

TRIBUNAL WATCH Survey

*Summary of Responses to the Survey Regarding the
Workplace Safety and Insurance Appeals Tribunal*

February 25, 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.

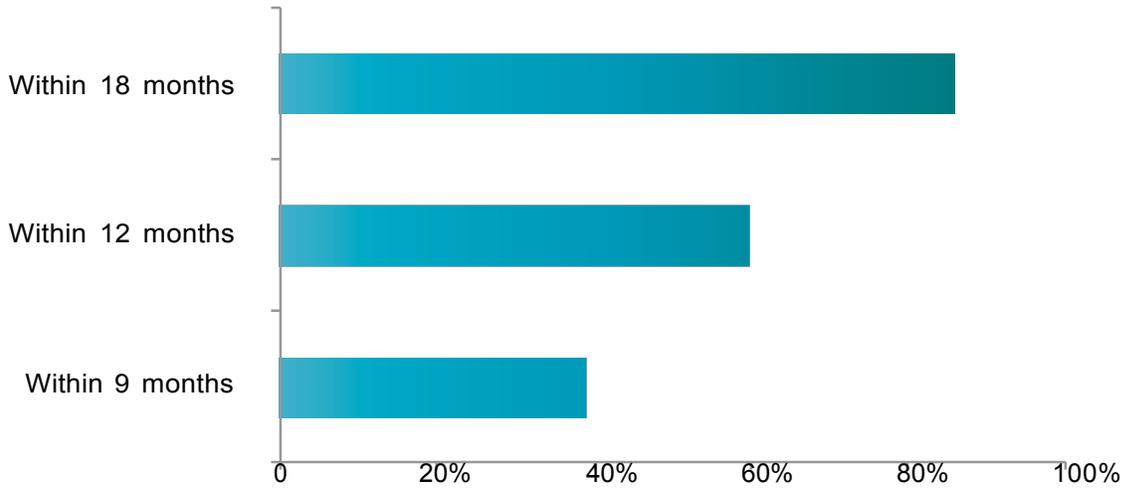
To fulfil our mandate Tribunal Watch Ontario circulated a brief survey to users of Ontario's tribunals. In soliciting responses, Tribunal Watch wrote: "*[We are] interested in your experience with Ontario's adjudicative tribunals. The following survey was designed for persons – lawyers and others – advocating 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 WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL (WSIAT)

The Workplace Safety and Insurance Appeals Tribunal (WSIAT), was established in 1985 to hear appeals from decisions of the Workplace Safety and Insurance Board (WSIB). In an appeal, WSIAT starts fresh as an original decider of both factual and legal issues, and it has the same investigative powers as the WSIB. It is structured to be independent from the WSIB – its budget is paid out of the WSIB's operating fund but subject only to the approval of the Minister of Labour. WSIAT also hears matters concerning the right to sue and such other matters specifically assigned to it under the Workplace Safety and Insurance Act, 1997 (WSIA). Its decision-makers are bound by WSIB policies; however, WSIAT adjudicators have the power to decide if the WSIB policy is not consistent with the law, and then refer the matter back to the WSIB for review.

Section 127 of the WSIA requires the WSIAT to release decisions within 120 days of a hearing. In 2020, this target was achieved 90% of the time. Waiting time for hearings is still a concern but has been steadily improving. The following chart from WSIAT's 2020 Annual Report sets out the documented waiting time.

CHART 6: Percent Disposed of Within 9, 12 and 18 Months



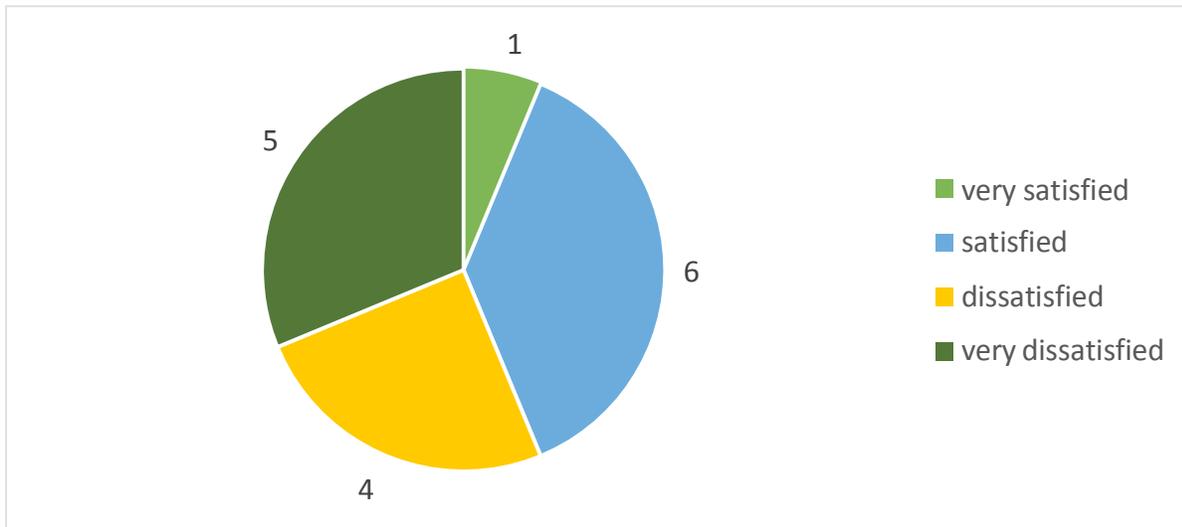
As reported in its 2020 Annual Report, WSIAT released 1,760 decisions. Of those decisions, 75% were made by an adjudicator sitting alone. This degree of reliance on single adjudicators marks a significant change from original WSIAT practices of normally assigning appeals to tripartite hearing panels. There has also been a shift from in-person oral hearings being the norm to many more written hearings. This move is in part the consequence of COVID-19. Additionally, there is an interest in increasing the use of remote video hearings post pandemic. About 12% of appellants are self-represented and, of those who have representatives, about 30% are represented by lawyers. Paralegals, union representatives and human resource specialists complete the majority of representatives.

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

The Tribunal Watch survey received only 16 responses relating to the WSIAT. This small number of responses is not intended to provide data for scientific analysis. The responses and comments support some trends that resonate with responses regarding other tribunals. This points to significant issues that should be investigated, monitored and addressed. For many of the survey questions, respondents commented on the same things. Timeliness and delays are foremost in the minds of respondents. There is general satisfaction with mediation and adjudication, but some respondents flagged the inexperience and lack of procedural and substantive knowledge among new appointees. A number of respondents expressed apprehension regarding the virtual/digital proceedings being overly relied upon on a permanent basis in the future.

Overall, WSIAT fared better than other specific tribunals identified in the survey (please see other Survey Reports).

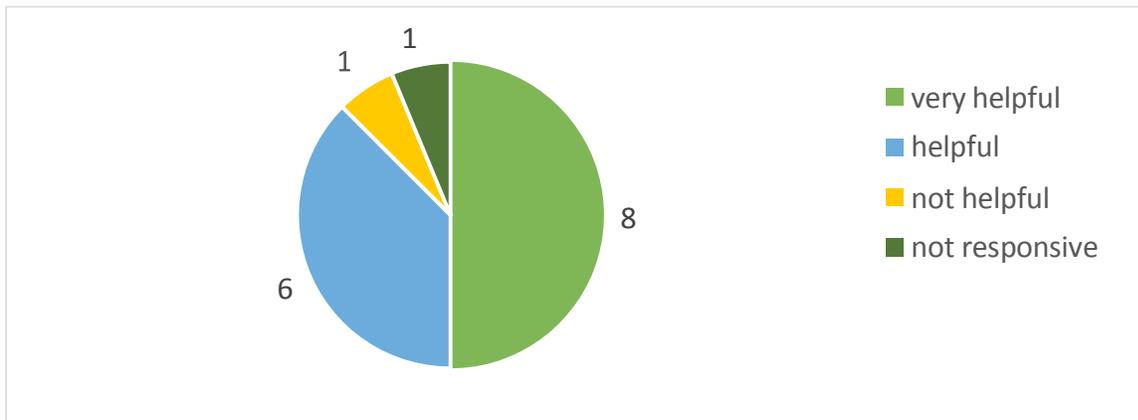
QUESTION 1: During the survey period, how satisfied were you with the timeliness of the processing from initial application or response to final resolution?



WSIAT is similar to the other adjudicative tribunals in its struggles with timeliness. The respondents wrote:

- *Waiting almost a year for a decision and longer for a hearing. Extremely slow and it is NOT justified as they are privately funded.*
- *The WSIAT is wonderful in all sorts of ways, other than timeliness. They have always taken approximately two years to deal with an appeal from application to decision. While they could do better with respect to timeliness, I do not want them to sacrifice their high quality decision making in order to make faster decisions.*
- *Slow resolution time is, in part, attributable to the COVID restrictions on the courts and tribunals and markedly increased number of appellant representatives seeking to go onto the Inactive list while they argue new issues at the WSIB Appeals level. However, that aside, in my experience there has been a marked increase in the wait time for decisions post-hearing. Especially from more newly appointed Vice Chairs/Panels.*
- *Pretty happy but the ADR process has a serious backlog as they are short staffed.*

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



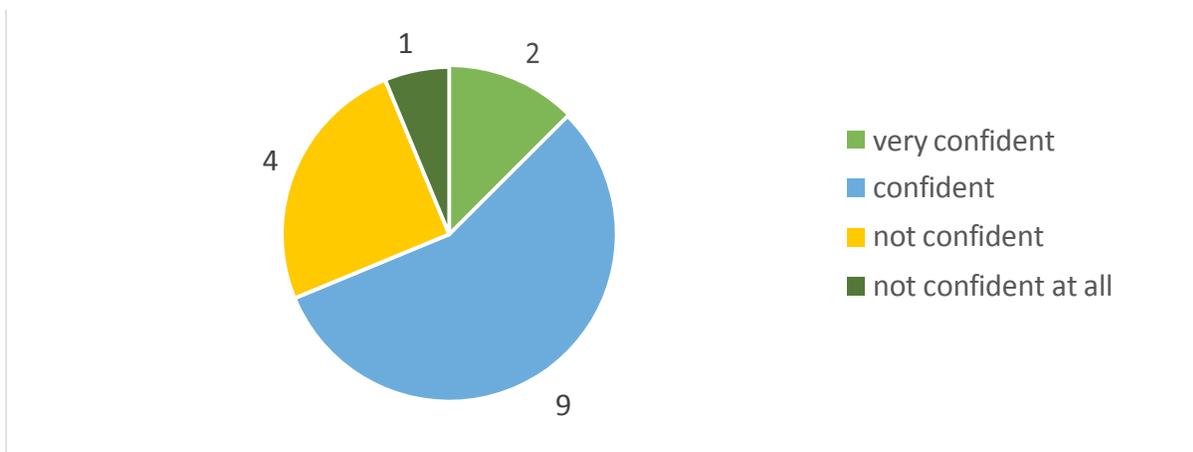
The majority of respondents found the staff to be helpful or very helpful and responsive. The assistance was described in this way:

They answer their phones relatively quickly and I am rarely on hold for great lengths of time. Phone messages are returned in a timely manner. When I do speak with tribunal staff my concerns are almost always dealt with satisfactorily.

In contrast, a Self-Represented Litigant (SRL) reported:

- *They provide no procedural advice or assistance for SRLs. All they are told to do is give referral to paralegal or lawyer. they DO NOT recognize SRLs.*

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?

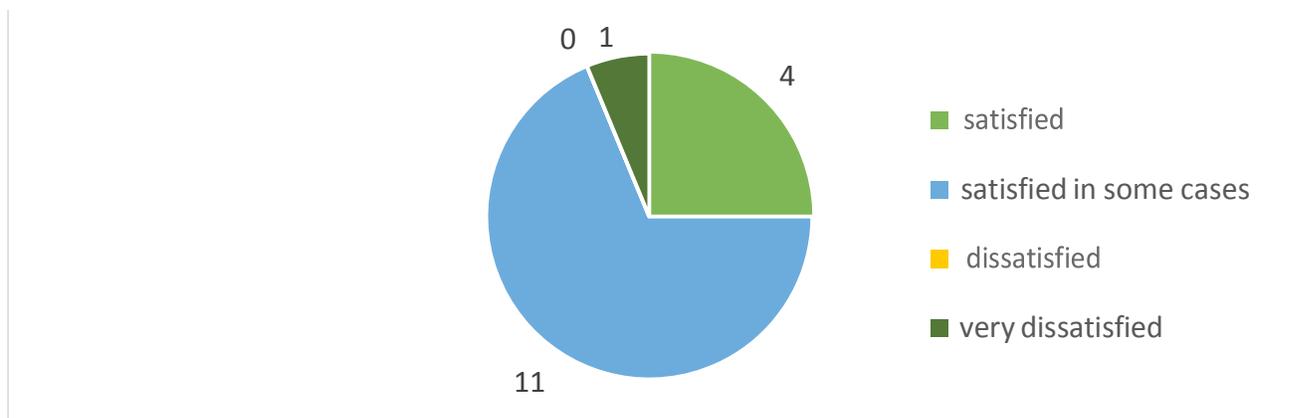


The majority of respondents described the adjudicators as impartial, and that they “had confidence.”

A lack of confidence was noted when reconsiderations were addressed.

- *I have very rarely detected any sorts of bias by decision makers. They are not totally unbiased but I can count the examples of bias in a 30+ year career on one hand.*
- *Noticed a shift in adjudication of persuading to withdraw as opposed to proceed. Also more policy driven and in some cases review of Appeal Resolution Officer decision and their interpretation of relevant policies...*

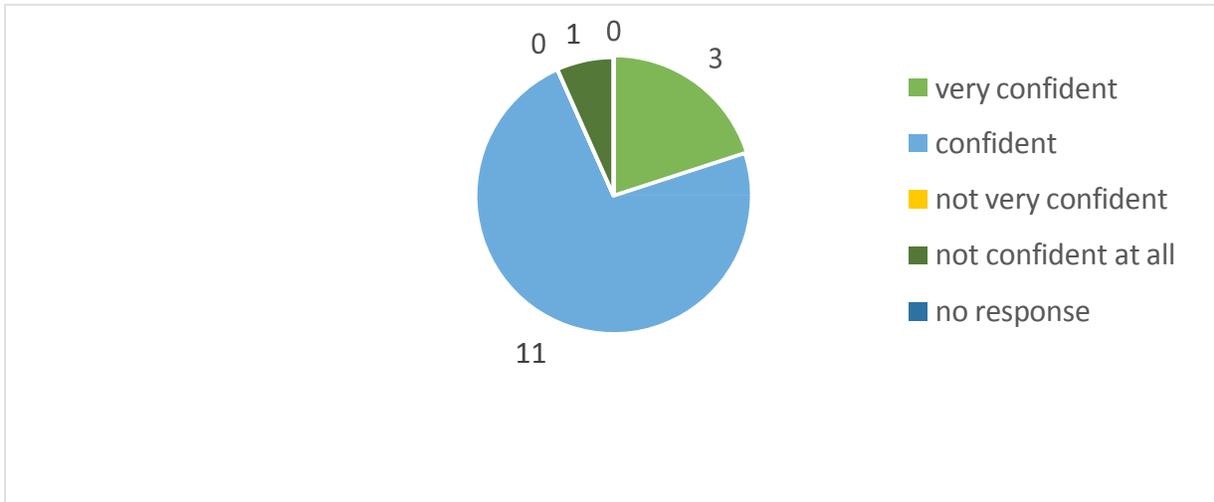
QUESTION 4: Given your experience with the Tribunal’s dispute resolution processes during the survey period, be they mediations or hearings of whatever nature, how confident were you in the subject matter expertise of the tribunal’s mediators or adjudicators?



Most of the respondents were satisfied with the expertise of the adjudicators. There was some concern about the absence of specific reference to legal precedent or policies. One respondent wrote:

- *The tribunal has very knowledgeable decision makers and the schedulers work very hard to assign the best adjudicators to the hardest cases.*

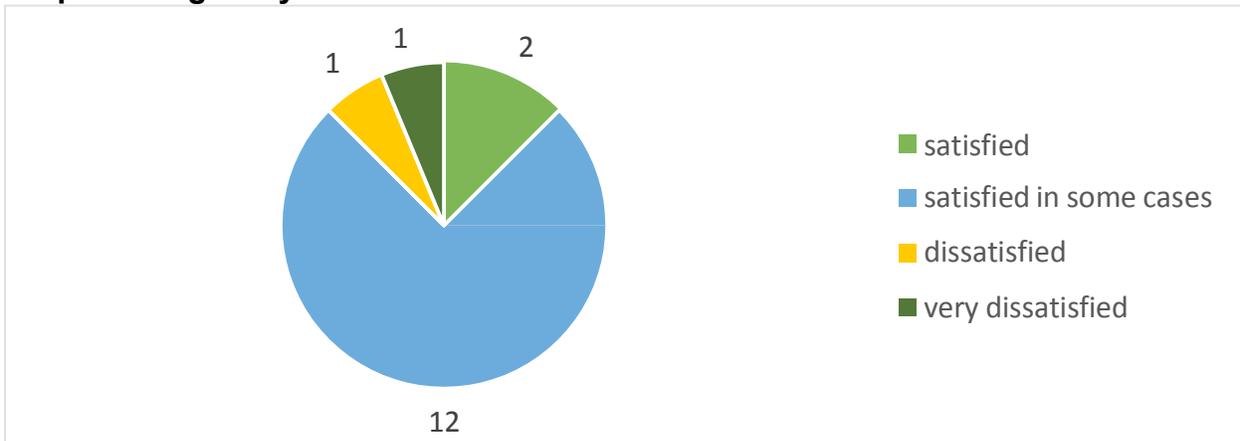
QUESTION 5: Given your experience with the Tribunal’s dispute resolution processes during the survey period, be they mediations or hearings of whatever nature, how confident were you in the skills of the Tribunal’s mediators or adjudicators to administer the process?



One of the key characteristics of WSIAT is the prehearing preparation by the staff. As a result, the majority of respondents were satisfied with adjudicators’ abilities to administer the process. They wrote:

- *The tribunal is very good at getting all the information with respect to the case to the litigants in ample time to prepare. And if there are any issues that might make things unfair, they will adjourn the matter or provide the ability to make post hearing submissions.*
- *The only skill they have is to rush through decisions and say no. There is not enough of them to take the time to do the job right!*

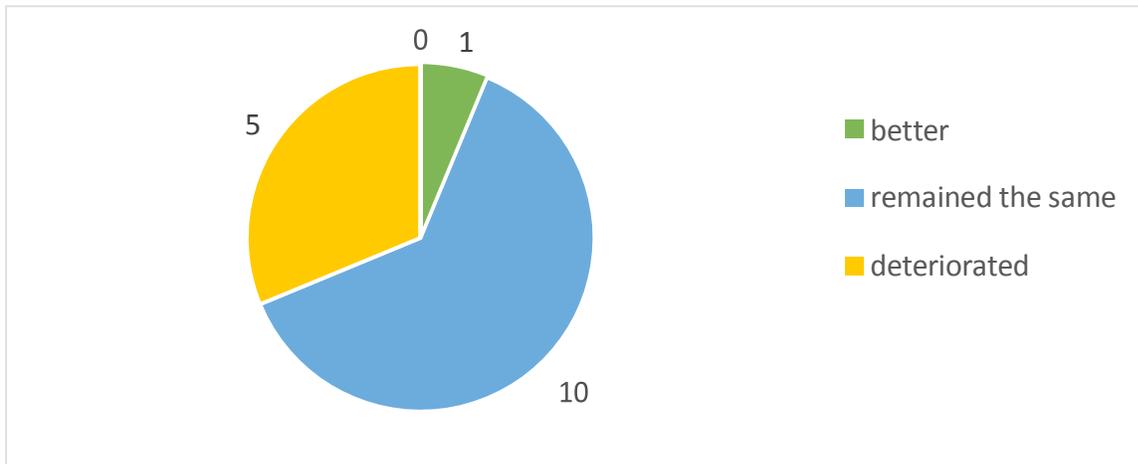
QUESTION 6: Given your experience with the tribunal’s hearing processes during the survey period, be they in-person, by video, or telephone or in writing only (or any combination of these), how satisfied were you generally with the fairness of the process given your clients?



The experience around video hearings is mixed. Notwithstanding attempts to make it work, there are still some issues.

- *The tribunal members work very hard to make my clients (injured workers) feel as comfortable as they can during the hearing. And they bend over backwards to ensure that the process is fair to all parties.*
- *Unfortunately, our clientele tends to not have secure access to stable internet or means of accessing video conferencing. Going forward it would be helpful that in-person hearings still be the primary option, with other options being available for those clients who cannot make it to a hearing in person. It would also be helpful to have hearing rooms available in community hubs so that clients can have a centre that will allow them to access video conference hearings, with technological support.*

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?

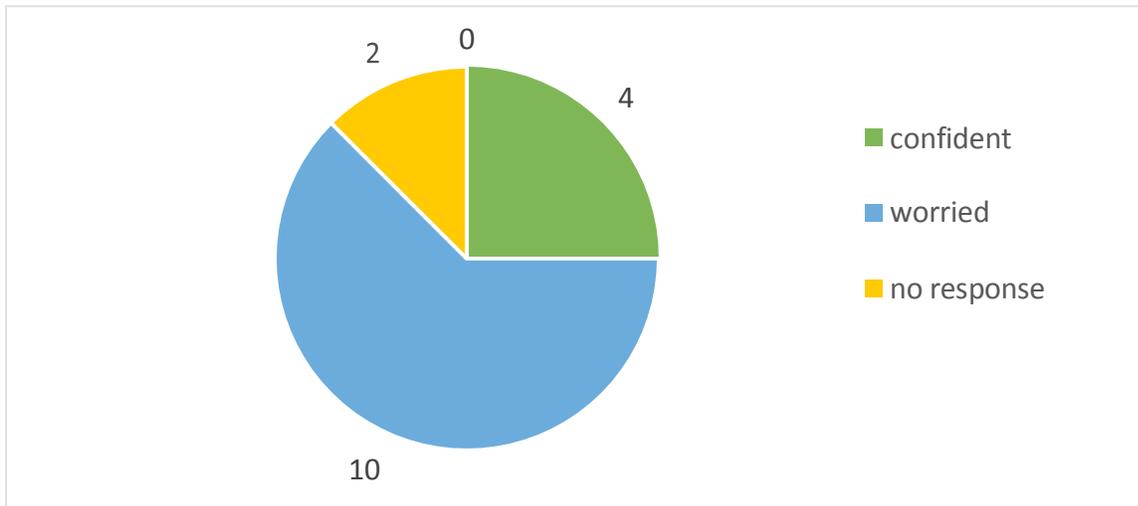


The majority of respondents indicated that the service had remained the same during the pandemic era. Several respondents expressed concern about access to video hearings. However, one respondent was very pleased with the video option.

The following responses are a sample of the comments:

- *Video has improved service and access to justice.*
- *It has gotten much worse. Decisions of WSIAT before took 6 to 8 months now even longer—closer to a year. Also WSIAT has no interim relief process or urgent process for those desperately needing it.*
- *Although I appreciate the difficulty of the current situation and my general support for the way in which they have handled it; I feel that a greater concern needs to be levied for individuals who do not have access to video conference hearings and the potential access to justice issues that arise from this.*
- *Video is the way to go. Love it, clients don't mind it and it saves a pile of money in travel.*

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?



There is a general concern that post-pandemic, WSIAT will be characterized by video or written hearings. The majority of respondents were concerned about fairness when hearings are held remotely.

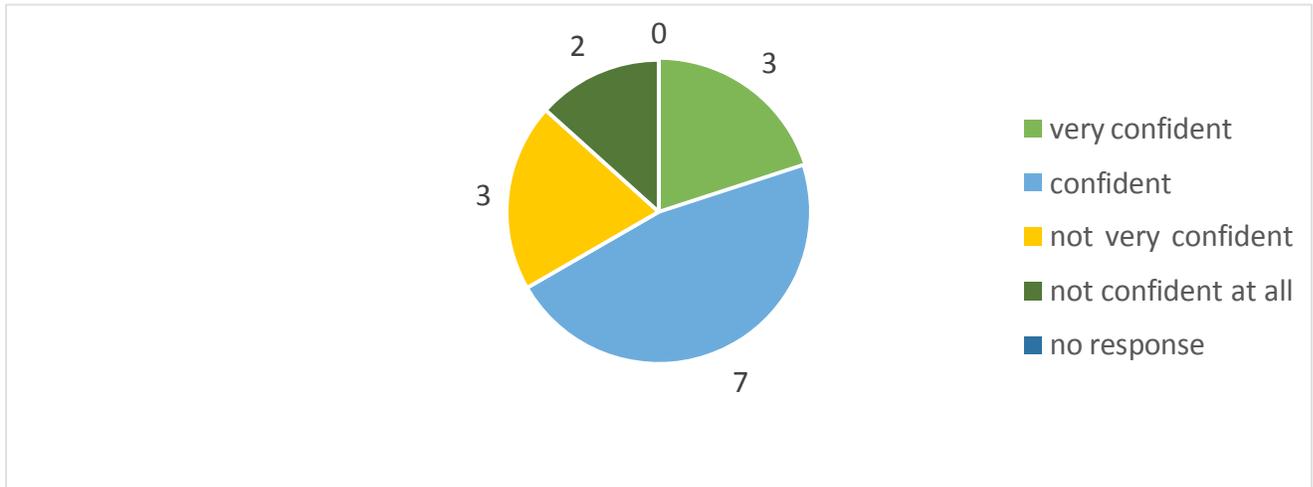
Some respondents were confident about the future and wrote:

- *I am confident that the quality of justice at the Tribunal will improve once pandemic challenges are eliminated. I do not believe that the WSIAT will use the pandemic as an excuse to move to all remote hearings. Remote hearings will only be used when that makes the hearing process better for the parties. I do not believe that the tribunal will use remote hearings for it's [sic] own convenience.*
- *I am confident that the quality of justice at the Tribunal will improve once pandemic challenges are eliminated*

In contrast, many respondents are concerned about the future and wrote:

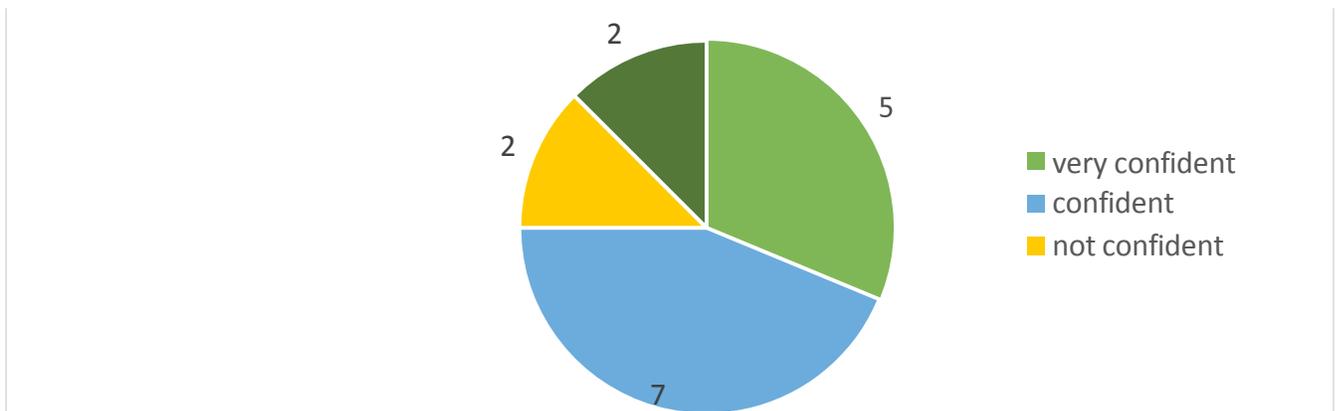
- *I am worried that the Tribunal will maintain changes made during the pandemic with a continuing negative impact on the experience of litigants. Examining a clients emotions by Zoom is very difficult*

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



Although there were limited comments, the majority of respondents expressed confidence in the decision-makers.

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?



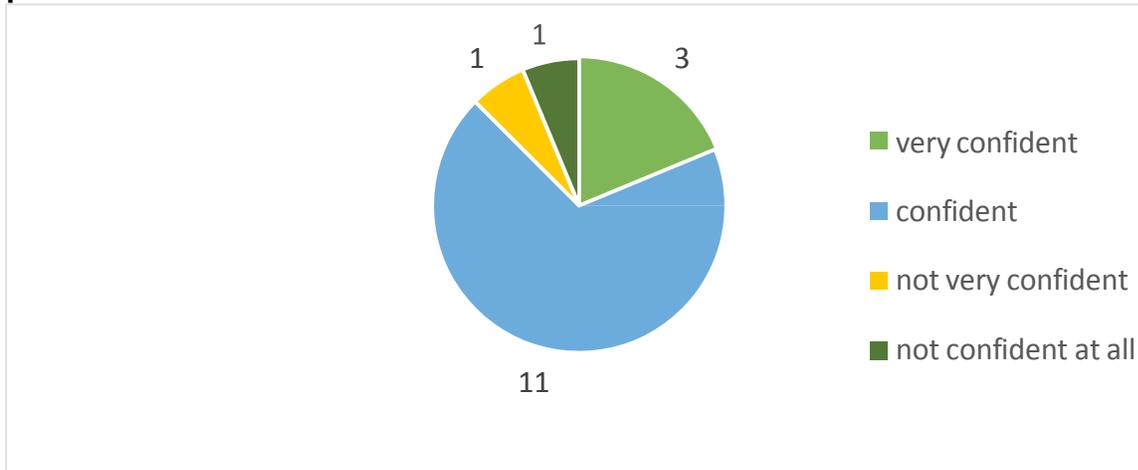
The majority of respondents indicated that they had confidence in the decision-makers but did not offer an explanation. One respondent who indicated confidence also added the following caution:

- *My confidence has diminished with the wholesale restaffing of the Vice Chair and Panel side member slots with new appointees.*

One respondent addressed the issue of appointments to the Tribunal:

- *They have been dinking around trying to appoint medical assessors. Seriously, no doctors in the City of Toronto?*

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?



The majority of respondents expressed confidence in the decision-makers. One respondent indicated a lack of confidence attributable to the decision-makers’ real life experience and commented:

- *They have no concept of a work injury, workplace environments or even have any common decency. They lack any professionalism in their decision writing. no law was mentioned, no policy just regurgitation of facts.*

Additional Comments

The overall theme is that while the WSIAT is not perfect, it also exemplifies good practices. That said, like other tribunals identified, the WSIAT struggles with delays and challenges related to hearings that are not in-person. The comments included:

- *The Workplace Safety & Insurance Appeals Tribunal is the best tribunal that I deal with. If the other Tribunals that I routinely deal with (the Social Security Tribunal, the Landlord and Tenant Board, and the Social Benefits Tribunal) did things like the WSIAT did, then the administrative justice system In Ontario would be the best. Sadly, the WSIAT is an exception, not a rule.*
- *The reason that my client and I had to go forward with a telephone hearing was because they felt that they did not have the stable internet connect needed to proceed via video conference hearing. This would have been the preferred option, if it was reasonably available. This speaks to the issues I addressed above.*
- *My experience is that wait times have increased as there are unfilled vacancies*
- *Impartiality varies depending on the background of the decision maker with respect to their pre-Tribunal workplace.*