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Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal

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Le présent article porte sur le nouveau Civil Resolution Tribunal ("CRT") de Colombie-Britannique. Premier dans son genre, ce tribunal vise à offrir des services de règlement de différends en ligne, afin d'améliorer l'accès à la justice dans la province. Dans un premier temps, le texte s'attardera sur les problèmes liés à l'accès à la justice civile. Par la suite, les auteurs tenteront de remettre en discussion certains aprioris dominant le débat en la matière, et cela afin de réfléchir aux éléments réellement essentiels d'un système public de justice civile. En s'appuyant sur le l'exemple du CRT, l'article conclura en illustrant certains principes pouvant régir une justice axée sur les utilisateurs.

This article deals with the new British Columbia Civil Resolution Tribunal ("CRT"). First of its kind in the world, the CRT will focus on early online dispute resolution as a tool to improve access to justice in BC. The authors will begin by examining public access problems with the current civil justice system. They will then challenge some of the common assumptions underlying the status quo, with the aim of opening a dialogue about which facets of the civil justice system are foundational to the rule of law and which ones ultimately detract from it. The article will conclude by offering some principles of user-centred justice design, and illustrating them through their application to the CRT.

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I. INTRODUCTION

Meet Sonia.[1] She is a 71-year old retired woman, living in a condominium in Vancouver. Sonia wants to move in with her partner, Walter, but she does not want to sell her condominium. Instead, she wants to rent it to her son, giving him a place to live, and giving herself some much-needed extra income. But when Sonia asked her condo board president about rentals, he said no. Sonia consulted a lawyer, who told her she would have to pay a $5,000 retainer for him to look into the problem. The lawyer told her if she has to go to court, it could be expensive, and she would have to pay the other side's legal costs if she loses. Either way, it could take a while to sort out. Sonia tried to figure out how to bring a court case on her own, but she quickly became overwhelmed trying to sort out how the law applies to her situation and how the court procedures would work.

Sonia could be anyone, anywhere, with almost any civil justice problem. Her story is typical of the emails the British Columbia (BC) Civil Resolution Tribunal (CRT)[2] gets every day from people desperate for an accessible way to resolve their legal disputes. When it becomes operational in late 2016, the CRT will allow people to resolve condominium (strata) and small claims disputes[3] wherever and however it is convenient for them. Currently, most of these disputes must be resolved in the BC Supreme Court.

The CRT will be the first online tribunal in Canada, and the first of its type in the world. It will focus on early, online dispute resolution, and empowering people to become active participants in solving problems. The CRT employs agile, user-centred design principles to pioneer transformative change in the civil justice system. It is presented as a case study for the proposed redesign of civil justice processes in this paper.

This paper begins by examining public access problems with the current civil justice system. It challenges some of the common assumptions underlying the status quo, with the aim of opening a dialogue about which facets of the civil justice system are foundational to the rule of law and which ones ultimately detract from it. The paper concludes by offering some principles of user-centred justice design, and by illustrating them through their application to the CRT.

This paper offers a concrete, pragmatic, and evidence-based proposal for a redesign of public civil justice dispute resolution processes. This practical focus is exemplified with reference to a description of the CRT. This work was not undertaken to make a direct contribution to the body of theoretical literature in the field of dispute system design. Nor was it based on an exhaustive survey of Canadian or international literature and jurisprudence on the subjects of access to justice, civil justice, and dispute resolution or the broader field of alternative dispute resolution. Rather, the proposed redesign of civil justice processes is informed directly by our experiences as actors in the public civil justice context. To the extent this paper proposes an

1 Sonia is not a real person, but rather a composite of emails we receive every day from members of the public with legal problems.

2 The Civil Resolution Tribunal was established pursuant to the *Civil Resolution Tribunal Act,* RSBC 2012, c C-25 (4th Sess) [*Bill 44*] (some provisions of *Bill 44* are in force, while others are being brought into force).

3 Small claims disputes generally include civil claims in contract, debt, specific performance of agreements, and personal injury, among others. The common feature of small claims disputes is a maximum monetary threshold; for example, in BC, small claims disputes must be below $25,000.

overarching theory of justice design, it can be distilled as follows: user-centred justice design is not only consistent with foundational legal principles, but is required by them. There is a direct relationship between legal rights and access to legal remedies.

A. Public justice processes

In Canada, and in many other jurisdictions, civil justice processes are, in broad strokes, centuries old. They are the product of a world that would, in almost every other respect, be unrecognizable to a modern population.[4] Their development rests on a set of assumptions that has not evolved with society's growing awareness and understanding of differences among people, particularly with respect to the ability to access the justice system. The civil justice system in Canada is, empirically and anecdotally, failing to meet the needs of the public to whom it belongs.[5] As this analysis is limited to civil justice matters, the "needs" at issue here are expressed in terms of the need for the just resolution of disputes that arise between actors in our society, whether they are natural persons, corporate entities, or governments.

The justice processes at the centre of this analysis are "public," meaning they are administered by institutions under one or more branches of government. These institutions exercise public authority to resolve, adjudicate, or otherwise determine the outcomes of civil disputes. They generally do so by applying sources of law in a deliberative public process. Responding parties are typically compelled to participate or suffer the consequences. Fees may be associated with the processes, though they are seldom charged on a full cost-recovery basis.

As courts are a branch of government, their processes are squarely in the public realm. Administrative tribunals, sometimes called administrative courts, also fall within the scope of public justice institutions in our analysis. They have been described as, "spanning the constitutional divide between the executive and judicial branches of government."[6] An administrative tribunal has only as much authority as is granted by its enabling statute, and its jurisdiction may be much more limited than that of a court. Despite this, and subject to applicable statutes, the common law rule is that tribunals are masters of their own process, which gives them a wide general authority

4 See Rosalie Abella, "The Law Society of Upper Canada Professionalism Revisited" (Opening address delivered at the Benchers' Retreat, 14 October 1999), online: <www.ontariocourts.ca/coa/en/ps/speeches/professionalism.htm> [Abella]. (Madam Justice Abella issued this challenge: "The horse and buggy of 1906 have been replaced by cars and planes; morphine for medical surgery has been replaced by anaesthetics, and the surgical knife by the laser; caveat emptor has been replaced by consumer law; child labour has been replaced, period; a whole network of social services and systems is in place to replace the luck of the draw that used to characterize employment relationships; the phonograph has been replaced by the compact disc player; the hegemony of the majority has been replaced by the assertive diversity of minorities; and adoring wives have been replaced by exhausted ones. And yet, with all these profound changes in how we travel, live, govern, and think, none of which would have been possible without fundamental experimentation and reform, we still conduct civil trials almost exactly the same way as we did in 1906. Any good litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today's courtrooms. Could a doctor from 1906 feel the same way in an operating room?").

5 See e.g. Action Committee for Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: Action Committee, 2013) [Action Committee] and Julie Macfarlane, *Treasurer's Advisory Group on Access to Justice (TAG) Working Group Report, National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants,* (Kingsville: 2013) [Macfarlane].

6 *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 24, 204 DLR (4th) 33.

to determine which public justice processes to adopt.[7]

In contrast, private justice processes do not tend to involve the exercise of public power, at least not to the same degree as courts and tribunals. Common examples of private processes include arbitration and mediation, which are typically carried out on a full cost recovery basis, and only with consent of every party to the dispute.

The justice processes proposed in this paper are aimed at resolving civil disputes among people (including corporate persons), governments, and other actors. By appealing to publicly administered justice processes, these disputants leverage the authority of courts and tribunals to exercise public power both to compel participation and to enforce the resolution or outcome.

In the absence of accessible public justice processes, people often turn to private justice processes, which may be quicker or more affordable. However, in our view, the availability of these private alternatives does not relieve institutions entrusted with the authority to administer public justice processes of their responsibility to ensure these processes are accessible.

B. An end-to-end civil justice architecture

The proposed redesign for civil justice processes in this paper envisions a complete end-to-end architecture. Each process is meant to work in symbiosis with the one that precedes or follows it, particularly with respect to the gradual escalation of effort and intensity required by each dispute resolution phase.

While the various dispute resolution phases are often standalone processes, they can be optimized by being placed within a deliberately constructed "end-to-end" system. For example, a structured negotiation phase works well when it is preceded by a self-help resolution process that has assisted the parties to identify their issues, and begin communicating with each other. Similarly, a facilitation phase is more effective if the parties know that, barring a full settlement, they will proceed to a final and binding adjudication.

The notion of end-to-end design, combining dispute resolution phases, is contrasted with initiatives that graft a single dispute resolution process onto a larger, pre-existing one. For example, the addition of a mediation step into an adversarial court process that generally follows typical court procedures, with an orientation towards inevitable trial, will not necessarily reflect an end-to-end design or achieve its goals. The mediation step could certainly generate benefits. But it does not reflect the same type of complete system proposed in this paper.

Steps like mediation may augment, but do not transform, traditional public justice processes. The add-on approach lacks the benefits of gradually escalating intensity and resources. It also lacks the seamlessness of an end-to-end system. For example, using current public justice processes, the parties would begin by framing their disputes adversarially in their pleadings, setting out explicitly contrasting rights-based positions, bolstered by legal arguments demonstrating why they should triumph over every opponent. If mediation is then offered as an add-on process, the parties would have to pivot from the adversarial approach and engage in an interest-based negotiation aimed at identifying common ground and possible concessions. It is unrealistic to

7 *Cambie Hotel (Nanaimo) Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch),* 2006 BCCA 119 at paras 38, 40, 265 DLR (4th) 657.

expect parties to detach quickly from the initial adversarial, rights-based position when they are suddenly in an added-on mediation. Yet, the current civil justice system drives parties to adopt and document deeply entrenched positions before any collaborative step is taken.

Finally, adding-on a collaborative resolution process to an existing structure oriented around judicial decision-making leads to under-resourcing and undervaluing alternative dispute resolution processes, despite their high level of success in obviating the need for adjudication.[8] These added-on processes risk being treated, by parties and the justice institution alike, as just another speed bump on the way to trial, rather than the core of a user-focused public justice process.

II. PROBLEM DEFINITION

A. Current public justice processes

In Canada, the public, and indeed the justice system itself, still perceives the courtroom as the primary forum for dispute resolution.[9] In reality, this is no longer the case, if it ever was. Canadian statistics show that, as in the United States, England, and other developed countries, only roughly 2% of the civil claims filed in court are resolved through a trial.[10] Of the other 98% of cases, some are settled consensually by the parties, but in many cases, people abandon their claims because of the cost, time, and stress incurred in navigating the court process.[11] Recent research shows the longer someone has a civil justice problem, the more likely it is to harm their mental, physical, and financial health.[12]

The common law legal system was designed by legal actors, for legal actors.[13] The artifacts of the legal system serve to reinforce its exclusivity and commitment to tradition; robes,

8 See e.g. US, Alternative Dispute Resolution At The Department Of Justice, *Statistical summary: Use and benefits of alternative dispute resolution (Fiscal Year 2015 Report)*, online: <www.justice.gov/olp/adr/doj-statistics.htm> (the report found a success rate for voluntary ADR of 71% in 2015).

9 *British Columbia Government Employee's Union v British Columbia (AG)*, [1988] 2 SCR 214 at 230, 53 DLR (4th) 1 (adopting the following statement by the B.C. Court of Appeal in the same case: "access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens … Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court").

10 For US trial rates, see Brian J Ostrom & Neal B Kauder, *Examining the Work of State Courts, 1998: A National Perspective From the Court Statistics Project* (Washington, DC: National Center for State Courts, 1999) at 11. See also John Barkai, Elizabeth Kent & Pamela Martin, "A Profile of Settlement" (2006) 42:3-4 Court Review: The Journal of the American Judges Association 34 at 34-35. For Canadian civil trial rates, see e.g. Canadian Centre for Justice Statistics, *Civil Courts Study Report* (Ottawa: Minister of Industry, 1999) at 10. See also British Columbia Justice Reform Working Group, *Effective and Affordable Civil Justice* (2006) at 2, n 3, online: <www.ag.gov.bc.ca/public/bcjusticereview/cjrwg_report_11_06.pdf >. For UK civil trial rates, see Ministry of Justice, *Court Statistics Quarterly: October to December 2012* (London: Ministry of Justice, 2012) at 2.

11 Carl Baar, "The Myth of Settlement" (Paper prepared for delivery at the Annual Meeting of the Illinois Law and Society Association, 28 May 1999) at 12, online: <www.siteresources.worldbank.org/INTLAWJUSTINST/Resources/MythofSettlement.pdf> [Baar]. For some directional insights into this issue, as well as the challenges in collecting accurate user data from courts, see Canadian Forum on Civil Justice, *Civil Non-Family Cases Filed in the Supreme Court of BC: Research Results and Lessons Learned* (Victoria: Focus Consultants for the CFCJ, 2015).

12 Macfarlane, *supra* note 5 at 14.

13 See UK, LJ Briggs, *Civil Courts Structure Review: Interim Report* (London, UK: December 2015) at paras 5.27-5.36, online: <www.judiciary.gov.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf>.

Latin, crests, bowing, archaic forms, complex rituals, and rigid hierarchies. It has been well-documented that self-represented litigants (SRLs) find the artifacts and machinery of the legal system in Canada intimidating, confusing, and stressful.[14] This is not to suggest that a majority of legal actors are deliberately maintaining barriers for the general public. Indeed, this phenomenon may be the result of deeply held beliefs in, and a commitment to, a historically constituted version of a system for resolving civil disputes through the exercise of public power.

Though our common law processes were designed primarily for legal actors, many people are attempting to navigate the court system on their own. In 2011, 57% of British Columbia provincial court family hearings included at least one SRL. Across Canada, the number of SRLs in provincial family hearings is at or above 40%.[15] In lower level civil claims, SRLs appear 70 to 80% of the time in some courts.[16] The numbers are likely low, since many parties will hire a lawyer for a hearing, but otherwise do the associated work themselves.[17]

The cost of legal services is a contributing factor to problems accessing justice. A recent survey found the average legal fees for a two-day trial in Canada reached an all time high of $31,330 in 2015.[18] Meanwhile, the median after-tax income of Canadian families was $53,500 in 2013.[19] The decision to pursue the resolution of a civil dispute through a publicly funded institution would require a person to risk over half of one year's disposable income.

In this context, it is not surprising so many people forego resolution of their civil disputes. However, the fact that only 2% of filed civil cases make it to trial is problematic for a number of reasons. Most obviously, it requires us to consider why the entire orientation of our legal system is directed at a public justice process that does not assist the vast majority of people with disputes.[20] The attrition of parties from the court system, after they have invested significant time and money, but before their dispute is resolved, arguably undermines the reputation of the administration of justice in Canada.

In effect, we have created a legal system where access to the courtrooms financed by everyone may only be accessible to wealthy or heavily subsidized parties. Not only does this deprive the average Canadian of a viable dispute resolution venue, but in our common law system, it means only the 2% of cases that make it to trial generate the caselaw governing all Canadians

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14 *Action Committee*, *supra* note 5 at iii. See also Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2016) 93:3 Can Bar Rev 639 at 662-665.
15 Macfarlane, *supra* note 5 at 33.
16 *Ibid* at 34.
17 *Ibid* at 33.
18 See generally Michael McKiernan, "The Going Rate", online: (June 2015) 33 Canadian Lawyer <www.canadianlawyermag.com>.
19 Statistics Canada, *Canadian Income Survey 2013* (Ottawa: Statistics Canada, 8 July 2015), online: Statistics Canada <www.statcan.gc.ca/daily-quotidien/150708/dq150708b-eng.htm>. 19 Justice Thomas Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach" (The Thirty-third Viscount Bennett Memorial Lecture delivered at the Faculty of Law, University of New Brunswick, 27 October 2011), online: <www.thefreelibrary.com/Access+to+justice%3A+towards+a+collaborative+and+strategic+approach.-a0302776655>.
20 Justice Thomas Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach" (The Thirty-third Viscount Bennett Memorial Lecture delivered at the Faculty of Law, University of New Brunswick, 27 October 2011), online: <www.thefreelibrary.com/Access+to+justice%3A+towards+a+collaborative+and+strategic+approach.-a0302776655>.

through the application of precedent.

Issues around access to justice also hold potential repercussions on a societal level. The social contract in democracies requires us to forego the right to seek retribution for civil wrongs, in exchange for access to public justice processes to seek resolution. When people lose confidence in the ability of the justice system to provide this resolution, it undermines our civil society[21] and our collective security.

Part of the access problem is the way the legal system characterize disputes. We refer to "justiciable issues" and "claims," rather than issues that may have a legal component. In Canada, lawyers enjoy a wide monopoly over the resolution of problems involving legal rights, and in accordance with their training, lawyers primarily seek to resolve disputes through formal, adversarial public justice processes. The public is left with few viable public dispute resolution processes outside of a formal court model.

Other cultures, and other jurisdictions, do not treat dispute resolution as the exclusive domain of lawyers and judges. In Australia, many organizations conduct dispute resolution processes mandated or authorized by legislation. For example, in several Australian states, people with telecommunications, utilities, financial services, or other consumer disputes can seek mandatory mediation from a designated industry ombudsperson for each of these sectors.[22] Under legislation, the corporation involved in the dispute must participate, and the industry sector must fund the mediation. The prevailing justice culture makes available a variety of accessible public, or quasi-public, justice processes, built around users' needs and problem types. Similar out-of-court processes exist in England, where our common law system was born.[23]

Some senior members of the judiciary are becoming increasingly concerned that procedural burdens are undermining the functioning of our justice system. As George Strathy said on being sworn in as Chief Justice of Ontario in 2014, "[w]e have built a legal system that has become increasingly burdened by its own procedures, reaching a point that we have begun to impede the very justice we are striving to protect…"[24] Before her appointment to the Supreme Court of Canada, Madam Justice Rosalie Abella stated:

> We have moved from being a society governed by the rule of law to being a society governed by the law of rules. We have become so completely seduced by the notion, borrowed from criminal law, that process ensures justice, that we have come to believe that process is justice. Yet to members of the public who find themselves mired for years in the civil justice system's process, process may be the obstacle to justice. It may be time - again - to rethink how civil disputes are resolved.[25]

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21 *Ibid*.

22 See e.g. Energy and Water Ombudsman - Victoria, "How to Make a Complaint", online: <www.ewov.com.au/complaints/process-for-complaints>.

23 See Jackie Gulland, "Current Developments in the UK - Complaints Procedures and Ombudsmen" in Michael Adler, ed, *Administrative Justice in Context* (Oxford: Hart Publishing, 2010) 457 at 482.

24 Paola Lorrigio, "Ontario's Legal System Too Costly and Complicated, New Chief Justice Says", *The Globe and Mail* (9 September 2014), online: <www.theglobeandmail.com>.

25 Abella, *supra* note 4.

What follows are some brief, but more specific observations on the limits of existing public justice processes for civil disputes.

i. Adversarialism and the court process

The adversarial system is the hallmark of our common law legal tradition. It has inspired noted legal scholars to exclaim, for example, that "[c]ross-examination is the greatest legal engine ever invented for the discovery of truth."[26] However, in many ways, the framing of everyday civil disputes in adversarial terms from the outset is counterproductive to resolving the problem by agreement. Rather than focusing on identifying the issues underlying the problem, the parties are required to concentrate their efforts on crafting highly aggressive claims and defences in unequivocally adversarial terms. Considerable time and money is spent on characterizing the dispute in a zero-sum manner, instead of beginning with a problem-solving approach focused on the issues in dispute.

Despite the effort that goes into them, adversarial, rights-based pleadings will be of little use in the 98% of claims that never go to trial. Admittedly, the discipline involved in this process may help the parties to assess the relative strength of their claims, and adjust their bargaining positions accordingly. However, adversarial arguments should not be given too much credit for encouraging resolutions by agreement, since they are more likely to entrench positions than soften them.

ii. U-shaped process design

The existing civil justice system creates a U-shaped process; parties expend a great deal of time and money at the initial stages to prepare pleadings, serve notice, and exchange documents.[27] Then there is a long lull in the middle, where there may be intermittent discovery activities. Finally, at the other end, for the 2% who make it there, there is a trial and the expensive and time-consuming scheduling and preparation activities that go along with it.

This U-shaped process presents a number of access barriers for the public. First, front-loading requires significant effort, time, and money to characterize a dispute in a highly adversarial way, in the absence of evidence and positions from the other parties. This is highly inefficient. In this early stage of the dispute, the parties are likely to have some familiarity with the case, but not enough to craft the precise arguments they would present in a trial. It is also difficult for disputants to objectively assess the strength of their claims. Under the traditional legal model, a person would consult a lawyer, who would, after collecting relevant facts and undertaking some amount of research, advise on the strengths and weaknesses of a case, and potentially identify a likely outcome. However, with the majority of parties now representing themselves, often the first time a person is advised on the merits of their case is when they are on the losing side of a judge's decision.

The pleadings represent a high point of activity because they mark the commencement of the court's dispute resolution process, and the trial is a high point because it marks the end of the process. What follows is a look at what happens in the months, or years, in between these two

26 *Lilly v Virginia*, 527 US 116 (1999) at 124, citing John H Wigmore.
27 BC Justice Review Task Force*, supra* note 9 at 3-4.

bookends.

iii. Discovery

The purpose of discovery processes is to encourage parties to uncover all of the relevant information after the dispute is commenced, but before the trial occurs. While these processes can help the parties to locate key evidence, the discovery process is driven by the parties' initial adversarial positions, and is often carried out adversarially, through interrogatories and examinations for discovery. A less adversarial exchange of facts and information could help to create a clearer picture of the dispute, before the parties focus on finding the argument that will help them win at trial. As stated earlier, the expenditure of time and resources on being "right" at this stage is not rational, considering 98% of cases will not be decided on a "rights" basis. A more rational approach might focus on addressing the wrong or harm that led to the dispute in the first place.

iv. Restrictions on amendments to pleadings

Even if discovery reveals significant facts prompting the parties to change their positions in the case, many courts and tribunals impose restrictions on the frequency or degree to which pleadings can be amended.[28] These restrictions exist for a reason: if each party can continually shift its claims and legal arguments, it will be difficult for another party to know the case to meet at trial.

However, as discussed, adversarial pleadings require parties to crystallize their claims, defenses, and arguments before the dispute resolution process begins, and before they are fully informed of both sides of the case. Limits on changing these positions discourage parties to narrow issues, make reasonable admissions, or propose resolutions.

v. Lulls in the dispute resolution process

The existing civil justice processes involve a series of steps, all based on the assumption the parties will go to trial. However, aside from pleadings and discovery activity, very little resolution-oriented processes happen in the valley of this U-shaped process.[29] The parties may engage with the court to make or respond to interlocutory applications, although these tend to be driven by procedure rather than a desire for resolution. Similarly, trial or case management conferences that place an emphasis on setting the date and duration of the trial tend to avoid a deep consideration of the issues in dispute.

Aside from these procedural and predominantly trial-oriented steps, the court resolution process does little to encourage the parties to resolve their dispute. At least, it is unlikely to offer direct support or steps aimed at encouraging a resolution. However, there may be merit to the argument that, in the face of the procedural work required to prepare for a trial, along with the associated time and cost, the parties will begin to view settlement or withdrawal more favourably.

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28 See for example BC Reg 168/2009, s 6-1(1) (allowing pleadings to be amended only once without the leave of the court at any time before service of the notice of the trial, and only after the service of notice of trial with the leave of the court or the written consent of the parties).

29 Warren K Winkler, *Evaluation of Civil Case Management in the Toronto Region* (Toronto: 2008) at 11.

vi. Cases that are said to "settle" before trial

Some argue that, by its nature, the court process encourages parties to "settle" before trial because the prospect of preparing for and conducting a trial is expensive, time-consuming and stressful. However, as discussed earlier, many parties are not actually settling their disputes, but rather withdrawing or otherwise conceding simply because they cannot withstand the process.[30]

Recent studies indicate large numbers of people encounter disputes on a relatively frequent basis. Twelve million adult Canadians will have a legal problem they consider serious in any given three-year period.[31] The studies also suggest many of these people will not rely on the courts to provide a resolution. Further, public justice processes which inadvertently encourage resolution through attrition caused by delay and cost, or the avoidance of the existing legal system altogether, are unsustainable and do not serve the public interest.

This evaluation of existing public justice processes is not a call to do away with courts, judges, or trials. The judiciary is a fundamentally important and trusted component of our justice system. Rather, it is a call to rebalance and restructure our public dispute resolution processes to recognize that most of the time, disputes are not resolved in courtrooms following a traditional adversarial trial.

B. Outcomes in the Civil Justice Process

i. Uncertain user satisfaction

Unfortunately, courts and tribunals seldom ask people who appear before them whether they are satisfied with the way the court handled their case. Given that adjudication can often create zero-sum outcomes, in any given case one or both parties will likely be dissatisfied with a court's decision. However, there is a role for measuring how parties feel about the way they are treated in their justice system. It is entirely appropriate, for example, to ask a party, did you feel heard? Were you treated with respect? Did you understand the process? Did you understand the decision, even if you do not agree with it? Asking these questions can provide a valuable confirmation of whether our public justice processes are meeting basic requirements of procedural fairness, including the right to be heard and knowing the case to meet.[32]

While there is little available data on people's satisfaction with the existing legal system, we do know most people would prefer to avoid it altogether. Survey data shows people want a say in how their civil disputes are resolved; they do not want the outcome determined for them by a third party, whether a judge or a tribunal member. In a recent British Columbia survey, 94% of people said they wanted a say in shaping their resolution. Fully 82% wanted the opportunity to negotiate with the other side.[33] Accordingly, it is not surprising that people are much more

30 Baar, *supra* note 11.

31 AB Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007) 2 at 10-12.

32 See *Administrative Tribunals Act*, RSBC 2004, c C-45, s 59.1 [*ATA*] (recent amendments permit tribunals to conduct participant surveys).

33 BC Ministry of Justice, "Online Civil Justice Services Survey 2105" (confidence interval of +/- 2.9%, 19 times out of 20) [BCStats].

satisfied with consensual resolutions, rather than those which have been imposed upon them.[34]

ii. Relationships between parties

It seems self-evident that adversarial court processes are likely to negatively impact the parties' relationships with each other, whether these relationships arise in a social, familial, commercial, or in a neighbourhood context.

Adjudication has the advantage of being final and decisive. It has a necessary place on a spectrum of dispute resolution alternatives. However, the imposition of resolutions by a third party, combined with a zero-sum approach to decision-making can irrevocably, and unnecessarily, destroy relationships to the detriment of the parties. Existing public justice processes seldom place a value on the preservation of these relationships. However, if we consider, holistically, the best interests of the parties, we could implement processes which stand a better chance of preserving relationships which will endure, for better or worse, long after the dispute resolution process is over.[35]

III. REDESIGNING CIVIL JUSTICE

A. Foundational principles

The proposed dispute resolution structure in this paper aims to achieve several foundational goals: the adoption of a user-centric approach which puts the public first, a systemic orientation toward the people who need justice services, rather than those who provide them, and a rebalancing between processes and outcomes. Each of these principles is explained in turn below, along with an identification of what they require, in practical terms, from public justice processes.

i. Putting the public first

A redesigned civil justice process must include a user-centric orientation to "put the public first," as key access to justice reports have encouraged us to do.[36] Here, the public is defined as broadly as possible to include any potential justice system user, and can include private and public participants, commercial actors, and others. However one defines "the public," justice processes should, to the fullest extent possible, put a high priority on the needs, interests, and limitations of justice system users.

Designing justice processes to meet the needs of users is not a matter of devising the simplest processes possible. There will naturally be a certain degree of complexity within a system that must resolve potentially complicated disputes. Similarly, the nature of justice itself introduces complexities that, in turn, demand potentially complex processes and procedures.

For example, our redesigned process does not eliminate the notion of procedural rules entirely. The CRT relies on a set of procedural rules to describe the dispute resolution process

34 Austin Lawrence, Jennifer Nugent & Cara Scarfone, *The Effectiveness of Using Mediation in Selecting Civil Law Disputes: a Meta-Analysis* (Ottawa: Department of Justice, 2007) at 21-23.
35 *Bill 44*, *supra* note 2 at s 2(2)(b) (stipulating that the CRT's mandate includes providing dispute resolution services in a manner that, "applies principles of law and fairness, and recognizes any relationships between parties to a dispute that will likely continue after the tribunal proceeding is concluded").
36 *Action Committee*, *supra* note 5 at iii.

followed in the ordinary course. The rules use precise language and deal with situations that are uncommon to everyday life.

But a user-focused civil justice system must not surrender too quickly to legalistic temptations to create extremely detailed procedures accompanied by lengthy, complex rules, no matter how well intentioned they may be. As lawyers and system designers, we seek to attain the best and most comprehensive justice processes for the public. This pursuit often leads us toward exhaustive procedures, created to handle the most complex and difficult disputes or "hard cases."

A balance must be struck between the needs of justice and the needs of the public. In the context of our current justice system, it may be more accurate to say there must be a rebalancing between justice and justice system users. There is no bright line between what does and does not strike the right balance.

In the absence of a clear determination of what types of processes and procedures strike the right balance, we must instead encourage a constant tension between the seemly incompatible forces of user-needs and the demands of justice. Using the example of procedural rules, one way to balance this tension would be to create a relatively complete set of rules for reference, but build processes whereby the rules are given to users only when and where they need them, rather than all at once. Taken a step further, this approach would see the rules embedded directly into the processes, forms, and interactions themselves, saving users from the burden of having to read, interpret, or decide how to adhere to them.

This tension also arises when we attempt to aggressively "plain language" or "clear language" rules, procedures, or text-based materials used during the process. Where it is possible and appropriate, technical words and phrases must give way to simpler ones. Defined terms and other cross-references must be kept to a minimum. Fewer words must be used even when a longer and more technically accurate provision would seem more complete. In our experience, even these modest-seeming recommendations can be challenging to put into practice. But their value cannot be overstated when it comes to accessibility for the public.

Research shows that public health information needs to be written at a grade 6 reading level to be widely understood.[37] With equally complex jargon and processes, public legal information must be written at a similar level. Fully 45% of British Columbians aged 16-65 have difficulty filling in forms or following instructions, due to literacy problems.[38] Yet filling out complex forms and following detailed instructions is exactly what our public justice processes demand from people at every turn. Court and tribunal forms and documents are seldom tested, validated, and revised in collaboration with the people who use them. Rather, they tend to be designed for an audience of judges, lawyers, or court staff.

One way the CRT is addressing this issue is by engaging in intensive user testing at the early stages of design. We started by testing conceptual designs of intake forms and processes with community advocates, who serve clients with various barriers, and then began testing them with

37 Richard S Safeer & Jann Keenan, "Health Literacy: the gap between physicians and patients" (2005) 72(3) Am Fam Physician 463 at 468.

38 Statistics Canada, *Skills in Canada: First results from the Programme for the International Assessment of Adult Competencies (PIAAC)* (Ottawa: Statistics Canada, 2013).

individuals with real disputes. This feedback has allowed us to frontload changes and refinements at an early (inexpensive) development stage.

ii. Reorienting the justice system towards users

Generally speaking, one of the biggest challenges in designing a justice system around the public is the necessary shift in emphasis away from the needs of people who provide justice processes towards the people who use them. There needs to be a rebalancing between the interests and perceptions of the people who work in the justice system, and the public for whom they work. This rebalancing requires a break with tradition.

The influence and inertia of tradition should not be underestimated. The legal profession from which the judiciary is exclusively drawn, has a deeply entrenched resistance to change, and a strong preference for past over present. Our common law tradition is built on the notion that precedent, or what came before, is inherently better and more trustworthy than some uncertain future innovation. This common law tradition is responsible for the development of important foundational legal principles, but it has also become an impediment to adopting necessary process changes to our legal system.

Thinking more creatively about the processes we use to give effect to foundational legal principles creates opportunities to reorient the justice system towards people's lives. People come to the justice system with a context; jobs, families, community obligations, socio-economic backgrounds, and sometimes barriers like illiteracy, poverty, or physical or mental disabilities. Wherever possible, the justice system must adapt to this context, rather than force people to adapt to a context designed for traditional justice actors.

In practical terms, this might mean freeing people from the procedural barriers of synchronous justice processes, where all parties must travel to a particular place, at a particular time, for a particular activity, even if it requires great personal cost in terms of lost wages, or childcare and travel expenses. It also might mean relinquishing unnecessary formality, including language, dress, or processes where these decrease access by intimidating or alienating people.

This reorientation might also require public justice institutions to redistribute decision-making resources toward early, self-help, and collaborative processes which empower people to become active participants in the resolution of their disputes, and in the justice system generally.

Again, there is no bright line between a system that places too great an emphasis on justice system providers as opposed to users. As with the previous examples, system designers must examine public justice processes from every perspective, and consider how a process could be reconfigured to advance the needs and interests of users even if it might seem foreign or unpalatable to traditional justice providers.

Ultimately, the power to redesign public justice processes, whether of a policy or an adjudicative nature, remains vested in decision makers who tend to be heavily invested in the status quo. Change management, therefore, is a key, and often overlooked requirement of justice system redesign. Beyond undertaking a range of change management activities to earn support from traditional stakeholders, it may be necessary to use more blunt tools, such as the passage of

legislation mandating a significant rebalancing with a view to public accessibility.[39]

In the end, a simpler way to ensure an appropriate balance between the needs of justice system users and those of the traditional justice system may be to adopt a service-based approach. According to this approach, members of the public are treated as the recipients of a court's or the tribunal's services. The services in this case involve justice and dispute resolution. If the court or tribunal adopts a service focus, and treats its users as the recipients, it should serve to rebalance the approach to justice and dispute resolution to consider the needs and interests of its users - beyond the strict execution of its mandate. In the negative, it departs from the view that justice providers should conduct themselves as if the administration of justice occurs in a vacuum, or that if people cannot meet the justice system's constraints and requirements, they simply cannot access those justice services.

An example of a service-based approach includes the creation of multiple means of interacting with the court or tribunal, rather than a strict adherence to filing paper forms in a court registry. Under this approach, a court or tribunal would provide choices for users and encourage them to choose the options that best suit their needs.

We are not advocating that courts or tribunals adopt a profit motive that often accompanies a private-sector approach to service. Court and tribunals offer an essential public service, and access to it should not cause financial hardship.[40] Nevertheless, a service-based culture can be instilled in the organization, beginning with the notion that members of the public deserve the best justice services that are reasonably within the organization's ability to provide.

iii. Rebalancing process and outcomes

Traditional public justice processes suffer from the adage that if a little is good, more is better. In an attempt to account for the "hard cases," situations which are infrequent but complicated, and a desire to ensure the highest degree of fairness in every case, courts and tribunals tend to pile on process, to the point where, as Chief Justice Strathy notes, they collapse under the weight of them. However, it is not only the legal system carrying this burden; procedural barriers make it nearly impossible for many members of the public to access the system altogether. Processes which cause needless delay and increase cost deny fairness rather than guarantee it.

It is hard to overstate how important careful process design is to creating accessible public justice processes. In many cases, legal process acts like the bouncer at an exclusive nightclub; process decides who gets in, how long they will wait, how much they will pay and what kind of documents they will have to produce along the way. Legal process can either tear down barriers to accessing justice or build them up so high that few can surmount them. Public justice processes must be rebalanced to recognize this fact. Justice processes must be fair, but they must also be affordable, understandable, and timely. Proportionality is a key to this rebalancing.

Proportionality requires that a dispute should consume only the amount of process, procedure, cost, and time required to resolve it, and no more. Often, proportionality is applied

39 See e.g. *Civil Resolution Tribunal Act*, *supra* note 2 at ss 2, 20, 39.
40 *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31.

bluntly; low value cases should require less process and higher value cases should require more. In many circumstances, this approach to proportionality may produce the desired outcomes. But often, monetary value is not correlated with complexity, and a more nuanced approach is necessary.

Rather than set out rigid rules for certain types of cases, public justice processes should grow along with the case. This proposal is based on multiple dispute resolution phases set out in a sequence from simple to complex. The simpler processes are carefully designed to involve the least amount of delay and cost for the parties. Discussed in detail below, the CRT is an example of an end-to-end dispute resolution process that begins with self-help, moves to direct negotiation, followed by facilitation, and finally adjudication, if necessary. Each of these phases is designed to encourage a resolution of the dispute, whether in whole or in part, as early as possible and with the least amount of cost and effort.

The self-help, negotiation, and facilitation phases are all designed to encourage a collaborative or consensual resolution. Collaborative processes provide better outcomes for users, since less adversarial processes progress faster and more efficiently than adversarial ones, and better accord with public preferences for dispute resolution.[41] During a collaborative process, the parties may expend less time and resources on offensive or defensive positions, and may stay more focused on resolving the issues in dispute. In a consensual process, there is no requirement to overturn every stone in search of evidence or to craft detailed submissions on the legal issues in dispute. However, the parties may consider some of these issues to better inform their respective positions and bargaining incentives.

Not every dispute will be resolved completely through a collaborative process, and therefore this proposal requires an adjudicative phase. The adjudicative phase is a hybrid between an adversarial and inquisitorial process. Parties make arguments and submit evidence. The decision-maker may also ask questions of the parties or their witnesses, or request further evidence. The dispute is resolved through a binding decision. Adjudication is a necessary part of the process where parties cannot agree, because it gives them certainty that, one way or another, their dispute will be resolved at the end of the process.

Consistent with providing a pragmatic, rather than a theoretical approach to this proposed system design, we use the CRT process as a practical way to illustrate the principles discussed in this section.

B. Case Study: The CRT

The CRT is an administrative tribunal with jurisdiction over small claims and strata property (condominium) disputes. Authority for the tribunal and many of its processes are found in the *Civil Resolution Tribunal Act* and associated amendments.[42]

As an administrative tribunal, the CRT's framework brings both advantages and disadvantages relative to courts. While this paper does not explore these in depth, one key difference is that by operating outside the traditional institutional structure of the courts, the CRT presents a clear opportunity for radical transformation, within the constraints of administrative

41 BCStats, *supra* note 33.
42 *Bill 44, supra* note 2.

law. The tribunal is also new, and to a large extent, "custom built" to allow for new services and processes, including the use of technology, a primarily remote staff, and the absence of a bricks-and-mortar delivery infrastructure.

i. Overview of the CRT process

The CRT end-to-end process includes several phases; an initial self-help stage, an opportunity to negotiate directly with the other parties, a facilitation stage where the parties are assisted to reach a consensual agreement, and failing this, an adjudicative phase where a tribunal member makes a binding decision. While the processes can be reordered, depending on the parties' requirements, in most cases parties will advance through them in a linear, but proportionate, fashion, expending only as much process, effort, time, and cost necessary to resolve the dispute.

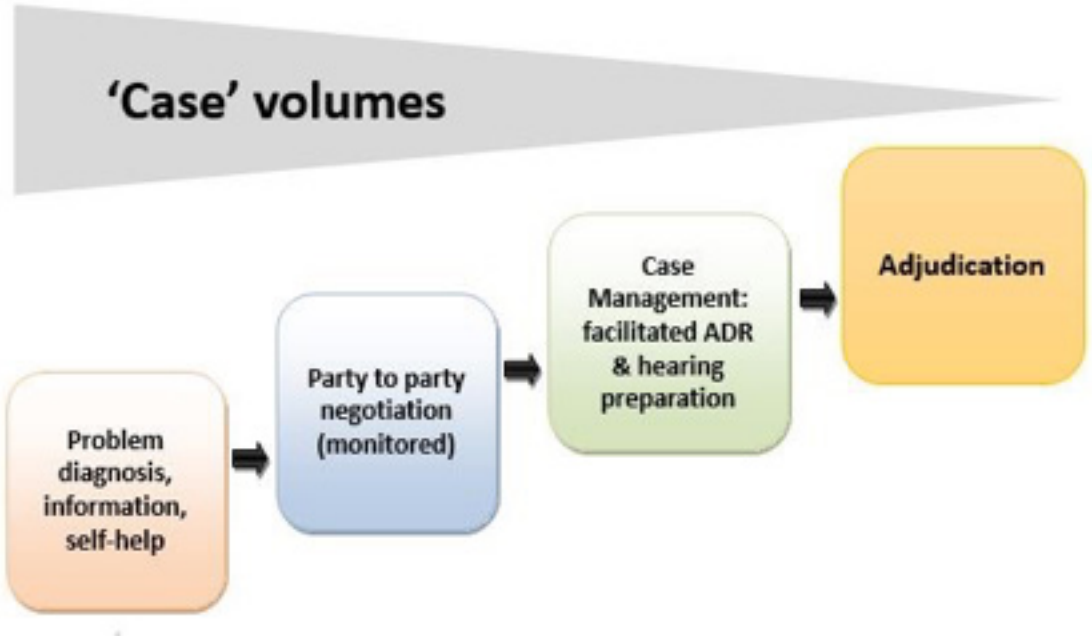

Figure 1: The CRT's four stages of dispute resolution.

In contrast with the U-shaped adversarial model, where are the parties are largely left on their own between filing their claim and a trial date, the dispute resolution phases at the CRT are designed to keep the parties engaged with each other and with the tribunal, maximizing the chances of an early resolution by agreement. The focus on facilitation as the primary means of dispute resolution not only increases the chances of an early consensual agreement, but also helps address fairness issues early in the process, to prevent some of the attrition that allows only 2% of cases to reach a resolution within the traditional civil justice system. For example, a facilitator could identify if someone has language or disability barriers and connect them with interpretation services, or other supports to help them fully participate in the CRT process. In the event adjudication is necessary, the facilitator can act as a neutral guide; explaining the process and what the parties need to do to prepare, and alerting the adjudicator to any special needs the parties might have. This is a role unparalleled in our current civil justice system.

ii. Phase 1: Problem Diagnosis, Information, Self-Help and Streaming

The first phase of the CRT is an online service provided through a platform called the "Solution Explorer".[43] The Solution Explorer is a simple, web-based expert system that carries out several functions to assist a user in understanding and resolving their dispute. It does not collect any personal information, and is available for free to the public, regardless of whether they have a CRT claim.

An expert system is a technology-based platform that imitates or emulates the feedback, guidance, or reasoning of a human expert.[44] An expert system relies on a knowledge base which is filled with expert knowledge from a given domain, collected from human experts.[45] This knowledge is structured in a specific way to make it computer readable, and accessible to the expert system user through the system's user interface.[46]

A foundational design principle of the CRT process is to create opportunities for early resolution. The Solution Explorer provides these opportunities in different ways. First, the system helps to diagnose a user's problem by narrowing it from the level of a wide domain, down to a much more granular level. A representative model would look like this:

> Karin has a Small Claims problem
>> Karin's Small Claims problem relates to the purchase of a good or service
>>> Karin's purchase is a consumer (personal, family or household use) type
>>>> Karin is the consumer (purchaser)
>>>>> Karin's purchase is a service contract
>>>>>> Karin's service contract is a continuing service contract (e.g. a fitness club membership)
>>>>>>> Karin wants to cancel and is having a disagreement over the terms of cancellation

The interface allows the system to accomplish this diagnosis through an intelligent questionnaire style of interaction, using plain language questions and answers. The diagnosis is formulated with the help of subject matter experts, who describe the various types of categorizations and the level to which they should be made.

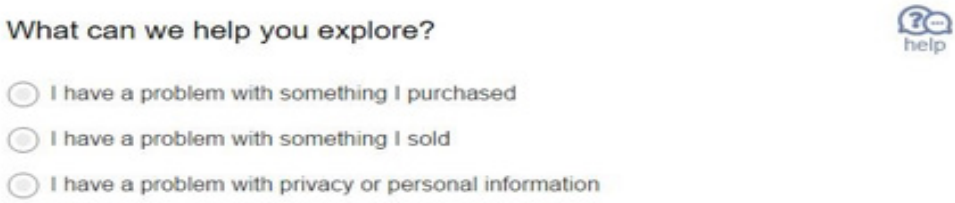

Figure 2: An example of the Solution Explorer's guided pathways, using a question and answer

43 Darin Thompson, "What is the Solution Explorer?" (2 December 2014), online: The Civil Resolution Tribunal <www.civilresolutionbc.ca/what-is-the-solution-explorer/>.
44 Richard Susskind, "Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning" (1986) 49:2 Modern Law Review 168 at 172.
45 George F Luger & Chayan Chakrabarti, "Knowledge-Based Probabilistic Reasoning From Expert Systems to Graphical Models" (2009), online: University of New Mexico < https://www.cs.unm.edu/~treport/tr/09-11/luger.pdf > at 1.
46 Mary Lou Maher & Panay Longinos, "Development of an Expert System Shell for Engineering Design" (1986), online <http://repository.cmu.edu/cee/1/> at 9.

format.

By helping to diagnose the user's issue or problem, the system provides structure around the dispute. It also enables the system to deliver targeted information to the user about the problem or issue, including the identification and explanation of potentially relevant rights and obligations. This information can be provided in a written text format or through multimedia such as videos, to assist those with language or literacy barriers.

Figure 3: An example of the Solution Explorer's tailored resources, including videos for people with difficulty absorbing written material.

Because the Solution Explorer begins by diagnosing the user's problem, it is possible to provide a small amount of focused information to the user, rather than a deluge of large amounts of information consisting of some helpful, but some irrelevant information.

After the user better understands the problem, the system can provide self-help tools designed to actively manage or attempt to resolve the problem. In some cases, this early action may be able to help a user avoid letting the problem become a full-fledged dispute.

These self-help tools are intended to be simple, with the most common one being a letter template to open communications between the parties involved in the problem.

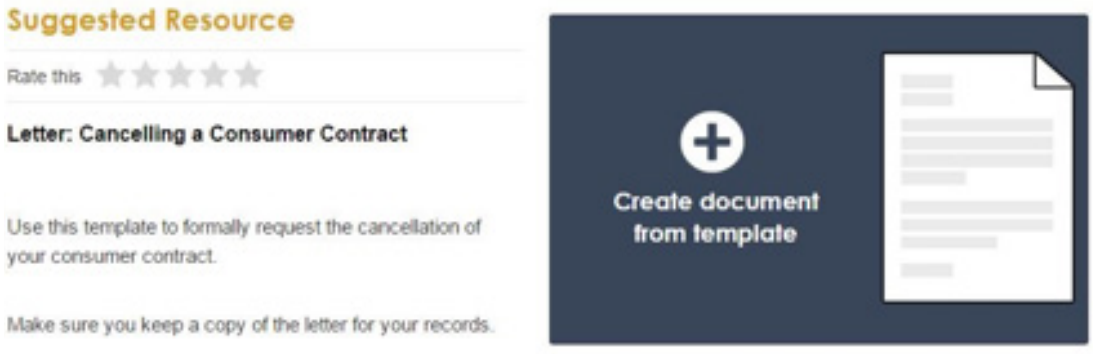

Figure 4: One of the Solution Explorer's self-help tools is a template letter which can be used to try to resolve the dispute through negotiation.

Because the tools are created with the assistance of subject matter experts, they can be very specific to the problem or issue experienced by the user. For example, the letter template can

be pre-populated with detailed content, tailored to the user's issue.

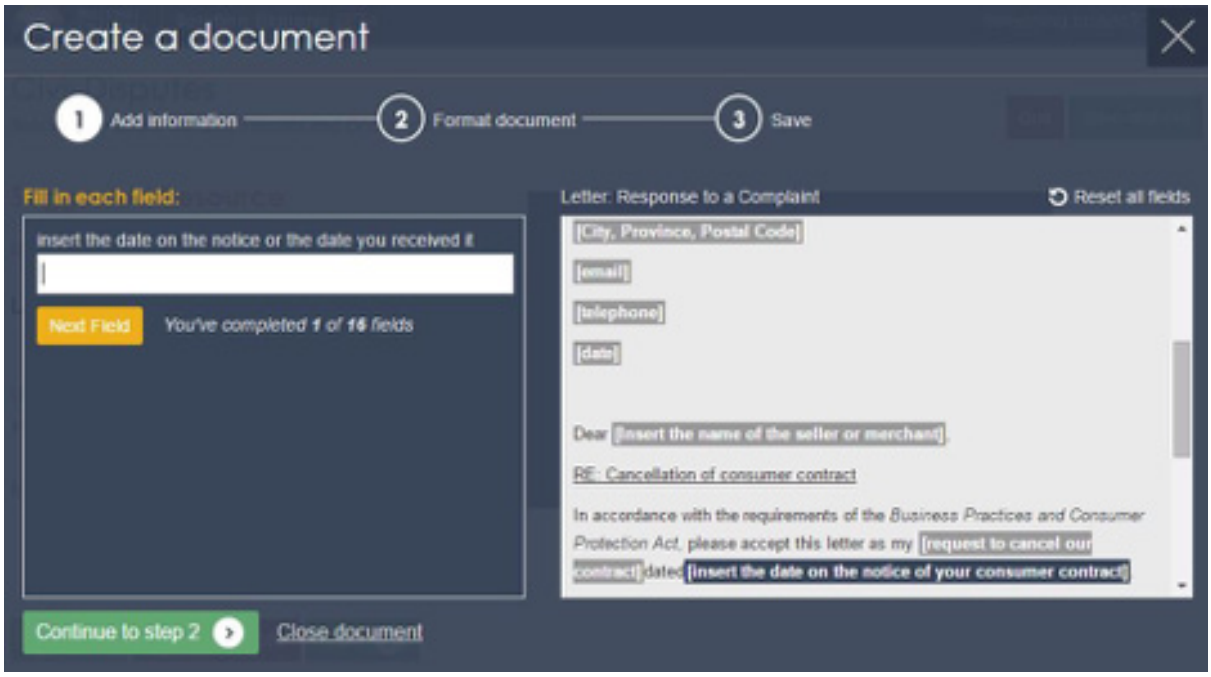

Figure 5: the Solution Explorer's template letters are pre-populated with the relevant sections of applicable legislation or regulations.

At the end of the Solution Explorer process, the user is taken to a customized summary report, which provides a natural language summary of the user's situation, along with the expert guidance and self resolution options that were provided. The summary might also set out additional options the user can try if the first option did not resolve the problem. If the user is unable to resolve the problem using these self-help options, they can begin the CRT dispute resolution process from within the summary page, leading seamlessly to the intake process.

iii. Starting a Case

A user who decides to start a formal CRT dispute resolution process is taken through the case intake process for the tribunal. The primary objective at this point is to capture the required information from the user to begin the dispute resolution process.

Starting the dispute resolution process is comparable to filing a case with a court or tribunal.[47] The major difference is that users are not asked to frame the dispute in highly adversarial terms, or to outline the arguments they would make if the dispute were to be resolved by adjudication. Rather, they are asked to provide enough information about the dispute and their positions on it, along with supporting evidence, to begin the collaborative dispute resolution process. The initiating party is also required to notify responding parties that the dispute resolution process is starting at the tribunal.

Once a case is opened with the tribunal, and the notice requirements have been met, each case is screened to ensure all necessary information is provided and the claim is within the CRT's

47 The fees to use the CRT are roughly equivalent to the current BC Small Claims Court, or about $200.

jurisdiction. If the screening does identify a potential problem requiring a decision, the case can be delivered immediately to the tribunal member with the authority to make a decision.

iv. Phase 2: Negotiation

Once the case has been screened into the process, a party to party negotiation phase begins. This is a low-cost opportunity for the parties to try to resolve the problem directly, with little intervention from the CRT. In essence, it is an "off-ramp" from the CRT process, and might be useful where, for example, both parties acknowledge a debt is owed, but need to work out a repayment plan. The incentive for the debtor would be to avoid the time, money, and tribunal order she knows will likely result from the CRT process. The incentive for the creditor would be to maximize the likelihood of repayment, while avoiding the effort of a CRT process. The parties can communicate through electronic means, or through paper or telephone-based ones, depending on their preference. The CRT monitors communications for abuse or harassment, but does not otherwise intervene at this stage.

The negotiation phase is unlikely to resolve a high percentage of disputes, but is consistent with the principle of empowering people with as many up-front opportunities to resolve a dispute as possible before imposing a resolution through adjudication. It is deliberately meant to be simple, with the potential to produce a resolution for the percentage of cases that require only the smallest amount of structure and effort to allow an agreement between the parties.

v. Phase 3: Facilitation

If a dispute is not resolved during the party-to-party negotiation phase, it moves into the facilitation phase. Facilitation is a broad name for a process involving a range of activities, with an emphasis on flexible, consensual dispute resolution and case management. Facilitators are tribunal employees with specialized dispute resolution expertise, who serve as third-party neutrals in the process. Tribunal members may also serve as facilitators, but are not required to do so in every case.

Most disputes move through facilitation on a remote basis. Electronic communications using the tribunal's web-based platform and email host most of the interactions between parties and the tribunal. These communications happen asynchronously, within specified timelines set by the tribunal's rules or directions from facilitators. The electronic communication channels are also used to share information and evidence among the tribunal and the parties to a dispute. Telephone or videoconferencing are used when real-time interactions are required. Paper-based documents are available via mail and fax.

As a preliminary matter, the facilitator ensures the parties understand the process, clarifies the issues, requests missing information or evidence, and adds any necessary additional parties to the dispute.

The facilitator then reviews the dispute, along with the parties' resolution efforts to date, and engages with them to facilitate a resolution by agreement. This process is similar to a mediation carried out remotely, however it is a flexible process. For example, a facilitator can provide a non-binding neutral evaluation of the parties' claims, including the facilitator's views

on how the tribunal would likely resolve the dispute if it went to an adjudication.[48] With the consent of the parties, and so long as the facilitator is also a tribunal member, the facilitator can also issue a binding decision for any unresolved claims.[49] Resolving a dispute by decision at this point saves the parties the time and effort of preparing for and scheduling an adjudication.

If the parties reach an agreement during the facilitation process, the facilitator helps them draft an agreement. The parties can ask the facilitator to refer the agreement to a tribunal member to have it turned into a final and binding tribunal order. Converting an agreement into an order makes it enforceable, and prevents a party from having to sue in the event of non-compliance. In some cases, the agreement may only cover some of the claims in dispute. The parties can document agreements where they arise, and take the remaining issues to adjudication.

If the parties are unable to resolve all of the claims or issues in the dispute during facilitation, the role of the facilitator returns to a case management function. The facilitator will, in a neutral fashion, assist the parties to prepare for adjudication by explaining the difference between facilitation and adjudication as well as the need to review the remaining claims, identify relevant facts and evidence, and prepare arguments.

At any time during the facilitation phase, the facilitator can direct a party to take an action, or complete a step to meet the objectives of the dispute resolution process.[50] If necessary, the facilitator can also refer a matter to a tribunal member to make an order requiring the party to do something. If a party fails to comply, the tribunal may dismiss a claim or proceed to resolve the dispute without that party's participation in the same way a court would conduct a default process.

From a proportionality perspective, the facilitation phase represents a significant escalation - both in effort and intensity - from the earlier self-resolution and party-to-party negotiation phases. However, it requires fewer resources than adjudication, the next step. For example, parties need not prepare formal arguments or evidence until it becomes clear the dispute cannot be resolved consensually. In addition, the facilitator can provide case management support as much, or as little as each case requires. The process is not expected to be arbitrarily time-bound. The flexibility built into the facilitation phase means the facilitator can avoid the access to justice barriers created by a one-size-fits-all, exhaustive process, and instead tailor the process to make "the forum fit the fuss."

These processes still provide the stability and predictability necessary to meet procedural fairness requirements. Parties have notice of the CRT's processes in the rules, and also through plain language information built into the intake and facilitation processes. Parties can also agree to have processes sped up or slowed down as the circumstances require.

vi. Phase 4: Adjudication

If a dispute remains unresolved at the conclusion of the facilitation phase, it moves into the adjudication phase. The purpose of an adjudication is to provide finality to the parties through a binding decision on the legal merits of the dispute, which results in a tribunal order.

48 *Bill 44, supra* note 2 at s 27.
49 *Ibid,* s 29.
50 *Ibid,* s 25.

Like the earlier phases of the CRT process, adjudications can be conducted largely through remote and asynchronous communications. The tribunal can support these processes through the online platform, email, or paper-based documents. Most decisions are made on the basis of written materials, similar to a "decision on the documents" in a court process. Where an oral hearing is necessary, for example because there are credibility or complexity issues, these are conducted through telephone or video-conferencing, or rarely, an in-person hearing. The default to written processes is consistent with the practices of many administrative tribunals in Canada.[51]

The adjudication process is adversarial; parties are required to articulate their legal claims and make arguments about how the facts support those claims. CRT tribunal members are lawyers with specialized expertise in one or more areas of the CRT's jurisdiction. In considering claims, CRT tribunal members are are bound to apply relevant caselaw and legislation. Like other administrative tribunals across Canada, the CRT is not bound by the strict rules of evidence. It also has the authority, under Bill 44[52] and in common law, to ask the parties questions or request further evidence from them. Administrative tribunals' flexibility in obtaining evidence increases access to justice and fairness, because it allows decision-makers to seek out relevant evidence instead of relying on self-represented parties to divine both the content of legal tests and how to marshall evidence to fulfill them. In other words, it saves parties the stress, confusion, and unfairness of requiring them to blindly play a legal version of "pin the tail on the donkey."[53]

The tribunal member's decision is usually sent to the parties through email. A CRT tribunal order can be filed with the court enforcement process and enforced as if it were a judgment of the court.

vii. The role of technology in the CRT

A key feature of the CRT and its potential for justice innovation is its reliance on technology to democratize the provision of dispute resolution services to those who have barriers accessing the traditional civil justice system. For most people, the internet is much more accessible than a courthouse.

However, one of the common misconceptions about the CRT, and other online justice processes, is that they offer a form of "robojustice," foreshadowing a future where disputes are decided by algorithm. In fact, the CRT is an extremely human-driven process. From the experts who share their knowledge through the Solution Explorer, to the dispute resolution professionals serving as facilitators and adjudicators, the CRT rests on human knowledge, skills, and judgment.

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51 See e.g. *ATA*, *supra* note 32 at s 36 (providing that a "...tribunal may hold any combination of written, electronic and oral hearings").

52 *Bill 44*, *supra* note 2 at s 42(2).

53 If parties are able to afford a lawyer, they are free to seek legal advice on these questions as well. Cf. *Civil Resolution Tribunal Act, supra* note 2 at s 20 (although the provision does impose a self-representation requirement, there are exceptions as of right for infants and people with impaired capacity to be fully represented. Moreover, the tribunal has wide discretion to permit a party to be fully represented by a lawyer). The CRT Rules can contain further exceptions. However, because the tribunal adopts a user-centric rather approach, and in recognition of the challenges many Canadians face in relation to the economics of legal representation (as noted above in reference to a 2-day civil trial), the processes are meant to be understandable and accessible for self-represented parties, to the fullest extent possible.

Technology is a tool used to connect the public with CRT experts, facilitators, and adjudicators who can support and help them to resolve difficult problems at a minimum personal cost. Granted, it must be used thoughtfully; it is not a panacea, and sometimes a telephone is a better tool than an email. However, the goal of user-focussed justice design is to bring public justice processes to where people are. Today, people are overwhelmingly online.

Another aspect of thoughtful technology design is its ability to "carry the load" of the high volumes of transactions between parties and the tribunal during the dispute resolution phases. Web-based technologies have proven to be very good at helping us to create, store, share, search and retrieve massive amounts of information - which is the core business of courts, and in particular, their registries and files. These interactions might occur in higher volumes at the CRT given its emphasis on continuing activity. A properly designed system will help to maintain these services in a highly efficient and sustainable way.

IV. AREAS FOR FURTHER WORK AND ANALYSIS

A clear risk in any new justice initiative is that one can become as entrenched in views about novel justice processes as others are in traditional ones; in either case, it is the public interest that suffers. At the CRT, continuous improvement is a key value; start with the best evidence available, design an initial solution, test it with users,learn, revise the design, and then start again.

Many areas requiring continuous improvement involve calibrating the rebalancing of interests of justice system users and providers we described earlier. How do we balance the need to encourage capable people to use online processes, while accommodating those who are not? How do we balance the need of some people to have a representative, while maintaining the tribunal's mandate to create an even playing field for unrepresented parties? How do we balance the requirements of efficiency and proportionality, with an overriding duty of fairness, and its attendant resource requirements? In short, continuous improvement leaves no room for hubris; it is inherently humbling and it keeps us both honest and busy.

This paper serves as an introduction to a new proposal for justice system redesign; one which puts the public at the centre of civil dispute resolution. However, the development and implementation of a new justice initiative like the CRT is built from the ground up; by definition there is no template or precedent to pave the way. There are a number of aspects of the CRT project that are referred to, but not examined in this paper, and would be fruitful areas of further study. These include strategies for change management within the justice sector; approaches to user experience testing for new justice processes; using data collection and analytics to drive transformative change in public justice processes; addressing the problem of procuring and building technology in the justice sector; and bridging the innovation gap between government and user-focussed design.

V. CONCLUSION

The proposal to redesign public civil justice processes demonstrates the potential to address many of the problems facing our justice system. New models such as the CRT can effectively

replace historical civil dispute resolution systems that, by many accounts, are failing to meet the needs of a large portion of our population.

A redesigned model will place a renewed emphasis on the needs, interests, and limitations of the public whom justice is meant to serve. It will employ proportionate approaches to resolution that only apply the amount of process required to resolve a case. It will leverage collaborative dispute resolution, case management and, where necessary, an adjudicative process. Technology will form a key part of this service-oriented civil justice architecture.

Redesigned civil justice processes should be more than an abstract topic for discussion; the collective knowledge and tools to make it happen are available today. Our current access to justice crisis serves as a call to reimagine and redesign public justice processes for civil disputes, centred on the needs of the public.