

DIGITAL DELIVERY OF LEGAL SERVICES  
TO PEOPLE ON LOW INCOMES  
FROM ONLINE INFORMATION  
TO RESOLUTION

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**Roger Smith**

## The Legal Education Foundation

This Report was commissioned by The Legal Education Foundation and we are very pleased to publish it as a contribution to identifying the advances being made in the use of information technology to aid the provision of legal services for people on low incomes.

### **The Author**

Roger Smith OBE is a researcher, journalist and consultant in the field of legal services and human rights. He is a solicitor; a visiting professor at London South Bank University; and a past director of the Legal Action Group, JUSTICE and West Hampstead Community Law Centre. He has also been director of legal education and training for the Law Society of England and Wales and acted for a time as its director of policy. He edits a bimonthly newsletter for the International Legal Aid Group and writes monthly columns for the Law Society Gazette and New Law Journal. He has undertaken various consultancies on legal aid in countries of Eastern Europe and published a number of international comparative studies.

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# 1. Introduction

The development of the Dutch *Rechtwijzer 2.0* and a Civil Resolution Tribunal (CRT) in Canada's British Columbia raise the question of whether the provision of online legal information can successfully morph into Online Dispute Resolution (ODR). If so, as recognised in *Face to Face*,<sup>1</sup> *we might see the application of 'disruptive technologies' of some force*. These, as explained by Professor Richard Susskind, are 'new, innovative technologies that periodically emerge and fundamentally transform companies, industries and markets'.<sup>2</sup>

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<sup>1</sup> R Smith and A Paterson *Face to Face Legal Services and their Alternatives: Global Lessons from the Digital Revolution* Centre for Professional Legal Studies, Strathclyde University, 2014, p13.

<sup>2</sup> R Susskind *The End of Lawyers: rethinking the nature of legal services* Oxford, 2010, p94

## 2. Two systems - *Rechtwijzer* and Civil Resolution Tribunal

The two applications offer the prospect of transforming the process of providing online legal assistance from initial information towards resolution. Thus, a user may come to *Rechtwijzer 2.0* in the expectation of getting information, as, indeed, they would under *Rechtwijzer 1.0*, but will then also have the option to move to the direct resolution of their problem. This would change the nature of assistance through the deployment of expert systems into which the legal structure was invisibly incorporated and the role of professionals morphed into assisting with resolution. The the systems will allow for a range of interventions by third parties, not only lawyers but also, for example, financial planners. The Civil Resolution Tribunal (CRT) is, from its name alone, oriented towards the resolution of disputes, but it plans an opening intake phase to include information, diagnosis and a degree of self-help which might, depending on how this is developed, make it very similar to the *Rechtwijzer* as a single, standalone scheme (though there may be practical difficulties with that, see below), taking someone from problem identification to its resolution.

Neither *Rechtwijzer 2.0* nor the CRT are yet publicly in operation. Public implementation for both is planned for 2015 (although *Rechtwijzer 2.0* quietly began testing in November 2014) so that their final form is unclear and a degree of caution must be exercised about exactly how they will work. Both will represent a quantum leap in the public delivery of ODR.

ODR has its roots in mechanisms developed for the resolution of disputes in relation to e-commerce in general, and most associated with *ebay* in particular. *ebay* started as a largely automated ODR system in 1999. It now handles 60 million disputes annually, 85% of which are handled by automated processes without human intervention.<sup>3</sup> The success of *ebay*'s system will, of course, be aided by the particularly transparent nature of its working systems: there is heavy pressure on repeat traders to settle disputes amicably for business reasons.

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<sup>3</sup> D Thompson The Growth of Online Dispute Resolution and its Use in British Columbia Civil Litigation Conference 2014, p 1.1.3

Public systems of ODR potentially lack such a cultural impetus for settlement and the use of ODR has, until now, been fairly marginal.<sup>4</sup> Both the UN and the EU are working towards ODR systems aimed essentially at cross-border disputes but they are not yet in force. In this context, British Columbia's 'CRT will be amongst the first, permanent, publicly administered ODR systems'.<sup>5</sup> Its jurisdiction is intended to be small claims disputes currently under \$CAN 25,000 but intended to rise to \$CAN 50,000 (£27,634 or €34,754), with certain exceptions (eg claims against Government, which is notably not risking liability in this system), and 'strata disputes' - issues relating to flats in shared blocks. *Rechtwijzer 2.0* is different: its design allows for online judicial determination but, as currently projected, might be seen as more directed to obtaining an agreement between the parties.

There has been contact between the Dutch and Canadian teams working on the two projects - and no wonder. They are very similar. First, at the core of each is a reliance on expert systems to identify issues both of dispute and disagreement. Thus, for the British Columbia system:

*The initial CRT phase will require users to engage with an online interface in the form of what can be called an "expert system". The "expert" aspect refers to the specialised content derived from experts in various fields, structured in computer-readable format. Using an intelligent questionnaire style of interface, this expert knowledge is then presented in a user-friendly format. Functionally, the expert system will help users to diagnose their problems or disputes, provide specific information, will offer self-help tools, such as calculators or letter templates, and will then triage and stream disputes into a subsequent phase, if necessary.*

Then, later, when in the negotiation phase:

*... If the other parties to the dispute agree to participate, the online negotiation tool (or platform) will guide the parties through a structured negotiation phase, with the goal of facilitating a mutually acceptable settlement. The parties can access the platform through the Internet, at their own convenience. The parties can participate in the negotiations at*

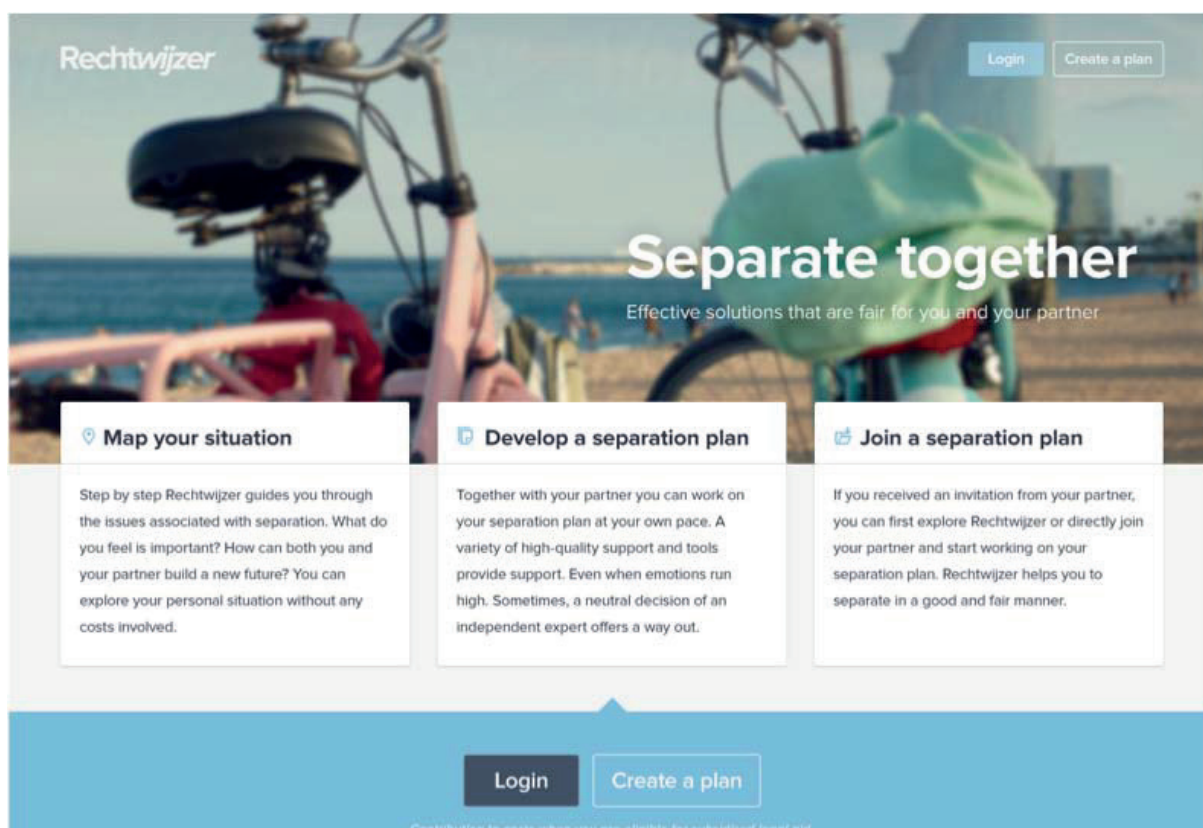
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<sup>4</sup> Thompson reports a Singapore system for e-commerce transactions and New York for some insurance disputes.

<sup>5</sup> as above, p1.1.4

*different times, when and where it is convenient for them. The tribunal will provide templates and time lines and tribunal staff may occasionally provide case-specific suggestions to help the parties with their discussions. However, the parties will be expected to lead the process at this stage. The negotiation will end if no agreement.<sup>6</sup>*

Similarly, *Rechtwijzer 2.0* will use guided pathways, questions and model solutions to lead users towards identification and settlement of issues. Below is a frame which, in draft form, sets out the process through which they are about to be taken. The user is on a 'justice journey' in which the system interacts with the answers provided. Advice, information, options and tools (such as a maintenance calculator) are supplied as required. The system is, thus, inherently dynamic. Available to the parties will be supplementary online or in-person mediation, adjudication and consultation with advisers in Dutch networks of advice provision or legal 'counters', and a neutral review by a lawyer at the end of the process. The CRT proposal envisages telephone and email assistance for the Alternative Dispute Resolution (ADR) and adjudication stages, with the possibility of physical representation at a tribunal hearing if one occurs.



<sup>6</sup> Dispute Resolution Model for the Proposed Civil Resolution Tribunal: <http://www.ag.gov.bc.ca/legislation/shareddocs/crta/CRT-Business-Model.pdf>



Second, both systems have an inbuilt bias to settlement. They are trying to encourage a pre-court and out-of-court negotiated agreement which can then be ratified. This must be correct though it will have every lawyer tense with anticipation that the system will encourage settlement at the price of lawful entitlement, to the detriment of the weaker party. The practical checks on this will be important. The Dutch system is expressly intended to highlight to the parties the 'best alternative to negotiated agreement' (in the jargon, BATNA) which sets the parameters for a settlement. It also contains a mandatory review of the final agreement by a lawyer.

Third, both systems anticipate picking up users at a very early stage. In the Dutch case, this is the very point. The system is a development of legal aid. For British Columbia, this could mark a considerable extension of the traditional role of a court system. British Columbia has a wide range of rather good Internet based provision, as described elsewhere, from other providers, notably the Legal Services Society (the statutory legal aid provider), the Justice Education Society (an NGO that actually runs a current small claims online service, see below), and the Courthouse Libraries (which publishes a range of material on the Internet). It will be some challenge for the Ministry to devise smarter pathways and approaches than the existing providers and it would seem sensible to co-opt them explicitly into the intake process. A similar issue would arise in England and Wales, where it would make sense for any ODR project which emanated from the court to link in with the existing online advice provision - currently provided by a range of organisations, private and not-for-profit, but notably the two national advice websites, *adviceguide.org.uk* and *advicenow.org.uk*.

Fourth, and crucially, both systems are designed ultimately to be self-financing because users will be willing to pay (with reductions for those on low incomes) for elements of service - particularly those that involve human interaction. So, for the *Rechtwijzer*, there are currently intended to be (though all this could still change in the final product) the following seven stages which are either paid for or free: (1) Diagnosis and Information (intended to be free); (2) Intake (intended as fee-based); (3) Dialogue between the parties (free - included in the entry fee); (4) 'Trialogue' - an opportunity for online mediation (fee-based); (5) External online adjudication if required (also fee-based and conceived as part of the trialogue process); (6) External online review (fee-based), and (7) Aftercare, (yet to be decided).



The proposed CRT procedure is very similar, although *Rechtwijzer*'s two first stages are collapsed into a free first stage of 'information, problem diagnosis, self help'; the second phase would be fee-based (but 'nominal and set at cost recovery level'), monitored, party-to-party negotiation; the third stage would be fee-based, case management facilitated ADR to which the parties (other than strata corporations) would have to consent; the final stage would be adjudication by a tribunal member - conceived of as generally online, though possibly with a telephone or video hearing, and with a rare option of a conventional hearing:

*additional fees will be charged as the dispute moves into the case management and adjudication phases, which may encourage parties to settle earlier in the process. Those fees will be lower than equivalent small claims fees, providing some cost recovery, while deterring frivolous cases. Fees can be recovered by the successful party.<sup>7</sup>*

A twist to the British Columbia scheme is that the case managers steering negotiations would, it seems likely, in part be funded by savings from the cost of tribunal members - something on which judicial controversy may yet emerge.

The differences between the two schemes are also worth explicitly noting. First, the CRT has a statutory framework - as befits a tribunal oriented scheme - but the *Rechtwijzer* does not.<sup>8</sup> By contrast, the *Rechtwijzer* is part of a legal aid scheme and comes with user access to a national network of 'law counters' as a package. This wider context of available help is not (and could not be) apparent in the CRT design - though, as stated above, British Columbia has a number of organisations that provide assistance in the fields of the CRT.

Second, the two schemes focus, in the first instance, on what are effectively diametrically opposite areas of law: the *Rechtwijzer* boldly goes for family cases because that is the need in relation to legal aid, even though they raise difficult emotional issues: the CRT focuses on strata disputes and small claims, which might be regarded as more marginal areas of the tribunal/court system. In the long term, this is not necessarily important because, clearly, the approach is transferable within, ultimately, almost any area of law. Indeed, the *Rechtwijzer* is already planned to move on to landlord and tenant cases.

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<sup>7</sup> Dispute Resolution Model for the Proposed Civil Resolution Tribunal: <http://www.ag.gov.bc.ca/legislation/shareddocs/crta/CRT-Business-Model.pdf>

<sup>8</sup> Civil Resolution Tribunal Act 2012

Third, the Dutch are intending to redeploy lawyers to non-partisan roles as, potentially, mediators, adjudicators or reviewers, and the Canadians are planning to re-orientate the work of tribunal staff. But again, this is not a major difference - it just explains where costs might be shifted.

Finally, there are a set of common questions for both schemes where the answers will only emerge in practice. What realistic assumptions can be made about digital literacy in these two jurisdictions and, therefore, about those for whom this procedure is – or is not - suitable? My own view for the United Kingdom is, as set out in previous papers, that we can probably assume that about two-thirds of the population overall have the skills and the willingness to use the Internet: amongst those with the lowest incomes, this probably reduces to about half. This will rise but, nevertheless, remains a qualification on any compulsory (or too favoured) use of digital provision.

### 3. What questions arise?

First there is the simple question of whether people will pay for the kind of online services provided - which raises issues both about financial willingness and cultural acceptance. It is true, of course, that in the Netherlands as elsewhere (and as documented in Working Paper 3), there are already providers of low cost online family services. More cynically, to what extent will these systems attract, and survive, judicial and professional attack if they are seen as threatening existing interests? Will the chance of redeployment into the different roles on offer in *Rechtwijzer 2.0* appeal to lawyers? Both the systems plan on moving from the provision of information to the determination of dispute, without passing over the line of providing advice and assistance in a partisan way to one or both of the parties. How realistic is that? If it is not, then that is not necessarily fatal to the concept but it will require some reconsideration. And, to what extent can the existing court and tribunal systems of the Netherlands and British Columbia accommodate these proposed upstart modern systems? We might bear in mind that, in England and Wales, apart from money claims, we are some distance away from electronic filing - something that creates an awkward end point for the Royal Courts of Justice Citizens Advice Bureau's *CourtNav* system where, at the end of an electronic system, the user has to print a form and somehow find their way to filing it. Some way down the line may emerge a further difficulty of reconciling a constitutional duty to open justice with Internet based systems of justice.

For all these as yet unanswered questions, these two schemes represent the cutting edge of the delivery of legal services on the Internet. They need to be observed by outsiders and evaluated by insiders, as hopefully they will, because, potentially, we could be looking at a development that could herald a revolution in the convergence of currently separate provision - information, advice, legal aid, assistance for self-representing litigants, lawyers and the courts. We need some agreement on indices of success. Presumably, we want to see an upturn in the number of users entering the system as compared with current proceedings; an upturn also in the number of agreements prior to trial; and a downturn in the number of trials, which reflects better satisfaction with pre-trial offers of settlement. We might also want to see a reduction in appeals. We want to see higher satisfaction ratings than currently. We want costs to government to remain static or reduce. We want acceptance by judiciary and the legal profession.

## 4. A less ambitious alternative

Both *Rechtwijzer 2.0* and the CRT are extremely ambitious. They represent nothing less, really, than shifts of paradigm. It might be worth just noting that while the Ministry of Justice in British Columbia is proceeding with its statutory backed CRT scheme, the province's Justice Education Society is already running a homemade, low profile, low cost, voluntary, online system described thus:

*This website provides people in dispute with tools to help them settle online, without going to court. SmallClaimsBC.ca provides a secure Online Dispute Resolution platform. Similar technology is used by ebay each year to settle more than 60 million disputes online It's fast. It's free. It works!*

*Resolve your dispute without spending time and money on a trial. On average, it takes 14 months to get a trial decision in British Columbia Small Claims Court. Save hundreds of dollars in court fees and reach a settlement within one month. Negotiate with the other party online. It's easier, faster and more convenient.*

*Almost 90% of Small Claims Court cases settle before going to trial. If your case does not settle, you can still pursue the matter in court. Get started now.<sup>9</sup>*

The scheme has, so far, achieved only modest numbers. Between March and September 2014, with no promotion at all, only 103 cases completed the opening process and only 21% managed to obtain a response from the other party (compared with 50% from the court). However, this happened with no mediator or moderator. In November 2014, the platform began to use members of MediateBC to take cases forward. So, even if these bold and expansive schemes, backed by governments and statutory bodies, do not work, then something less ambitious may still be available. This would not affect the advantages of revolutionising, through the Internet either the processes of advice or of the court, it would just mean that we might be careful about merging the two together.

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<sup>9</sup> <http://www.smallclaimsbcc.ca/how-it-works>

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