

FAMILY LAW

New tools designed to prevent domestic violence during and after separation

A screening tool designed by York University professors asks 19 questions that “have been shown to accurately predict the likelihood of abuse or violence occurring and the seriousness of the risk.”

By Hilary Linton and Catherine Davison

Recent research findings by York University professors Desmond Ellis and Noreen Stuckless have bolstered the reliability of “screening tools” as a means of assessing and managing the risk of domestic violence in family mediation.

The DOVE screening tool (Domestic Violence Evaluation), developed by Ellis and Stuckless, is designed to help prevent domestic violence and abuse during and after the often-volatile period of separation. It has 19 questions that parties entering mediation are asked to complete, separately. The answers to those questions have been shown to accurately predict the likelihood of abuse or violence occurring and the seriousness of the risk.

DOVE has been tested most recently in a two-year field study at 311 Jarvis Court (Ontario Court of Justice) in Toronto as part of a longer-term study. The tool has also been tested at the Family Court in Hamilton (Superior Court of Justice).

DOVE is designed to distin-

guish between two types of male partner abuse or violence: control-motivated and conflict-instigated abuse or violence. The causes of control-motivated abuse/violence are quite different from the causes of conflict-instigated abuse/violence. Some of the other screening

tools and literature in the field do not make this important distinction, say Ellis and Stuckless. As such, some of the other screening tools may not be as reliable as DOVE.

The other unique feature of DOVE is that it links degree and

type of violence/abuse with appropriate safety plan measures.

Ellis and Stuckless answer critics of family mediation, who claim that it is unsafe for women, particularly where there is or has been any abuse or violence. Such claims are not supported by the research that is reviewed by Ellis, Stuckless and Dr. Lori Wright in their paper “Separation, Domestic Violence and Divorce Mediation” (to be published in *Conflict Resolution Quarterly* (Winter 2006). Specifically, they found no evidence that:

(a) abused women are more likely than non-abused women to be the victims of physical violence

and or emotional abuse during ... mediation, or

(b) abused women participating in divorce mediation are more likely to be victims of male ex-partner violence than abused women participating in adjudication or lawyer-negotiated separations/divorces.”

Ellis and Stuckless stress that the primary objective of their recent paper is to explain DOVE in such a way that family mediators, lawyers and judges will be able to use it to reduce or prevent violence between partners who are separating or have separated.


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Hilary Linton



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Note: Program concludes on July 13 at 12:00 noon.

PROCUREMENT LAW

“Partnering agreements” in construction law explored in recent N.B. decision

By Harvey J. Kirsh



There is a dearth of judicial authority and legal literature on whether “partnering” obligations in a construction contract create legal obligations outside of those otherwise defined in the contract, and whether a cause of action can be based upon a breach of those obligations.

The effect of a “partnering”

clause in a contract, as well as the partnering workshops which were held and the partnering charter which was signed, were reviewed in a recent decision in the Court of Queen’s Bench of New Brunswick by Justice Hugh McLellan in *EBC Inc. v. Province of New Brunswick* [2005] N.B.J. No. 428. The case arose out of the construction of a new wharf and ferry terminal at North Head, Grand Manan. The contractor, EBC, alleged that the province’s in-house engineers were negligent in failing to specify a concrete mix with accelerator admixtures for the slip form method of construction of the caissons in winter conditions, which caused EBC to incur substantial damages. The Province of New Brunswick denied liability, arguing that EBC was free to choose any method of construction and should have done an engineering analysis and testing in order to determine the cost of pro-

ceeding with that method.

The province relied upon the 1993 decision of the Supreme Court of Canada in *Auto Concrete Curb Ltd. v. South Nation River Conservation Authority* [1993] S.C.J. No. 93, where the court stated (at para 5):

“It has long been established that, barring specific arrangements to the contrary, the method by which a contractor chooses to execute the work falls within its sphere of responsibility, and that neither the owner nor the design professionals employed by the owner have a duty to advise the contractor as to what method to choose, or how to go about accomplishing the work by whatever method the contractor in fact chooses.”

In his review and analysis of EBC’s claim against the province, Justice McLellan observed that the partnering provision in the construction contract “encourages

partnership with the Contractor”, providing in part as follows:

“The concept of Partnering is to develop a proactive effort and spirit of respect, trust and cooperation among all key players in a Contractual relationship. It utilizes a structured systematic methodology for developing a spirit of teamwork and cooperation through shared goals, open communication, problem identification and resolution, conflict escalation procedures and the monitoring of team performance.”

During the course of the construction of the wharf and ferry terminal, representatives of the province, the contractor and others attended a partnering workshop with a facilitator, which included sessions on team building, and which emphasized the themes of partnership, trust, cooperation, assistance and communication. The workshop participants were discouraged from having an attitude that something is “not my job”. The participants also signed a Partnering Charter, affirming that they were “Partners . . . committed to work together to complete this project on time / on budget”.

After considering all of the evi-

dence, Justice McLellan found that, in preparing the project specifications, the province’s engineers innocently misrepresented that an accelerator admixture would not be necessary when they in fact knew that it was necessary for the expected slip form method of construction. As a result, when addressing EBC’s claim, the judge stated that partnering concepts actually employed on the project contradicted the province’s contention that it was “not my job” to disclose to the contractor what the province’s engineers knew. In his view, the quoted excerpt from the Supreme Court of Canada’s decision in *Auto Concrete* clearly provided that the contractor’s choice of its own construction methodology was subject to “specific arrangements to the contrary”, which he felt were found in the partnering provisions.

In the end, EBC was successful, and was awarded damages, interest and costs.

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Language and reach of clause will determine result

TENDER

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otherwise incapable of lawful acceptance. There, a tenderer was held able to withdraw its own non-compliant tender and thereafter entitled to refuse the owner’s award of the contract tendered. The Court of Appeal referred to the trial decision in *Kinetic*, and determined that it need not consider if that case was correctly decided insofar as it was distinguishable on its facts. In *Graham*, the scope of the discretion clause was held limited to the waiver of “non-material defects” whereas the discretion clause in *Kinetic* was much broader. The Court of Appeal confirmed the trial judge’s conclusion that bid contractual relations did not arise insofar as the defects in the tender in question were, on an objective view, material and could not be waived in reliance upon the discretion clause.

One court has subsequently reasoned that “these cases can be reconciled if one concludes that the result is dependent upon a careful construction of the terms of the agreement reached between the parties and that the different results in *Kinetic Construction*, and *Graham* result from the differences of the wording of the two discretion clauses at issue and not in different approaches to their construction”: *NAC Constructors*

Ltd. v. Alberta Capital Region Waste Water Commission, [2005] A.J. No. 847 (A.C.Q.B.). However, in a case decided before the Court of Appeal decision in *Kinetic*, another court concluded that the reasoning of the trial judge in *Kinetic* and the Court of Appeal in *Graham* was irreconcilable, and that the reasons in *Graham* were preferred: *Chandos Construction Ltd. v. Alberta (Alberta Infrastructure)*, [2004] A.J. No. 143.

Based on the reasoning in *Kinetic*, a broad and properly worded discretion clause, can (absent a breach of the duty of good faith) insulate an owner from successful bid contract claims by a compliant tenderer arising out of the owner’s acceptance of a non-compliant tender. It will not however assist an owner in asserting the existence of valid contractual relations as against the non-compliant tenderer where, on an objective view, the discretion clause is insufficient to permit the owner to waive the defect in issue and accept the non-compliant tenderer’s counter-offer. In each case the result will be determined on an interpretation of the language and reach of the discretion clause.

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Tool prescribes safety plans

DOVE

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The use of violence and abuse prevention tools such as DOVE will become more commonplace in family law and ADR if the proposed amendments to the *Arbitration Act* are passed, expected to be this spring. That (draft) Act requires all family arbitrators to take training in the dynamics of family abuse and violence, and may require similar training for all family lawyers who provide independent legal advice to parties contemplating family arbitration.

The DOVE screening tool puts 19 questions to separated partners about how the other treated them during the relationship and after it ended. The questions are specific, and cover physical and sexual assault, serious emotional abuse, relationship control, mental health problems, alcohol and drug abuse, communication and social skills, and threats of harm or death.

The tool measures whether these 19 statistically significant predictors of male partner violence and abuse are present, and, if so, with what frequency and seriousness. The scoring mechanism places individuals into one of four risk categories: low, moderately high, high and very high. Appropriate safety plans have been developed for each risk category.

These plans are grounded in two assumptions. The first is that partners who do not interact with each other in person, or who

interact only in the presence of a third party, are unlikely to physically harm each other. The second is that individuals who are highly motivated to harm their ex-partners are more likely to do so than individuals whose motivation is low.

The safety plans prescribed by DOVE are therefore based on the factors of opportunity and motivation to cause harm. They include such interventions as:

Low risk

- rules of mediation that encourage respectful communications

- written agreement to terminate mediation if mediator obtains credible evidence of threatened or actual violence or abuse during mediation process

Moderate risk

- violence/abuse prevention rules are in place, and mediator carefully monitors compliance with such rules by separate interviews with parties throughout the mediation process

- partners arrive and leave at different times (victim arrives last and leaves first) and do not wait in the same room

- supporter present in face-to-face mediation, or shuttle mediation

High risk

- partners given written safety warnings

- all interpersonal contact in public places or with third party present

- parties escorted to and from

mediation

- shuttle, phone or online mediation: no face to face mediation

Very high risk

- telephone or online mediation only if professional referrals produce credible evidence of positive personal or situational change that would support mediation.

All risk categories include the referral to appropriate professional treatment interventions.

And, as is always the case in mediation, there are two important caveats to the DOVE research.

First, no screening tool is a substitute for the professional judgment and intuition of experienced divorce mediators. And secondly, safety interventions should always be requested from female victims of male partner violence. They know each other well, and such victims are going to be highly motivated to protect themselves and their children. Their recommendations and judgments should be respected.

Hilary Linton is an accredited family mediator (OAFM) with 18 years of combined experience litigating and mediating family law disputes. She is principal of Riverdale Mediation in Toronto. Catherine Davison worked as an assistant Crown Attorney and prosecuted cases of domestic violence for over 12 years. She is an experienced mediator with a certificate in Conflict Management and an Advanced Certificate in Conflict Resolution from York University. She is an associate at Riverdale Mediation.