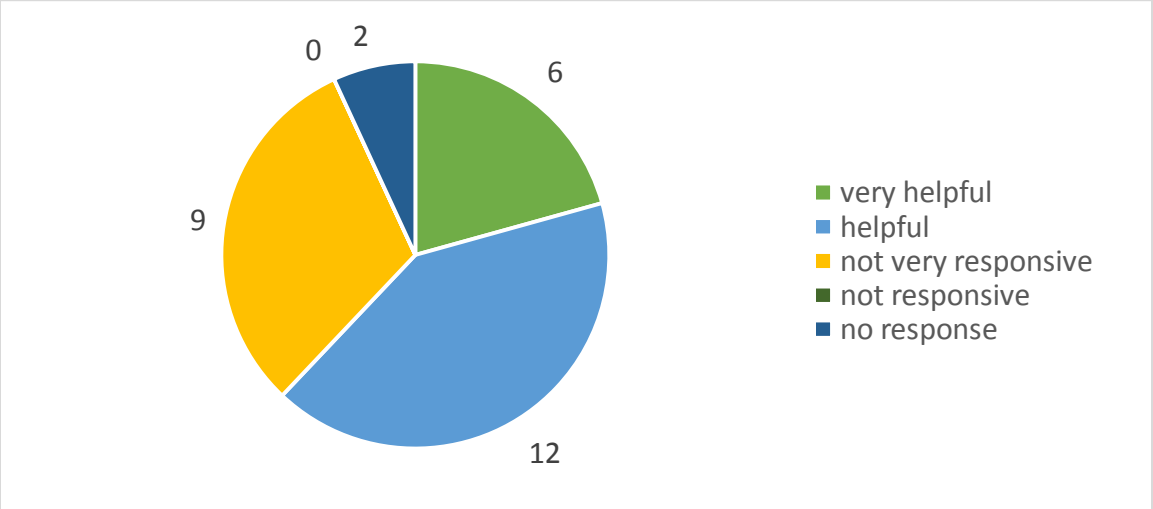
Overall processing times, for cases that go to a hearing and final decision, appear to have gone from 6 - 9 months to 1.5 - 2 years.

Here are a couple of the 19 comments, to provide a clear context for the impact of these long delays on auto accident victims.

- *"At the LAT, I handle accident benefits claims, where individuals are seeking to dispute their insurer's denials for medical treatment and benefits such as attendant care. These services are often needed immediately, and while insurers are allowed a 10 day grace period to make a decision to deny – an applicant seeking a dispute has to wait years before an ultimate decision is made. This type of delay for a system requiring quick access to benefits undermines the entire purpose of the scheme."*

- *"The LAT was created to replace FSCO as a more timely procedure. During the period in question, I have assisted clients in over 40 disputes at the LAT. During the 2016 - 2019 period, there was some timely resolutions of the proceedings within about 6 - 9 months, but decisions were taking much longer to receive. During the period in question, unfortunately, the process has been much slower. A hearing could not be booked until a year later, and since COVID this has increased with an average of up to 1.5 - 2 years for a hearing date. My most recent applications are being booked for a case conference in 5 - 6 months."*

QUESTION 2: In your dealings with the Tribunal staff how helpful and responsive did you find them to be?



This question had the most positive responses, with almost two-thirds of the respondents saying that tribunal staff were helpful or very helpful. Many respondents also understood that heavy caseloads might impede staff's efforts and abilities to help in a timely fashion. Also of note was that, while case managers were "friendly", they did not have the authority to make certain decisions or take specific actions. This sometimes led to a requirement to file formal motions to a tribunal member, causing another delay in the process. Lack of time and training to address problems was also reported. .

The general tone of all responses was that while the majority of staff are collegial and do their best to be helpful and responsive, their efforts are often impeded because of organizational challenges and inefficiencies.

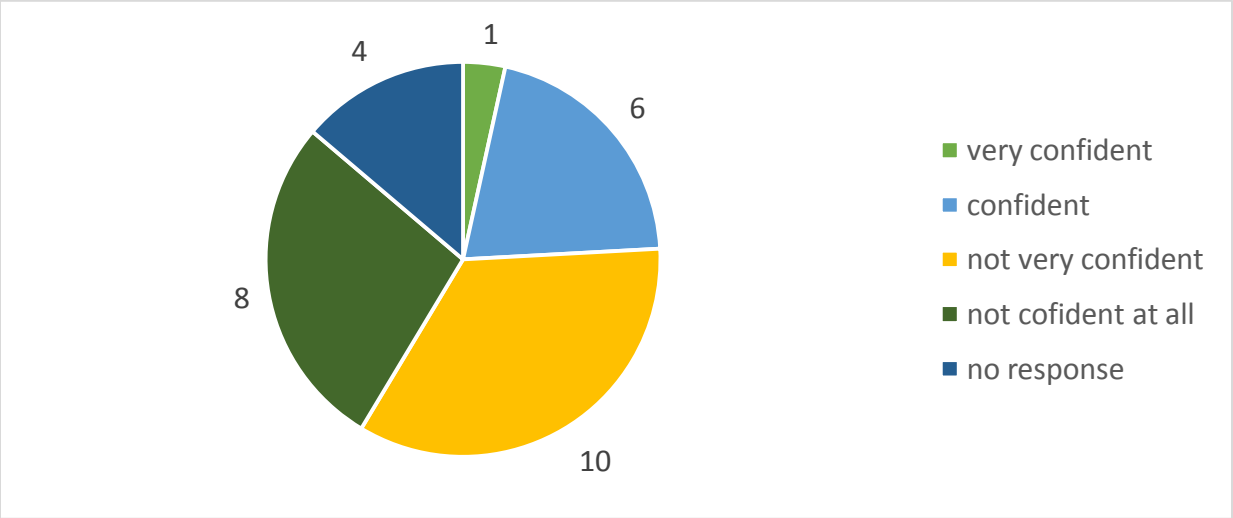
These are some of the 12 comments that were provided.

- *Case managers tend to be friendly but have no authority to make simple changes or decisions, essentially making them answering machines with data entry skills. We have had to file countless unnecessary and at times ridiculous motions at the behest of the case managers because that is the only way that they know they will get a response from the powers that be.*

- *They are helpful, but not very responsive. There is no quick way to call and get answers to simple questions. E-mails often do not get responded to immediately, or the person simply doesn't know an answer to the question. There is a clear lack of training, because you will sometimes get different answers from different [case management officers].*

- *In general, most tribunal staff are very responsive. There have been a couple of instances of non-response to inquiries.*

QUESTION 3: Given your experience with the Tribunal's dispute resolution processes during the survey period, be they mediations or hearings of whatever nature, how confident were you in the impartiality of the mediators or adjudicators?



Almost two-thirds of the 29 respondents expressed some a lack of confidence in LAT's dispute resolution process. For example, some responses referred to mediators and adjudicators who rejected expert evidence without providing reasons; failed to intervene when the respondent's counsel was "out of line" in a case with an unrepresented applicant; failed to review the materials submitted in advance; mischaracterized the evidence provided; making decisions with novel arguments that were not raised by anyone at the hearing.

Of particular note, several respondents referred to the case of Shuttleworth v. Ontario (SLASTO) 2019 ONCA 518. The Ontario Court of Appeal, in June 2019, upheld the Divisional Court's 2018 findings that the Executive Chair imposed a draft decision review process on a LAT member without the member's prior consent; that LAT did not have the required protections to safeguard adjudicative independence; and that the adjudicator did make changes following the Executive Chair's comments.

Some of the 15 comments indicated a perception that the members were biased in favour of the insurer.

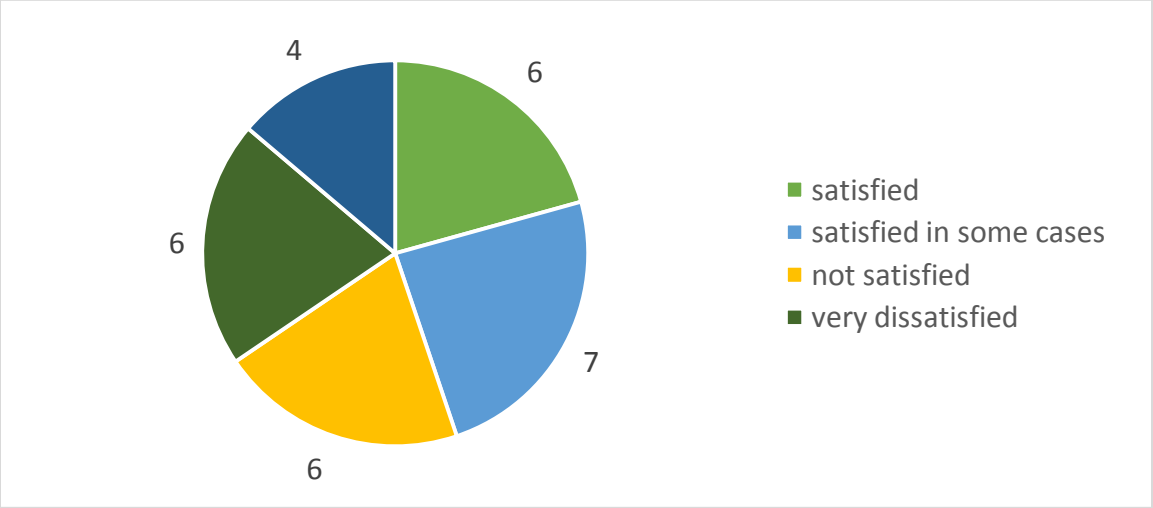
- *"I received a negative result from an adjudicator and looked up his last 45 decisions. In only one did he find in favour of the applicant on all issues. In three more there was mixed success for the applicant. The balance was entirely in favour of the respondent insurer."*

- *"With incompetent adjudicators taking routine 15 minute breaks to "think" about basic procedural motions brought up, or in handling any particular issues, it seems there is a centralized group of decision makers within the Tribunal who really make all the decision. Also, in light of a decision called Shuttleworth v LAT*

(ONCA) highlighting the internal review and editing procedures in the Tribunal, there is no perception that exists of adjudicative independence in their decision making. There is also a complete lack of transparency given attempts to make access requests are denied or unanswered without supportive substantive reasons."

- *Confident – "However it depends. Sometimes the adjudicator appears independent. However at times the adjudicator appears to have an inclination and a degree of familiarity with the insurance company and/or its lawyer."*

QUESTION 4: Given your experience with the Tribunal's dispute resolution processes during the survey period, be they mediations or hearings of whatever nature, how confident were you in the subject matter expertise of the tribunal's mediators or adjudicators?



The responses appeared to be evenly balanced between those satisfied and those not satisfied in regards to the perceived expertise of the adjudicators or mediators. Among respondents who express some degree of satisfaction, there was a focus on the process itself, for example, due to overall inefficiencies, or a focus on particular points in the process. As one respondent noted, "At the case conference stage, adjudicators are fine. At the hearing stage, adjudicators have shown significant bias."

Negative responses signalled concerns about an apparent lack of adjudicator expertise in procedural and substantive matters.

The following are some of the 8 comments. The respondents who were satisfied did not have many comments.

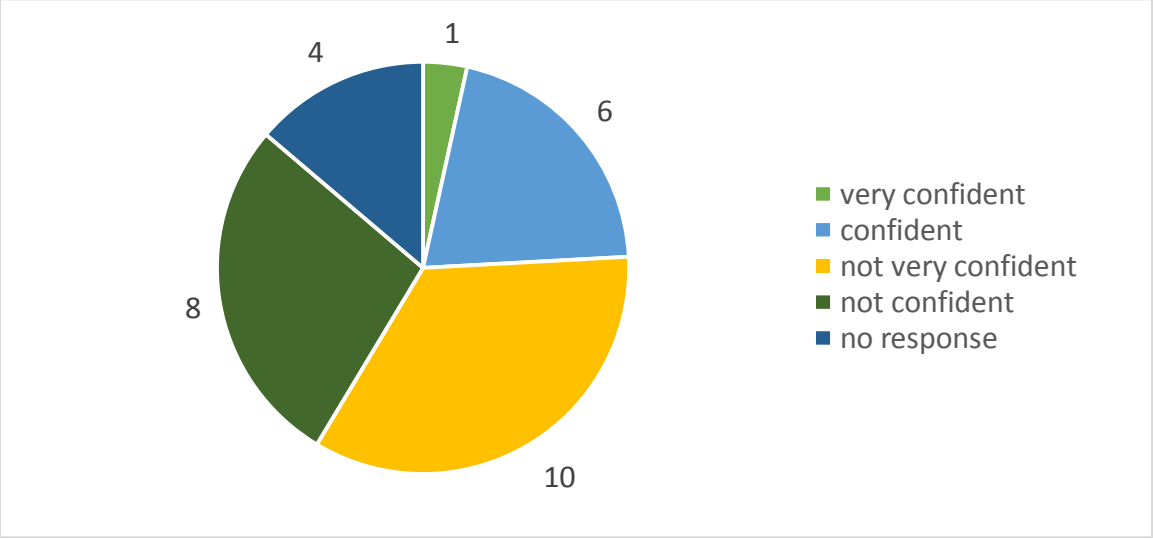
- *"In general, I find the adjudicators to administer the process well. The delays seem to be systemic in nature."*

- *"It would be helpful at Case Conferences if adjudicators actually took active steps to encourage the parties to resolve rather than just procedurally administering the next step."*

- *"Both legal and non-legally trained adjudicators have limited insights into procedural fairness issues or concerns. They often seek to find 'compromise' between the parties, and agreement/consensus at the expense of fairness. Especially in my area of law where vulnerable individual persons (many who are unrepresented) are pitted against sophisticated insurers that take advantage of the tribunal's incompetence and inherent delay for their own economic advantage."*

- *"Adjudicators and CMOs are not particularly good at ensuring the process is followed. Some are strict, some are completely relaxed in the rules. Sometimes people don't file responses, documents, or information in time, and there is no repercussion to anyone. Costs are awarded in the most frivolous cases, which is totally unreasonable. Adjudicators have no real flexibility in administering the process. They often must "check with" some other person before deciding if a certain matter ought to proceed one way or the other. They are not given any room to be creative. Adjudicators often refuse to do things that are reasonable. Adjudicators need more training."*

QUESTION 5: Given your experience with the Tribunal's dispute resolution processes during the survey period, be they mediations or hearings of whatever nature, how confident were you in the skills of the Tribunal's mediators or adjudicators to administer the process?



Where respondents expressed diminished confidence, the reasons included an apparent lack of competence in the assigned adjudicator or mediator, and a failure to approach the evidence and arguments presented by the parties in a thorough manner,

or perceptions of bias (e.g. appearance of familiarity with counsel for the insurance side during a hearing.)

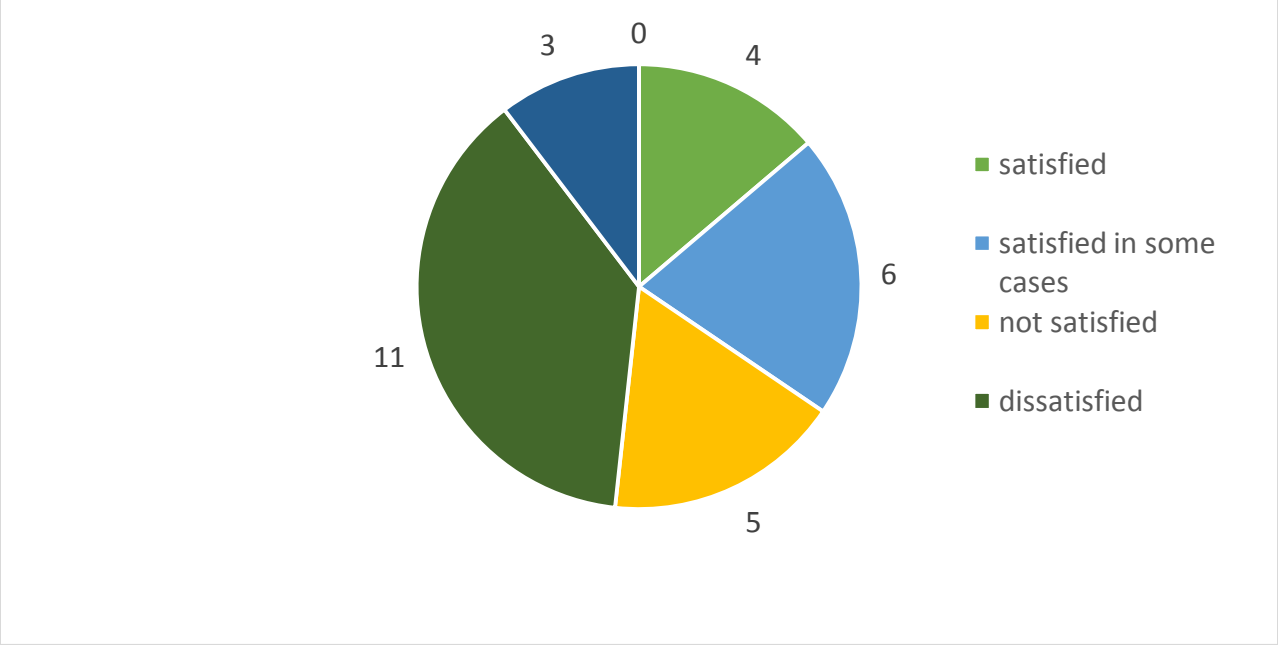
Some of the 10 comments include:

- *Confident – "However it depends. Sometimes the adjudicator appears independent. However at times the adjudicator appears to have an inclination and a degree of familiarity with the insurance company and/or its lawyer."*

- *"Certain decisions received show adjudicators not reviewing the materials submitted whatsoever. Worse, their decisions at times mischaracterize the evidence. Decisions have raised arguments that none of the parties discussed, which is unfair to everybody involved, as no party had an opportunity to consider or make submissions on the adjudicator's novel argument."*

- *Very confident – "In rare instances, there has been a sense that the adjudicator may not be impartial in the process, however for the most part they are impartial and fair."*

QUESTION 6: Given your experience with the tribunal's hearing processes during the survey period, be they in-person, by video, or telephone or in writing only (or any combination of these), how satisfied were you generally with the fairness of the process?



Most respondents were not satisfied with the fairness of the process (16 versus 10 who expressed some satisfaction). Even where some degree of satisfaction was noted, respondents indicated concerns about bias and inconsistency in overlooking deadlines

with a lack of consequences to insurers, sometimes resulting in undue delay and hardship for applicants, as well as long-term delays.

Here are some of the 13 comments, which illustrate the impact of delay and unfair processes on accident victims.

- *"The Tribunal's arbitrary decision to not allow any in-person hearings to be adjourned due to COVID and to force all of these to be heard by videoconference has prejudiced, in my view, a fair hearing in some cases…"*
- *"The process is long and unpredictable. Applicants generally rely on these benefits to be able to address an illness, or who sometimes are just looking to ensure their family's livelihood (income). Leaving them to wait for 1.5 years or more to get treatment, or to get their much-needed financial support, is certainly not a fair process."*

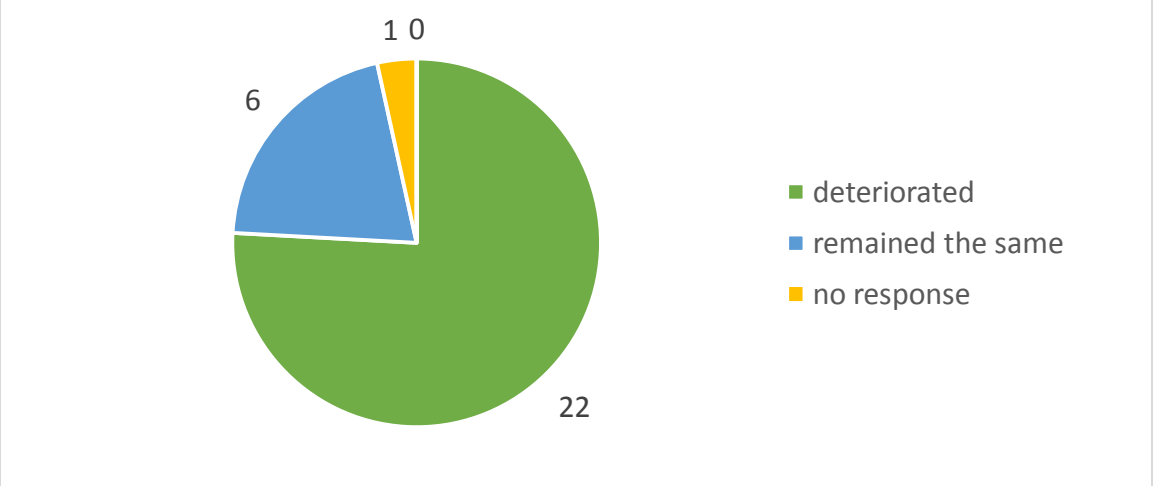
- *"I have attended numerous case conference hearings where the Adjuster/Respondent is not present but our client is required to be. There also tends to be a complete lack of consequences when the insurer/their counsel fails to meet various timelines, even those set out in Orders and, in fact, our hearing dates are often pushed back for the failures to abide by those Orders resulting in undue delay and hardship to our clients."*

- *"Unfair to make accident victims wait over a year to access benefits they need. Process is unnecessarily complicated and onerous for an unrepresented individual to participate in. Costs of a dispute often outweigh the benefit being disputed - lack of adverse costs repercussions for an insurer means they have an incentive to deny, and injured people have a disincentive to seek justice at the tribunal."*

- *"At the LAT, motions are brought by insurers to bar individual disabled claimants from disputing their claims and basic procedural steps like having an oral hearing, or documentary disclosure or adducing evidence from witnesses are completely ignored or denied. The adjudicators seem to be taught, efficiency at all costs regardless of justice or fairness."*

- *Very dissatisfied – "The process is long and unpredictable. Applicants generally rely on these benefits to be able to address an illness, or who sometimes are just looking to ensure their family's livelihood (income). Leaving them to wait for 1.5 years or more to get treatment, or to get their much-needed financial support, is certainly not a fair process. It leaves them with a dark cloud hanging over their head, leaving them worried and concerned. The process often worsens their psychological condition."*

QUESTION 7: Thinking of the span of the survey period, would you say that the overall experience of litigants at the tribunal, in terms of the quality, accessibility and timeliness of justice, has improved, deteriorated or remained the same?



The responses to this question overwhelmingly indicate a deterioration in the overall experience of litigants (22 of 29 respondents). The general theme in the responses to this question (as well as responses to the other questions) was a big decline in quality, accessibility and especially timeliness in recent years, compared to some indications that the tribunal was "productive and fast" when it first started. While e-filing has led to applications being processed much faster, the case conferences and hearing dates have long delays that are unacceptable. One of the main purposes of the creation of the LAT was to increase efficiencies by replacing FSCO with LAT, but this does not appear to be the case.

Some of the 17 comments are set out below.

- *"It initially improved and then it deteriorated in the last 6-8 months. …I understand there is currently a shortage of adjudicators that is contributory to the significant delay and cancellations experienced as of late."*

- *"Delays are only increasing. More written hearings are being forced on applicants with less ability to present live evidence or even affidavit evidence. There is less access to true justice than when FSCO was the tribunal."*

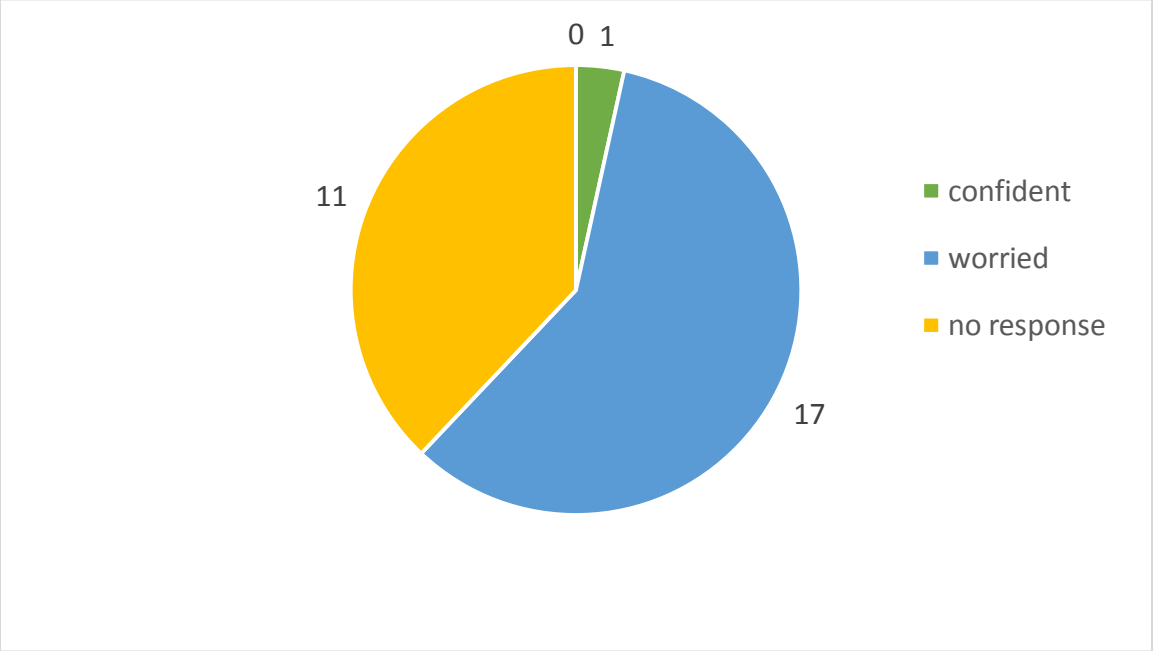
- *"Backlog issues are getting worse. Instead of dealing with things like documentary production at case conference (pre-hearing conferences), adjudicators are now copping out by forcing parties to bring motions for each and every item they might seek. What should be routinely provided in my area ([motor vehicle] accident benefits) such as the complete insurer's accident benefits file, or the adjuster's log notes, now require detailed written motions. This is not efficient, and this just adds costs to claimants, and reduces the accessibility of the Tribunal to claimants - especially those are self-represented."*

- *"One of the main purposes of the switch from FSCO to LAT was the expediated timelines for a case to be heard and being more efficient. I believe the LAT attempted to do this initially but has failed on all accounts. In my experience, FSCO's timelines at this point were shorter and Arbitrator's were very knowledgeable in accident benefits. Once an Application for LAT is filed, the case conference dates are being set 6-8 months down the road when it was initially supposed to be within 60 days. Not to mention, we are waiting for 1.5 years for decisions. Personally, FSCO should have remained as it was."*

- *"My clients cannot afford to retain me to represent them at the LAT because no costs are awarded even if they win. The amounts involved and the absence of any costs penalty to the auto insured only encourages auto insurers to deny small but deserving claims as they know the claimant cannot afford a lawyer and the process is so hopelessly complicated no private citizen has a remote chance of representing themselves. The current law and process is just exactly where the auto insurers want it. All in their favour."*

QUESTION 8: If you responded "deteriorated" in the previous question, which of the following reflects your assessment of the prospects for improvement in the post-pandemic period?

- **I am confident that the quality of justice at the Tribunal will improve once pandemic challenges are over.**
- **I am worried that the Tribunal will maintain changes made during the pandemic with a continuing negative**



Most respondents expressed concern that changes implemented during or because of the pandemic will continue to have a negative impact on the processing and outcome of LAT applications. Restricting the filing of applications and materials to electronic format creates bars to equal access to justice for those without the means, knowledge or wherewithal to master such formats.

Several respondents commented on the unexpected cancellation of scheduled hearings, forcing parties to lose work days and scramble to meet the tribunal's needs (and not vice-versa).

Here are more excerpts from the 12 comments.

- *The inability to file applications in any manner except for e-file has negatively impacted our ability to properly present our issues, evidence, etc. to the Tribunal and Respondent at first instance. Furthermore, this change has made it near impossible for lay persons to file their own dispute without the assistance of a representative which they must fund at their own cost due to the restrictive nature of the cost awards at the Tribunal.*

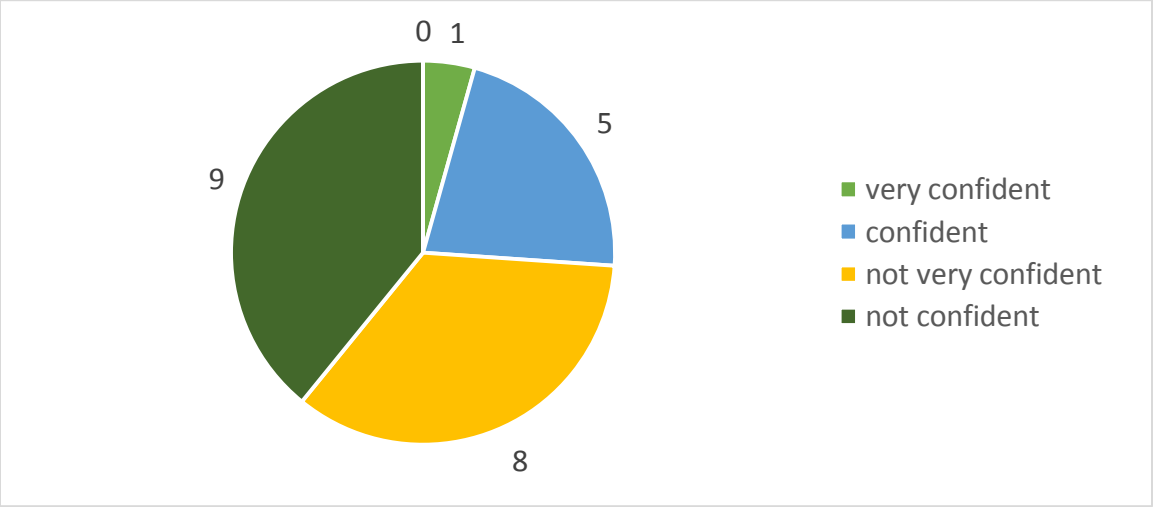
- *"The Tribunal has made some positive changes that will help moving forward - CAT pilot project, video conference hearings (although there needs to be a change to Zoom hearings as Microsoft Teams is not as user friendly). More does however need to be done to streamline LAT processes including the need for expedited hearings, particularly on more simply [sic] matters where the case conference serves no purpose but to delay the decision."*

- *The Tribunal has found ways to cut corners. They will continue to require motions for basic disclosures. They will continue to schedule "preliminary issue hearings" in writing despite the fact that 90+% of preliminary issue hearing relate to insurer's attempts to bar individuals from even being able to access the tribunal to dispute the insurer's denial or handle their behaviour."*

- *It is highly unlikely that anything will change regarding procedural timelines and training. Unless an overwhelming amount of support is given to the Tribunal, there will be no change, but things will only get worse, as insurers will only become more reassured in denying benefits, increasing the frequency of claims filed to the Tribunal, which will result in an increasing backlog."*

- *"The major changes that are required are better trained and experienced adjudicators and restore the ability of a successful claimant to receive cost."*

QUESTION 9: In your most recent matter before the Board, how confident were you in the impartiality of the mediators or adjudicators?



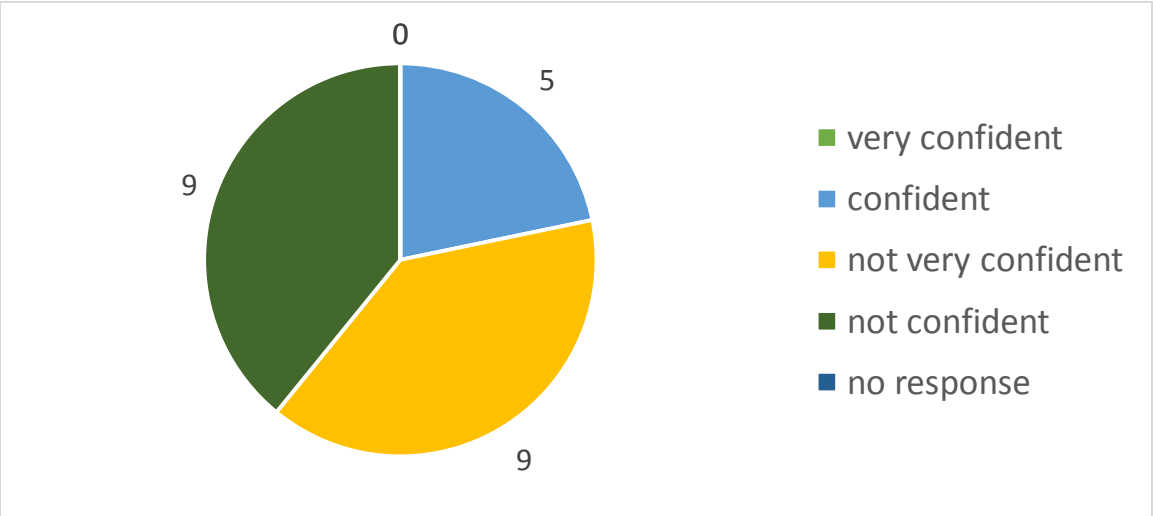
The majority of respondents (17 versus 6) expressed a lack of confidence in the impartiality of mediators or adjudicators. This is consistent with the responses to earlier questions regarding the overall perception of bias in favour of insurers.

A couple of the 5 comments are below.

- *"The cases coming out and the percentages show that adjudicators are much more likely to side with insurers."*

- *"Adjudicator clearly cherry-picked evidence to support a denial, entirely ignoring other evidence."*

QUESTION 10: In your most recent matter before the Board, how confident were you in the subject matter expertise of the Tribunal's mediators or adjudicators?



Most respondents (18 to 5) expressed a lack of confidence in subject matter expertise. Again, this is consistent with the earlier similar question.

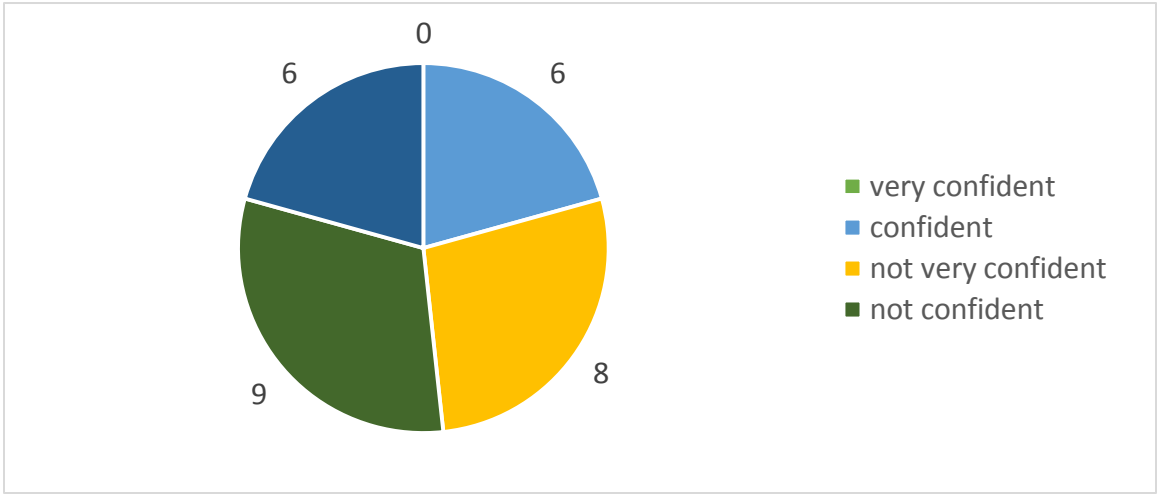
There were only 4 comments, including the following.

- *"Given that the adjudicators seem to take back seat approaches to AABS [Automobile Accident Benefits Service] matters, it suggests to me that they aren't overly familiar with the intricacies of the law surrounding the SABS [Statutory Accident Benefits Schedule]"*

- *"They don't really understand the implications of their actions. They booked the hearing 1 year from now."*

- *"I can think of a handful of decisions where the adjudicators considered things that were not even submitted by either party and were not relevant to the issue at hand and complicated things further for reconsideration/appeal."*

QUESTION 11: In your most recent matter before the Board, how confident were you in the skills of the tribunal's mediators or adjudicators to administer the process?



Most respondents (17 versus 6) expressed a lack of confidence in the skills of mediators or adjudicators to administer tribunal processes. This reflected similar concerns as arose for the earlier questions.

The only 2 comments were as follows.

- "Again, they were not active at all in trying to resolve disputes. They were mainly concerned about setting the parameters of the hearing rather than trying to encourage resolution at a Case Conference."

- "Overall I think that the more experienced adjudicators are doing much better. I still have SERIOUS concerns about the efficacy of this body from a systemic viewpoint. It needs serious reform, in my opinion."

Additional Comments section

There were only four additional comments, which reflected themes that were common in earlier comments and responses. These included observations about overall inefficiencies in processes and timelines at all stages, and the need for experienced adjudicators or increased training.

The 4 comments are set out below.

- *"The LAT was meant to repair the broken FSCO system. It has resulted in a worse process, with high levels of unpredictability, and no real improvement with respect to Timelines. While in its early stages it offered some reduced processing times, as compared to FSCO, it took the adjudicators MANY MONTHS to render a decision. At this time, the process doesn't take any longer than it did at FSCO, and it takes the adjudicators a long time to render decisions still. My last written submissions hearing was in January, but a decision has yet to be rendered."*

- *"The current laws dealing with denial of SABS benefits are essentially in favour of auto insurance companies. A claimant for benefits does not have a fair chance to apply to the LAT to have the denial adjudicated. The process is too form intensive rather than substance intensive. Cost need to be recovered by a successful claimant. Adjudicators need to be better trained and experienced. Some adjudicators need more training on the appearance of being independent. there needs to be a simpler, cheaper and faster process to adjudicate small SABS denials. for example if a treatment plan for a month or two of physio is denied that issue ought to be dealt with in a single attendance of the claimant and the insurer. An immediate decision ought to be made without further delay and especially without further cost to the parties."*

- *"Get rid of LAT and go back to FSCO."*

- *"Applicants are being compromised. Things need to change. Benefits have been reduced over the years and with the LAT things have gotten worst [sic]. It's all in favor of the insurers!!!"*

CONCLUSION

As Tribunal Watch prepares successive reports on survey responses relating to individual tribunals, a consistent pattern is quickly apparent. Several themes resonate across these different tribunals: (1) long delays; (2) lack of confidence in the expertise, independence and impartiality of the members; and (3) chronic inefficiencies that have only been worsened by the pandemic. Some respondents also express serious concerns about new online processes that create barriers for access to justice for parties without adequate or effective access to technology.

Tribunal Watch Ontario remains committed to monitoring this crisis in our adjudicative tribunal system, and advocating for dispute resolution processes that are fair, expert, timely and accessible.