BC'S CIVIL RESOLUTION TRIBUNAL—RECHTWIJZER 2.0 ON STEROIDS SOME EARLY OBSERVATIONS

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The purpose of this paper is to provide the ILAG community with a brief introduction to Canada's and quite possibly the world's first court designed and court financed online dispute resolution system. And one that is not a voluntary option but a mandatory path for defined categories of disputes. This new ODR program is the British Columbia Civil Resolutions Tribunal (CRT) and thus far operates only in that province. But it also could be a harbinger of an ODR world to come—one that poses new and different challenges for legal aid and poor people's access to justice in general from those presented by traditional courts and in-person administrative hearings.

(The paper is based principally on an analysis of the Civil Resolution Tribunal Act (SBC 2012) Chapter 25, as amended, along with two interviews with the CRT's Chair, Shannon Salter—in June 2017 and April 2019, and a statistical report and user survey for the year 2018. The second interview included Ms. Salter's responses to a series of written questions prepared by the author. For Ms. Salter's own views on the CRT and online dispute resolution in general, see her article, "Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal," Windsor Yearbook of Access to Justice, 34, (1) 112-129 (Nov. 2017).

The scope of CRT's jurisdiction

CRT started as an online venue that diverted so-called "strata" cases — involving condo owners and condo associations— from the courts to the internet. But in early June, 2017, after more than a year of testing, revising, and refining the model, the court system expanded CRT's jurisdiction dramatically to encompass all disputes with $5,000[i] or less at stake. Moreover, while participation in the CRT process remained voluntary during the lengthy testing phase, on that date it became the mandatory forum for small claims under $5,000 in value as it continued to be for strata cases. Then In April of this year CRT's mandatory jurisdiction was expanded once again to include all automobile accident cases up to $50,000 in value.

While the term "small claims" conjures images of two individuals contesting over who owes the other for a broken fence or the like, many of the case types listed as within CRT's jurisdiction are more likely to pit an individual against a corporation or other entity. Those categories include debt collection, sellers vs buyers, construction disputes, insurance claims, employment, property, and motor vehicle accidents, among others.

Those who have been attending ILAG conferences in recent years are familiar with the Dutch online dispute resolution program Rechtwijzer 2.0. For those, consider British Columbia's CRT as Rechtwijzer 2.0 on steroids. First, because of the broad range of disputes it seeks to resolve, second because it is a creation of and has the strong backing of the court

system, third because it is a salaried staff program not dependent on the parties to agree to use private mediators or third party decision makers. But most of all, because it is mandatory. In fact, it is mandatory in part because during the time it was offered as an option, too few disputants chose to take their disputes to the internet rather than the courts. After a few years of experience as a mandatory program it is possible enough people will have found it a superior or at least acceptable option that it could be sustained as a voluntary choice. But for now and for the foreseeable future it is the only way into the justice system for British Columbia residents who want to resolve a dispute involving $ 5,000 or less. There are a few exceptions at the margins. That is, CRT does not accept small claims cases that raise constitutional issues or unresolved legal issues that would profit from determination by a venue that can establish precedent, i.e., the courts. Nor does it take cases that involve the Human Rights Law.

The CRT's staff

To accomplish its three missions—strata cases, small claims cases, and auto accident cases—the CRT has a substantial staff. The tribunal is chaired by Shannon Salter, a creative, committed and charismatic leader who has occupied the position for several years including the period during which the small claims process was being developed. Under her are three Vice Chairs, one for each of the three major case types—strata, small claims, and auto accidents. There are eight other full-time tribunal members and over thirty part-time members.

All tribunal Members—full and part-time—must be lawyers. Nearly all have extensive litigation experience—some in solo practice and others with major firms. They also tend to specialize in their Tribunal assignments—deciding either strata, small claims, or auto accident cases.

The staff also includes more than a dozen case managers, some of whom are lawyers and some not, in addition to administrative support. The case managers are chosen for their skill and experience in interacting with the public because of their role in the process. They receive training in the unique aspects of dealing with people in the midst of a dispute and not necessarily trusting each other.

The CRT process in small claims cases

So how does this CRT staff operate with the vast majority of small claims cases that do fall within its jurisdiction. There are three potential stages —a preliminary stage, a facilitation stage, and an adjudicatIon stage. Depending on when the dispute is resolved, a given case may conclude at any one of these stages.

The preliminary stage is a "solution exploration" tool, similar in concept and purpose to BCLaw's "solution explorer," discussed in detail by my co-presenter from BCLaw. CRT's version appears on the CRT website where it can be used without paying any fee. Users are encouraged to search for a solution to their problem and indeed to work out a resolution of that problem with any other party involved without bringing in the CRT staff. Over 30,000 individuals and entities accessed this solution exploration tool in 2018, the CRT's first full year of operation. It is not clear how many of those who consulted the solution exploration tool turned

out to have a problem that fell within CRT's jurisdiction in the sense it could be remedied by a monetary award and in the amount of $5,000 or less. Nor do we know how many were able to resolve their problem, whatever it was, with the guidance of that online tool and thus had no reason to proceed further. What we do know is that over 7,000 disputes were filed that year asking for the CRT to resolve the dispute.

Stage 2 — the facilitation phase — begins when a BC individual or entity files an application with the CRT seeking a payment of $5,000 or less from another individual or entity. The individual or entity filing the claim is referred to thereafter as the "Applicant," equivalent to the plaintiff in an ordinary court proceeding. For claims under $3,000, this requires payment to the CRT of a modest fee of $75 if filed online or $100 if filed by mail, e-mail or fax. For claims between $3,000-$5,000 the online fee goes up to $125 and to $150 if using other means to file. That application will, among other things, name the individual or entity from whom the applicant is seeking relief. The Applicant then notifies that person or entity making them an involuntary "Respondent," equivalent to the defendant in a traditional court proceeding. The Respondent is not required to pay a fee if participating online, but is charged $25 if responding otherwise to an under $3,000 claim or $50 for one in the $3,000-$5,000 range. Notably, any fee will be waived for poor people whose incomes are verified as not being more than 25% higher than the low income threshold which is $21,000 for a single individual or $40,000 for a family of four. (In other words, an individual with an income a bit over $26,000 or a family of four with an income of $50,000.) An unexpected and disturbing fact is that only one to two per cent of disputants request or receive fee waivers, suggesting few poor people participate in the CRT process.

Once the applicant and respondent are identified the CRT puts the two parties in touch with each other and suggests ways they could negotiate a settlement without further involvement of CRT staff. If the parties succeed at that point, the CRT returns the fees to both parties. If the parties are unable to settle their dispute on their own, the CRT staff swings into action. Each pair of disputants is assigned to a case manager. The role of the case manager is to facilitate a negotiated voluntary settlement of the dispute. The parties submit evidence and argument by entering it over the internet into the electronic file. Then two way and three way communications take place over the internet in an attempt to reach agreement on a settlement amount. The Facilitation stage gives the case manager every tool up to and including affirmatively suggesting and arguing the virtues of a specific payment amount— as well as less interventionist tactics.

If the facilitation succeeds in arriving at a settlement, those terms are converted into an enforceable order, in effect a judgement the courts will honor. But if the parties fail to reach an agreement efforts fail, the case moves on to the adjudicatIon stage. Unlike Rechtwijzer 2.0, it does so whether the parties request a third party decision of their dispute or not. This adds a further incentive for the parties to agree to some settlement during the facilitation stage.

Stage 3 — the adjudicatIon stage— begins when the case is assigned to a member of the CRT Tribunal. While case managers are chosen for their people skills and may or may not be lawyers, tribunal members are all experienced lawyers, many of them having served on other tribunals where they presided over and made their decisions at traditional in-person hearings. The difference is that nearly all—98-99 percent—of CRT adjudications are conducted entirely over the internet. Exceptions are allowed in unusual circumstances with all or part of the

interactions occurring telephonically, in writing, or even in-person. But these are rare exceptions — reportedly, only a dozen in 2018. The CRT process is designed to function through entries participants make on their computers or other electronic communication devices and, with those rare exceptions, does so.

In any event, when the tribunal member renders his or her decision—formally called an adjudicatIon—its terms are communicated to both parties. In some instances, both sides will be satisfied with the result or at least accept it. But if one party or the other is dissatisfied, they have 28 days to file an "objection to decision," which requires payment of another $200 fee. If no such objection is filed within the time limit, the adjudicatIon becomes the basis of an enforceable order, the equivalent of a court judgment against the losing party. On the other hand, the filing of an "objection to decision" is sufficient to nullify the CRT adjudication and transfer the case to the regular small claims court for a trial de novo before a judge in a regular in-person hearing.

Statistical results from the first full year of CRT's small claims cases

Statistics from the first full year of CRT's operations—2018—present an interesting profile. Of the 5,270 completed cases that year 42% were successfully facilitated— that is, the parties arrived at a negotiated settlement, usually with the assistance of a case manager. 11 % of the total required adjudicatIon, with one side or the other filing an "objection to decision" in a quarter of those adjudications. So what happened to the other 47%? They ended up as defaults, that is, the respondents failed to file any sort of opposition to the applicants' claims or dropped out at some point in the process. Those defaults resulted in enforceable orders against those respondents—in slightly less than half the cases the CRT completed processing during 2018.

Without a valid survey of the defaulters one can only speculate about the reasons. Some unknown percentage of them probably couldn't read or understand the applicant's complaint because of language or intellectual impairments. Another unknown percentage probably lacked the equipment or the ability to use the equipment to engage effectively in the online process—after all, possession of a cheap instrument capable of accessing the internet does not necessarily make one capable of engaging in rather complex online exchanges, entry of documents, photos, and other data, etc. Yet another unknown percentage probably erroneously believed they had no defense so why bother—while others were correct in that perception.

A survey of participants in CRT's small claims process

A satisfaction survey CRT conducted of its users suggests some people found the online process difficult to navigate. Of those surveyed, 25% reported the CRT's online process was not easy to use, 28% said the process was difficult to understand, and 22% claimed the explanatory information CRT supplied did not adequately prepare them to participate in this new form of dispute resolution. Obviously, these are the negative reactions of a minority of the survey sample, with roughly three-quarters of the sample responding positively on all three measures—the CRT online process was easy to use, not difficult to understand, and CRT's information was adequate to prepare them to participate effectively. Nevertheless, almost a third—31%—would not recommend CRT to their friends (assuming it were an option and not mandatory). The CRT

staff fared significantly better than the process with 86% rating them as professional and 81 % finding the staff treated them fairly.

The CRT process and disadvantaged populations

From the perspective of access to justice for the poor and otherwise disadvantaged disputants, a critical question is the composition of the substantial minority who expressed negative views of the CRT process—finding it difficult to understand and use, and dissatisfied with the CRT's efforts to prepare them to participate effectively. And second, who are the 47 % who simply defaulted? My hypothesis—or at least my guess—is that the defaulters as well as the roughly one quarter who said they were unhappy with the CRT process are both disproportionately composed of the poor, and those disadvantaged by language, education or lack of technological competence. It must be acknowledged that courts also experience a high rate of defaults among their low income defendants—except in jurisdictions where legal aid lawyers are provided to all or most poor people, in which case the default rate can approach zero. If free lawyers or even technically competent representatives were afforded to poor respondents I suspect the default rate would plunge at least among that segment of the population of defaulters.

There are other possible concerns for those advocating for low income people. One is the possible imbalance between parties in their abilities to effectively negotiate the online system. Although parties are encouraged to represent themselves and are not allowed to be represented by a lawyer without specific authorization from the CRT—unless they are under 19 years of age. Such permission is seldom given to adults, but if it is, the opposing party is also allowed to have a lawyer— if he or she can afford one, that is. In any case, parties are allowed to have assistance from family and friends.

Those provisions are clear when applied to disputants who are individual human beings. But many parties, especially applicants, are not human beings but entities—banks, credit collection agencies, apartment building owners, major retailers, etc. Under the CRT statute, a corporation can be represented by its president, a board member, or an "officer." In practice, the "officer" generally turns out to be a designated employee who is empowered to commit the company to any terms negotiated or positions taken during the facilitation or adjudicatIon stages of the CRT process. And that designated employee may represent the entity in all or many of the disputes the company has before the CRT. The designated employee may even be a firm's in house lawyer. Lawyer or not, a company's designated employee will soon gain considerable knowledge and expertise in online advocacy in the CRT'S high tech world. Meanwhile the opposing parties will usually be unsophisticated first timers, many of them struggling with this unfamiliar new application.

Yet another concern is the language barrier. According to CRT'S own chair 49% of British Columbians can't speak English. So she is acutely aware of the problem and doing everything she and her staff can to deal with it. CRT's explanatory material appears in the five most common foreign languages found among the province's population. In addition, users are given free telephone access to translation services in over 100 languages. There also is some reliance on the expectation most litigants who are deficient in English will have sons, daughters, or other family members who are fluent in English and the litigant's own native tongue. These

family members, in turn, will provide the assistance required for the litigant to participate effectively in CRT's online process. Assuming scores or hundreds of foreign-speaking litigants are living with smart, tech-savvy, multi-lingual children or family members, what about those who don't?

The future of the CRT and online dispute resolution in Canada and elsewhere and its implications for the poor and other disadvantaged populations

Already mentioned earlier is the recent expansion of CRT's mandatory jurisdiction to embrace all auto accident injury cases with claims of $50,000 or below. This time the legislature did allow both parties to have lawyers. Nonetheless, the bar filed a lawsuit the very day this expansion went into effect challenging its constitutionality. But the chances for further expansion extend beyond auto accident cases. The BC small claim's court's own jurisdiction extends up to $35,000 and CRT's authorizing legislation permits that tribunal's online jurisdiction to be raised as high as $25,000 through simple regulatory changes without amending the law itself. At some point, the legislature could decide it might as well shift another layer of cases to the CRT. And how about replacing the small claims court entirely with the CRT, confining the judiciary to oversight and the few small claims cases that are inappropriate for resolution through the CRT process—those involving constitutional issues, the Human Rights Law, or unresolved legal questions. And how about other case types outside the realm of small claims or even monetary awards? BC'S Residential Tenancy Tribunal which decides landlord-tenant cases is already contemplating introducing an online process. Although it is difficult to imagine resolving child custody or abuse cases in a purely online process, there may be other family law cases, like straightforward divorces, that could be handled that way. One can also envision government deciding it would be beneficial to shift all government benefit cases to the internet.

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I cite these potential expansions of CRT-like online dispute resolution primarily as examples of how quickly and easily the ODR universe can expand at the instance of the court system and thus how important it is for the access to justice community to study ODR's effect on low income and otherwise disadvantaged litigants. Equally important, that community and especially the legal aid component of that community needs to figure out ways of providing those litigants the assistance needed for them to effectively participate in the online process. If lawyers are barred from providing direct assistance, perhaps legal aid programs should consider enlisting non-lawyer tech experts to do so.

We all know the courtroom can be a hostile environment for a poor person lacking counsel when facing an opponent with a lawyer. But an online dispute resolution forum can be equally hostile for a poor person or otherwise disadvantaged one, especially when the opponent possesses expertise in navigating the online system or is assisted by someone who does. For the most part up to now, when discussing technology, the access community has focused primarily on how providers can use it to improve access for their clients.

The CRT provides a reminder that technology may be imposed by others for reasons other than improving access to justice for the poor and disadvantaged, whether disadvantaged by language, lack of education, or deficiencies in using technology. Those reasons may be commendable, many of them especially helpful to lower income litigants, such as allowing

disputants to avoid the cost, lost income, child care expenses, etc. of attending court hearings. But if it involves moving to a forum where poor people can't be represented by legal aid or pro bono lawyers and where they may be sorely handicapped in the online world, it may be a bad bargain for them. In most advanced countries, poor and otherwise disadvantaged people are a minority of the public. Hence, court innovations like CRT that are motivated by a legitimate desire to do good for the public as a whole may do the opposite for the clients the access community serves.

I have far less concern for the CRT itself, at least so long as it remains under its current leadership. That leadership has demonstrated a desire to make its process as just as possible for all users and a willingness to modify its procedures to achieve that goal. CRT is still young and remarkably agile in making changes in its process as gaps or problems appear. If further research should confirm some of the speculations in this paper or surface other issues with CRT's treatment of the poor or other disadvantaged populations, I am not only hopeful but confident the CRT leadership would move quickly to address those deficiencies.

But I have less confidence if other courts begin shifting important categories of their caseloads to online dispute resolution—and personally I think that is entirely possible if not likely. In that instance, the access community may only have two choices: resistance or accommodation. That is, try to demonstrate ODR is an inferior or unfair way to resolve most disputes. Or, persuade the courts and/or their ODR programs to guarantee low income or otherwise disadvantaged populations the special help they need to participate effectively in that process. Neither path would be easy. But as an essential first step, we need sophisticated empirical research focused on how ODR works for these populations and what it would require to allow it to serve those populations better.

[i] All monetary amounts are expressed in Canadian dollars, equivalent to approximately .75 US dollars, .67 Euros, and .56 British pounds.