



June 29, 2021

Sean Weir, Executive Chair  
Tribunals Ontario  
15 Grosvenor Street, Ground Floor  
Toronto, Ontario M7A 2G6

Dear Executive Chair,

**RE: Online Dispute Resolution and Tribunals Ontario**

I am writing on behalf of the Ontario Bar Association (the “**OBA**”) with regard to Tribunals Ontario’s work towards development of an online dispute resolution (“**ODR**”) system.

The OBA is the largest voluntary legal association in Ontario and consists of lawyers, judges, law professors and law students, who serve on the frontlines of our justice system in no fewer than 40 different sectors, including administrative law, and in every region of the province. This submission has been prepared by the OBA’s Working Group on Ontario’s Tribunals and is made up of lawyers from a number of our practice sections including; Administrative Law, Constitutional, Civil Liberties and Human Rights Law and Labour and Employment Law Sections. These sections include members who appear before Tribunals regularly representing both applicants and respondents and a broad range of stakeholders.

In the last year and a half, Tribunals Ontario has moved quickly to adopt technology for hearings to ensure matters would continue to move forward in an expeditious manner, provide access to justice and ensure fair outcomes were maintained. This advancement of technology has been crucial to move Tribunals Ontario forward. As infection rates continue to fall, and recovery is on the horizon, we understand that as a next step Tribunals Ontario is in the process of developing an ODR system that will provide an opportunity for parties to engage exclusively online. While we applaud the continued advancement of technology by Tribunals Ontario, we recommend inclusion of five key hallmarks in the adoption of a successful ODR system, to ensure continued access to justice for all parties involved. I would like to highlight the five key hallmarks as outlined below, are provided in exclusion of the Ontario Land Tribunal. The OBA recently provided a separate submission to the Ontario Land Tribunal, on their work to modernize their rules and processes.

*1. Access to and Inclusion of Legal Advice Prior to and During the Use of an ODR Process*

All Ontarians have a right to access to justice in our province. As part of that right is the right for individuals to present their strongest case before an independent third party. Lawyers play a key role in ensuring parties put forward their strongest case through summarizing evidence in an efficient and effective manner that assists not only all parties but the adjudicators they are before. Lawyers' subject matter expertise, understanding of administrative law and the Tribunal system assists both adjudicators and parties to help resolve issues fairly. The establishment of an ODR system must ensure that parties be permitted to have legal representation throughout the ODR process, including duty counsel where they are available.

## *2. Expert Adjudicators*

Ontario's administrative law tribunals are leaders in the sector across Canada. The basis of this success rests on the continued premise and support of an independent, highly qualified adjudicator base. The most efficient and effectively run Tribunals are those whose adjudicators are experts in the law of the Tribunal on which they are members. Indeed, the Human Rights Tribunal of Ontario's enabling legislation, requires members have experience, knowledge or training with respect to the Tribunal's subject area. This expertise ensures that parties, for whom our members act, have their entitlements and rights determined by those best versed in the historical and recent developments in the law. In the development of an ODR system, the maintenance and protection of this valued expertise of members whose subject matter excellence ensures that parties receive equal access to justice, must be protected and promoted.

## *3. Effective Technological Tools for the Delivery of ODR*

Ontario's only current ODR system is the Condominium Authority Tribunal ("CAT"). As part of the CAT dispute resolution process, there is a step that allows parties to engage with a mediator to help resolve outstanding issues between them, prior to a hearing. Ensuring the appropriate technological platform is used to take full advantage of the expertise of mediators, or dispute resolution officers where appropriate, is a key consideration for the future development of an ODR system. Concerns have arisen among practitioners about the use of telephone, teleconference or videoconference technology. Specifically, our members have indicated that mediations by telephone tend to be cumbersome and less effective. Participants are unable to see the mediator and the other parties and counsel are unable to speak directly with the mediator or opposing counsel for sidebar discussions. This impedes the likely success of the

mediation. Further, parties often need to disconnect and reconnect multiple times causing inefficiencies and delays and generally undermining the mediation effectiveness. Many of our members are regularly participating in videoconference mediations and arbitrations on effective and efficient platforms where these limitations are reduced and believe that this leads to better and more effective mediations in a Tribunal setting. To this end, the OBA encourages the Tribunal to conduct mediations by videoconference with preference for a platform that allows the parties to separate into breakout rooms, for example, but not limited to platforms such as Zoom.

#### *4. Prevention of Barriers*

While ODR systems can be an efficient and an accessible way to proceed, ODR systems will not be the ideal for all hearings. Tribunals Ontario is encouraged to be flexible to circumstances of individual parties including those without access to technology (including the poor and disadvantaged), persons in areas without adequate broadband coverage (including rural areas and First Nations communities) and those individuals living with a disability. These groups are among the most likely to experience poverty and discrimination and in turn require the Tribunals' services. In the current Tribunal Ontario Digital Strategy, it has been highlighted that all matters will proceed as written or electronic with the exception of when a party can establish an in-person hearing is required as an accommodation for an Ontario *Human Rights Code* related need or that a party can establish that the hearing format will result in an unfair hearing. While this is an important step in ensuring the justice system is accessible to all Ontarians, consideration should be given to individual circumstances and barriers when deciding if a matter should proceed through the ODR system to ensure that access to justice is attainable for all parties.

#### *5. Training and Support on the ODR System and Software*

Tribunals Ontario is focused on modernizing the digital tools that they rely on to provide dispute resolution services. Our understanding is that the tools range from developing one digital platform for case tracking and data analytics to online submissions of applications. The OBA supports modernizing the digital tools and would welcome an opportunity to discuss the development of specific tools in more detail.

The OBA notes a potentially disproportionate impact an ODR system may have on parties of differing abilities with technology. In addition to actual access to technology, some hearing parties/participants may

not have the necessary sophistication or ability to deal with the variety and complexity of technology that is increasingly required for virtual proceedings.

As Tribunals Ontario works to establish an ODR system the OBA recommends that online tip sheets, online training and support for members of the public and their representatives be made available on an ongoing basis to ensure an effective and efficient use of the ODR system. For example, currently, the CAT provides access to online and phone support and have staff specifically trained in assisting with technology inquiries. Ensuring this type of support is available both prior to and during any ODR process is important to ensure the system is fair and accessible to all parties who may seek to access it. Consideration should also be given to providing access to computers for parties who may not otherwise have access to the appropriate technology for a variety of reasons. For example, ensuring that parties have access to an equal level of video equipment, with multiple screens when complex proceedings are in play, is an important consideration. The Canadian Human Rights Tribunal has offered access to appropriate technology in their hearings when an individual's situation would not otherwise support their participation in the matter. For example, individuals with unstable internet and limited access to computers are provided an opportunity to attend a location, which is equipped with a computer and an onsite technical support person. This forward thinking approach ensures all parties have access to the technology required to fully participate.

In closing, the OBA would welcome the opportunity to discuss the proposed five hallmarks of a successful ODR system with you in further detail, including; access to and inclusion of legal advice prior to and during the use of an ODR process, the use of expert adjudicators, effective technological tools for the delivery of ODR, prevention of barriers, and training and support on the ODR system. As Tribunals Ontario moves forward on the development of an ODR system, engagement with the sector is encouraged. Further, we consideration should be provided to establishing an ongoing evaluation of the ODR system to ensure that any ODR system provides a procedurally fair dispute resolution in a manner that is responsive to user needs. We are happy to provide any additional input on these and other matters that may be of assistance to you as you continue your work with Tribunals Ontario.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charlene Theodore', written over a white background.

Charlene Theodore, President  
Ontario Bar Association