

Focus ALTERNATIVE DISPUTE RESOLUTION

With half-day mediations, less is not always more



Colm Brannigan
Mitchell Rose

Has this ever happened to you: At a half-day mediation of a civil dispute, just as momentum builds, the other side announces that they must get to the airport or a scheduled meeting?

How about the following: At the three-hour mark, the mediator advises that he must depart to attend the next mediation across town?

In both situations, a full-day mediation, scheduled in advance, might have prevented a wasted opportunity.

Timing, after all, is everything.

Half-day mediations are not always the norm. Mediation times vary by subject matter, counsel, medium (i.e., online or in person) and even region and country. Lawyers often assume that “small” cases (i.e., where less than \$100,000 is involved) or cases perceived as “simple” require only a half day (generally, two to four hours) and they schedule their mediations accordingly. The following factors contribute to the popularity of half-day mediations for these cases:

- A smaller litigation budget creates a perceived need for a smaller mediation budget;
- The idea that small cases settle quicker than larger ones;
- Positive experience with a mediator settling cases at short mediations and then assuming all of that mediator’s cases will



FRUTTIPICS / ISTOCKPHOTO.COM

follow the same pattern;

- Preconceived notions about the behaviour of parties or counsel at mediation;
- An attitude that mediation is just something to get out of the way before a pre-trial or trial and, therefore, there is no need to invest much time or money;
- Local mandatory mediation rules with three-hour formats. For example, the Ontario Mandatory Mediation Program has existed for over a decade in Toronto, Ottawa and Windsor, leaving a de facto half-day standard in those cities; and
- Three hours is about the minimum time period for lawyers to say they have made a real effort to settle at mediation.

However, just as lawyers may underestimate the length of trial, we can also underestimate how

long it will take to mediate a case.

Paradoxically, shorter mediation sessions may doom the small cases that need to settle early because the cost, time and risk do not justify continuing proceedings.

For mediation, the popular notion that “less is more” is not always true. Sometimes, less is just less.

Every mediation is unique. Like Forrest Gump’s box of chocolates, you never know what you’re going to get. Faced with new and unexpected information (and for many parties, a novel and stressful experience), participants may need time to absorb, adjust expectations and strategize.

Optimal mediation time depends upon individual personalities, past experience, degree of preparation, the number of parties and their level of emotion.

“

Lawyers often assume that ‘small’ cases (i.e., where less than \$100,000 is involved) or cases perceived as ‘simple’ require only a half day (generally, two to four hours) and they schedule their mediations accordingly.

Colm Brannigan
Mediator and arbitrator

Mitchell Rose
Stancer, Gossin, Rose

There is not necessarily a correlation between the amounts at issue in a lawsuit and the parties’ degree of emotional attachment. For example, we regularly experience six-figure cases taking three hours or less to settle and low five-figure cases taking six or more hours.

Add to all of this the long duration of some joint or plenary sessions (if used), late arrivals due to weather or traffic conditions, and the pressures of an early stop time due to travel or scheduling issues, and it is not surprising that half-day mediations often result in missed opportunities.

These problems can be addressed by a full-day mediation. For example:

- Knowing the entire day has been set aside permits everyone to focus on the case at hand;

■ A greater time commitment may lead to a greater commitment to the mediation process;

■ A mediator has a better opportunity to build trust and rapport with the parties and to understand their needs to help them break impasse and avoid poor decision making;

■ There is more time for everyone to respond to surprises;

■ There is a lower chance that one side will terminate the mediation early; and

■ The parties can agree upon longer and more realistic deadlines for ending the mediation if there is no momentum.

While the cost of committing to full-day mediation might be off-putting to some, counsel should consider that there is almost always as much preparation and travel time for a full-day mediation as for a half-day, many mediators offer reduced rates for a full-day commitment and the cost of not settling a case because of a shortage of time will far outweigh additional mediation costs.

Mediation has matured in Ontario, but we believe it has also lost much of its flexibility as a process. One size does not fit all in litigation or mediation. Lawyers must make a greater effort to evaluate the time their specific case may require rather than shoehorning it into the half-day box and hoping there is enough time. With proper evaluation and preparation half-day mediations can work well, but they should not be the “default” out of habit.

Colm Brannigan, is both a chartered mediator and chartered arbitrator. Mitchell Rose is a mediator and lawyer with the firm Stancer, Gossin, Rose in Toronto.

Discretion: The blue box case was not a typical commercial dispute

Continued from page 10

ability to achieve a fair and just result.” In so doing, he noted, among other things, that the arbitration concerned a “potentially significant amount of taxpayer money.”

The blue box arbitration decision is one of the few cases to directly consider the private nature of arbitration in Canada. It signals that arbitrators acting under the Ontario *Arbitration Act* (and presumably other parallel provincial statutes) possess the discretion to order public hearings. The result is similar to a number of other arbitration decisions that have allowed public access to hearings, notably in labour disputes held pursuant to

“

... [T]he baseline presumption remains that arbitration hearings are private unless otherwise agreed by the parties.

Ryder Gilliland and Max Shapiro
Blake, Cassels & Graydon

labour relations statutes. One such example (referred to in the arbitrator’s decision) was *Toronto Star Newspaper Guild, Local 87 v. Toronto Star Ltd.* (1977), 14 O.R. (2d) 278, where the Divisional Court concluded that the board of arbitration had the discretion to determine whether the

public should be admitted to the proceedings in a case involving the dismissal of a reporter who alleged that his newspaper “slanted the news.” In the more recent case of *North Simcoe Hospital Alliance v. Ontario Nurses’ Assn. (Schemmer Grievance)* [2007] O.L.A.A. No. 419, the

public was admitted to an arbitration hearing relating to the discipline of a nurse for alleged patient abuse at a public hospital.

The reach of the blue box decision is limited, as is signalled by the arbitrator’s caveat that the case was “not a typical commercial arbitration” carried out under the *Arbitration Act*. The dispute also differed from a conventional arbitration because there was no formal arbitration agreement between the parties and the dispute resolution process was established by statute. As such, the baseline presumption remains that arbitration hearings are private unless otherwise agreed by the parties. A public hearing will still be inappropriate in most cases,

especially in “private” disputes with no apparent public interest.

Although dependent on its facts, the blue box decision highlights the need for parties wishing to ensure their arbitration remains private to set out their explicit agreement to that effect in the arbitration agreement and the arbitrator’s terms of reference. This is particularly advisable if one or more of the parties is a public or quasi-public entity, or if the dispute concerns an issue that may be argued to have a significant public interest element.

Ryder Gilliland and Max Shapiro are members of the litigation & dispute resolution group at Blake, Cassels & Graydon in Toronto.