IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Campbell v. ICDL Canada Ltd., 2008 NSSM 49

2008 Claim No. 289784

BETWEEN:

Name: **Paul Arthur Campbell and SMART Innovations Consultancy Incorporated** **Claimants**

- and -

Name: **ICDL Canada Limited** **Defendant**

Appearances:
Claimants: Matthew Moir
Defendant: Kelly Peck

Hearing Date: July 10, 2008

REVISED DECISION:The text of the original decision has been revised to remove addresses and phone numbers of the parties on September 15, 2008

D E C I S I O N

[1] This is a claim for an outstanding invoice dated June 28, 2006, in the amount of $11,866.04, inclusive of HST, arising from consulting services provided to the Defendant.

[2] In its defence the Defendant says that it did not "*...authorize, approve of, or receive value or benefit from the services and expenses to the extent claimed by Campbell and the Defendant states that Campbell acted outside the scope of the agreement*". The written defence goes on to provide particulars of the general allegation. As well, there is a counterclaim alleging that Campbell breached the agreement by failing to followup and respond to establish contacts and independently changing the size of a project and further, breached the agreement by sending inappropriate emails to third party individuals.

[3] The hearing on the merits took place on July 10, 2008, in Halifax. There had been an earlier hearing on May 8, 2008, where the Defendant made a motion to dismiss the claim based on the doctrine of *forum non conveniens*. That motion was dismissed for oral reasons given on May 8, 2008.

Evidence and Findings of Fact

[4] The Claimant, Paul Campbell, is the principal of the Claimant SMART Innovations Consultancy Incorporated. He is a resident of Porters Lake in the Halifax Regional Municipality and has been operating his consultancy business since 2000 and incorporated the company in 2003.

[5] Mr. Campbell testified that he met Bryn Jones, the President and Chief Executive Officer of the Defendant, at an Information Technology Association of Canada meeting in 2001. There was an approach made by Mr. Jones to him at a "Soft World" conference in 2002. Dialogue continued into 2003 about the prospect of Mr. Campbell acting as the regional representative for the Defendant company. According to Mr. Campbell, in those discussions Mr. Jones characterized Campbell's expected role as being based on the fact that he was networked and had contact with key decision makers in the region and that he would therefore provide an introductory role to the ICDL services. Mr. Jones would then be the "deal closer" and Mr. Campbell would be the "followup guy".

[6] The Defendant - ICDL Canada Limited, is an Ontario incorporated for-profit corporation. ICDL is the acronym for "International Computer Driving License". The Defendant is a licensee of a not-for-profit organization called "ECDL Foundation" which is based in Europe and apparently operates with the overall objective of raising the general level of computer skills. The Defendant itself acts in conjunction with and licenses educational, institutional and training facilities for the delivery of ICDL certification testing. It charges fees to these educational institutions, government, corporations, and other clients.

[7] The Claimant's role was to find potential clients and follow up in an attempt to have them enter into contracts with the Defendant. Once such leads became stronger prospects, Mr. Jones who is resident in the Toronto, Ontario area, would travel to Nova Scotia and the two men would jointly meet with the prospect. As noted earlier, Mr. Jones's role was to be the "deal closer".

[8] Entered into evidence as Exhibit C1 was a document entitled "Consultants Personal Services Agreement" dated March 1, 2003, between ICDL Canada Limited and Paul Campbell. This nine paged document contains the terms and conditions intended to govern the relationship between the consultant and the company. The evidence indicated that this document was prepared by the Defendant and was the standard document which was used between the company and consultants. There was no signed version of this document entered in evidence and, the oral testimony of the parties indicated that it was never signed. In Mr. Campbell's evidence he stated that it was sealed with a handshake.

[9] Mr. Campbell referred to the history of the contractual relationship which in general terms ran from March 2003 until June 2006. It would appear from Mr. Campbell's evidence and Mr. Jones's evidence as well, that for the most part the relationship was a positive one at least during the first few years or so. Mr. Campbell worked diligently and consistently with the expectations of the parties. He established contacts and set up meetings and in the period March 2003 - December 2004, Mr. Jones came to Nova Scotia nearly every month attending meetings with prospective clients in trying to establish a client base in the area. Apparently, this work did not bear fruit.

[10] In late 2004 - early 2005, Mr. Jones communicated with Mr. Campbell in regards to a change in approach. I will refer to that in more detail below.

[11] During the first year and a half or slightly longer, the following invoices were issued:

November 20, 2003	$ 15,525.00 (Exhibit C4)

May 6, 2004	12,937.00 (Exhibit C5)
November 26, 2004	18,687.00 (Exhibit C6)

[12] All of the above invoices were paid, albeit in some cases somewhat slowly and in part payments. There was no evidence that any of the services or charges were questioned by the Defendant.

[13] The invoice in question in this proceeding was dated November 28, 2006, and it is the total amount of $11,866.04 (Exhibit C7). Nothing has been paid on that invoice.

[14] As mentioned, in November 2004 there were some discussions between Campbell and Jones about reducing the volume of work and apparently Mr. Jones indicated at that time that Mr. Campbell was to reduce his service from four days per month to two days per month. This change was further "fine tuned" in an email dated January 18, 2005, from Mr. Jones to Mr. Campbell. This email is an important piece of evidence and I quote it in full:

From: Bryn Jones

Sent: Tuesday, January 18, 2005 9:47 AM

To: Paul Campbell

Subject: ICDL

PRIVATE & CONFIDENTIAL
Hi Paul,

We have started the new year with a need to control our costs. One of the larger categories is travel. Therefore, I have decided to reduce my frequency of travel to no more than quarterly visits rather than monthly. Obviously this means the priorities have to be on the most important opportunities. It probably means we need to work further in advance to ensure we can time the meetings to catch those we really need to see. It also means that we need to find ways of communicating with the key people independently of visits. I should devote some time to calling people from Mississauga and keep you informed of the results of these efforts.

We also need to address our budget for your time. We started out with the idea that we would limit ourselves to two days per month, but we have done much more than that. We now need to keep it inside 4 days per quarter. I know this is tight but we have not got much choice at the moment.

One variable that will help is actually gaining some skills card sales increase in NS. Having said that, I would like to see if we can launch Farmers without travel. The only element that require actual face to face activity is witnessing the photo ID and signatures of certified testers and the actual in-person view of the test centre to ensure it is physically supervisable. The rest can be delivered via conference call presentations and the mail. Testing this approach with Farmers may help us do it for others. For example I have a school in Victoria BC that wants to get started. They would likely only serve two classes per year which won't cover much overhead.

If you have any suggestions how we can save money and increase revenues I am all ears. Getting growth will return us to a more aggressive efforts.

I am also pursuing substantial investor possibilities with the objective of increasing the scale of the program substantially beyond the organic growth model.

I have attached the last file copy I had of the spreadsheet which you requested.

I look forward to your input and appreciate your valued support throughout this very tight period.

I have currently no trip planned to Atlantic Canada. The one that has some pressure for being there is the NB pilot launch and steering committee meeting set for February 8th. We have been putting a lot of time into the evaluation tools and will try for some recovery which should help.

Hope you are getting through the big snow today.

Cheers,
Bryn

[15] From January 2005 to June 2006 the amount of work performed by Mr. Campbell did significantly decrease. As well, Mr. Jones no longer traveled to Nova Scotia and it is clear that the verbal communications between the two of them also decreased.

[16] Exhibit C8 is a booklet of email communications. A lot of the emails deal with the Bermuda "project", but as well, there are a number of other emails and references therein dealing with prospects including the Capital Health Authority, Doctors Nova Scotia, Mooseheads Hockey team, Farmers, and others.

[17] In Exhibit C7, Mr. Campbell tendered all of the pages of his date book for the period December 2004 up to June 2006 which contained entries dealing with ICDL. These entries support the billing contained in the June 28, 2006, invoice. I understood his evidence to be that these entries were made contemporaneous to the dates in question. There was nothing in the evidence to question the veracity or reasonableness of these entries.

[18] Mr. Campbell testified that in June 2006, Mr. Jones indicated that he was not pursuing any more contacts in Atlantic Canada. At that point he did no further work for the Defendant but did submit the invoice for the work that had not been previously billed. He testified that he considered that this invoice was consistent with the email of January 18, 2005. He further testified that it was consistent with the previous invoices. He also referred the Court to the particulars of the invoice which were contained in an email of August 27, 2006.

[19] As to the counterclaim, Mr. Campbell denied any suggestion that he failed to follow up. On the contrary, he stated that his follow up activities were significant. He denied that he changed the Nova Scotia Health project to a smaller size.

[20] He did acknowledge that he copied some of his emails seeking payment to individuals at ITAC which, he said, is a sponsor of ICDL but that no one outside of that circle was contacted. He said he was not aware of anything in the agreement that would prohibit such a communication.

[21] As to why he had not issued a bill in an 18 month period, he indicated that he was not planning to issue a bill until they had landed some work but, since the arrangement was terminated, he felt it appropriate at that time to submit a final account.

[22] Mr. Campbell indicated on cross-examination that the agreement of March 2003 guided the relationship. He testified that the Defendant was aware of his relationship with SMART Innovations. He also indicated on cross-examination that there was "at least monthly updating to Bryn Jones".

[23] Mr. Jones in his evidence indicated that there were 23 months when they "beat the horse as hard as they could". In the latter part of 2004 he came to the realization that the work was not paying off and he had a session with Paul Campbell and discussed things. He told Mr. Campbell that he was not going to come to Nova Scotia every month but that he should keep going if there was any activity but there really was not any activity. He stated that from that point on there was very little information. With respect to the first three invoices he stated that he was up to speed inherently as he was much more involved at that stage. With respect to the last invoice he had very little knowledge and stated that typically you would get billed monthly but that was not the case with Paul Campbell and that was alright because he knew what Mr. Campbell was doing during the earlier period. That was not the case with the fourth invoice.

[24] He stated that in April 2005 he first learned of Bermuda which he referred to as a "watershed moment". He stated that at that point Mr. Campbell had shifted roles and that he was in a potential conflict of interest. He said that they responded to Paul Campbell right off the bat saying they had no jurisdiction in Bermuda because there was already an operator in Bermuda. In response Mr. Campbell made it clear that he wanted it done with ICDL Canada so as a result they had discussions with the EDCL Foundation. According to Mr. Jones, Mr. Campbell's evidence flips reality in regard to Bermuda.

[25] Mr. Jones testified that it was over in January 2005 and it was just follow up after that. He felt that a lot of the time entries seemed to be inserted to support a bill. He stated that his approach was that if someone in whom a seed was planted and called they would deal with it on a case by case basis. They had to be tangible prospects. He referred to the spreadsheet as something that he and Mr. Campbell had cobbled together. He suggested that of the list they had worked up, there were three or four that might have self-ignited.

[26] He further testified that it would have expected that every time Mr. Campbell did something he would have received an email and indicated that that is the practice that the Quebec-based representative follows.

[27] According to Mr. Jones's calculations there were 96 hours of the invoice spent in connection with the Bermuda work. As to the issue of charging interest, he said there was no interest in the agreement, none was added and none was ever paid. Again, referring to the first three invoices, he stated that he knew what Mr. Campbell was doing on those. With respect to the last, he stated that he had already told him it was over and they had no idea what he was doing. In summarizing his complaints he stated that he was not aware of Mr. Campbell's activities, he did not instruct Mr. Campbell with respect to those activities, he did not consider that the Bermuda activities were legitimately billable to the Defendant and he never got a satisfactory response to his request seeking particulars. With respect to the Nova Scotia Health project, he stated that he recalled it going down to 25-30 individuals.

[28] Mr. Jones stated that after the change in January 2005, he expected Mr. Campbell to keep working "under direction". He acknowledged that this was not in the January 18, 2005, email but this was in their verbal discussions.

[29] As to the counterclaim dealing with Capital Health, he stated that he felt they did not get the information as early as they should have received it.

Analysis

[30] I start first with considering who is the proper Claimant here and also the significance of the written document dated March 1, 2003.

[31] Given the evidence that the Defendant was aware of SMART Innovations Consultancy Incorporated as clearly evidenced by the fact that the invoices were issued in that name and the payments were made in that name, I conclude that the proper Claimant here is the corporate entity, SMART Innovations Consultancy Incorporated.

[32] The written document of March 1, 2003, was, on the evidence, never signed by the parties. However, the evidence of both is that they accepted it as containing the contractual terms. It would seem as well that their actions were entirely consistent with that.

[33] To the extent that the communications in late 2004 and early 2005, and specifically the email of January 18, 2005, constituted a change in the contractual relationship, I think the evidence establishes that Mr. Campbell accepted that change and therefore his company is bound by it. In any event, I do not understand that Mr. Campbell was raising that issue. Rather, his position seemed to be that the invoice of June 2006 was entirely consistent with the changed terms of the email of January 18, 2005.

[34] I note the following article which neither party made reference to:

> ***ENTIRETY***
> *9.01 It is agreed that this written Agreement embodies the entire Agreement of the parties hereto with regard to the matters dealt with herein and that there are no other covenants, representations, warranties, conditions, understandings or collateral agreements, oral or otherwise existing between the parties except as herein expressly set out. No change or modification of this Agreement shall be valid unless in writing signed by each of the parties hereto.*

[35] Certainly, from a literal point of view, this clause was not satisfied since the change effected by the January 18, 2005, email was not signed by each of the parties. As I have already stated, I do not consider the March 1, 2003, to be the actual contract although, the terms thereof were adopted by the ultimate parties which I find to be ICDL Canada Limited and SMART Innovations Consultancy Incorporated.

[36] I turn to the issue of whether or not the work performed by Mr. Campbell was authorized. I again refer to the email of January 18, 2005. I refer specifically to the following from that email:

> *We have started the new year with a need to control our costs. One of the larger categories is travel. Therefore, I have decided to reduce my frequency of travel to no more than quarterly visits rather than monthly. Obviously this means the priorities have to be on the most important opportunities. It probably means we need to work further in advance to ensure we can time the meetings to catch those we really need to see. It also means that we need to find ways of communicating with the key people independently of visits. I should devote some time to calling people from Mississauga and keep you informed of the results of these efforts.*

[37] In my view, considering this paragraph as a whole, what it imparts to the objective reader relates entirely to Mr. Jones attendances in Nova Scotia and containing travel costs.

[38] I then turn to the second paragraph which reads:

> *We also need to address our budget for your time. We started out with the idea that we would limit ourselves to two days per month, but we have done much more than that. We now need to keep it inside 4 days per quarter. I know this is tight but we have not got much choice at the moment.*

[39] There is nothing in this paragraph to suggest that the prospects that Mr. Campbell was to follow up with or initiate had to be, to use Mr. Jones's words, "someone in whom a seed was planted", "to deal with on a case by case basis", or to be "tangible/strong prospect, that might self-ignite". These characterizations given by Mr. Jones at the hearing of the type of work that he suggested Mr. Jones was to pursue is, with all respect, inconsistent with this email of January 18, 2005.

[40] The change effected by the January 18, 2005, was to limit Mr. Campbell's time to four days per quarter (1.3 days per month). That was a change from the contract. There is nothing in the email of January 18, 2005, to suggest that the prospects had to be "qualified" in some regard, either by Mr. Campbell acting alone or in conjunction with Mr. Jones.

[41] I also note and emphasize that in this email Mr. Jones refers to the prospect of returning to more aggressive sales efforts and that he is pursing substantial investor possibilities with the objective of increasing the scale of the program. These type of comments are, again with respect, inconsistent with Mr. Jones's evidence at the hearing that the program in Atlantic Canada had been all but shut down in January 2005. To quote his evidence he said "it's done" and "it's not working". Those comments are of an entirely difference flavour and meaning than what is contained in his email of January 18, 2005.

[42] I conclude that the work done by Mr. Campbell in the ensuing 18 months was authorized under the contract.

[43] I turn to the issue of the Bermuda work. I reject Mr. Jones's evidence that Mr. Campbell was attempting to "flip reality" with respect to the Bermuda work. My review of the emails leads me to the conclusion that the Defendant was very interested as a business proposition to get the Bermuda work. The issue of Mr. Jones somehow being in a conflict of interest was never broached in any of the emails that I have been referred to but, is raised now, after the fact.

[44] The reason Mr. Jones sought out Mr. Campbell in the first place was that Mr. Campbell was “connected” with decision makers. That certainly was the case with respect to the Bermuda work and if anyone could object to the issue of conflict of interest it would have been Mr. Campbell’s employer in Bermuda not, Mr. Jones who, with all respect, appeared to be quite willing to take advantage if possible of the favoured position which Mr. Campbell might occupy. In regard to the Bermuda issue I also note the comments of Mr. Campbell in his email of August 27, 2006, in which Mr. Campbell indicated that he did not “...bill for any Bermuda-related time except for the 24 hours required for researching your specific Bermuda questions or communicating directly with you regarding Bermuda opportunities”. In all events, I see no legal basis to reject the invoice or part thereof because of the Bermuda work.

[45] The Defendant also says that they had no reports back from the Claimant and had no idea what he was doing. First, I do not accept that the Defendant had no idea what the Claimant was doing. There are a number of emails during the 18 month period between the parties which clearly show that the Defendant had some degree of knowledge of activities of the Claimant. I have outlined some of those communications in the evidence above.

[46] Mr. Jones indicated in his evidence that he would have expected that every time Mr. Campbell did something that he would send an email to Mr. Jones reporting. Mr. Jones indicated that that is what the representative of Quebec did. I would observe that at least from a business point of view, it would have been quite advantageous had Mr. Campbell provided some form of periodic reporting, in writing, which could have been put in evidence to the Court. The issue however, is whether there is a legal requirement for him to do so and that engages the question of whether or not that was a term of the contract.

[47] I refer back to the “Consultants Personal Service Agreement” and in particular, Article 2.0 which reads:

> ***2.00 <u>TERMS OF REFERENCE</u>***
>
> *2.01 The Consultant shall have a job title as set out in Article 1(a) on Schedule "A" and shall report to the President. The Consultant shall carry out all legal directives of the President and the Board of Directors and shall carry out the Duties as may be designed by the President from time to time or as may be more specifically set out in Article 1(b) on Schedule "A". The Consultant shall comply with all applicable laws, regulations, contractual agreements, established rules and policies of the Company and legal instructions issued by the President or the Board of Directors of the Company. The Consultant shall render such other services as the Company may delegate to the Consultant from time to time and all such other typical duties applicable to such a Consultant in the normal course....*

[48] There is nothing in Schedule "A" dealing with reporting requirements. There is nothing in the evidence indicating that there were any "established rules and policies of the Company and legal instructions issued by the President or the Board of Directors of the Company" regarding reporting requirements.

[49] The clause then goes on to refer to "...such other typical duties applicable to such a Consultant in the normal course". It might be argued that providing regular reports is a typical duty to such a consultant in the normal course. Whether that is the case is something that I would have to have evidence on before so concluding. The fact, which was in evidence, that the Quebec-based representative did provide monthly reports does not establish this to be a **typical** duty.

[50] The next question then is, is this a term of the contract that should be implied. The normal rule of implying terms in contracts is that if business efficacy requires it, then a Court will imply it. I refer here to the Supreme Court of Canada case of ***MJB Enterprises v. Defence Construction (1951) Ltd., et al***, [1999] 1 S.C.R. 119, where Iacobucci J., states (at para. 27):

> *Term may be implied in a contract:*
> *...(3) Based on the presumed intention of the party where the implied term must be necessary to give business efficacy to a contract or as otherwise meeting the 'officious bystander test' as a term which the parties would say, if questioned, that they had obviously assumed.*

[51] I do not think this test is established in this case.

[52] I conclude for these reasons therefore that there is no legal term requiring reporting on any regular basis.

[53] For the reasons outlined above, I conclude that the Claimant, SMART Innovations Consulting Incorporated is entitled to the amount of the June 28, 2006, invoice which totals $11,866.04.

[54] The Claimant also claims for interest on the overdue account at 2% per month. In order for contract interest to be awarded by a Court there has to be evidence of an agreement between the parties. There is no provision for interest in the Consultant Agreement and there was no evidence of any verbal agreement to pay interest on overdue accounts. There is a statement on the invoices. The fact that the Defendant has not objected to that term having received three previous invoices, does not in my view, in the circumstances of this case, establish an agreement to pay 2% per month. I disallow the claim for interest.

[55] I turn to the counterclaim. First, there is the allegation that Mr. Campbell failed to follow up with the representative of Capital Health. Mr. Campbell denies that but assuming without deciding, that he indeed did fail to follow up in this once instance, is that a breach of his contractual obligations? It seems to me that one instance of an administrative oversight does not, as a matter of law, constitute a breach of contract. If I am wrong on that, then what damages result from that? Mr. Jones indicated that he felt Capital Health

did not get the information as early as they should have received it. That evidence does not give me any indication that there was loss to the Defendant. Accordingly, I do not accept that part of the counterclaim.

[56] The other part of the counterclaim relates to sending communications to third parties.

[57] It would certainly appear that such communications would have been of some embarrassment to the Defendant company. On the other hand, it may well be that the recipients of such communications simply view this as a type of dispute that sometimes arises between contracting parties and not attribute any negative inference on either of the parties. To the extend that such a claim is considered as "defamation" the Small Claims Court has no jurisdiction to deal with such a claim (Section 10(c) of the *Small Claims Court Act*).

[58] In the counterclaim the Defendant says that the Claimant breached the Agreement by sending inappropriate emails to third party individuals. At the hearing reference was made to Article 3.02 which requires the consultant to act in the best interest of the Company. It seems to me that sending the correspondence that Mr. Campbell did send to the third party is, on a balance of probabilities, contrary to the best interest of the Company. Such a finding does not depend on how the recipients view such communications but it would seem to be based solely on the article in the contract which I have already said above was adopted by the parties. However, the issue of how the recipients viewed this is relevant to the damages.

[59] Clearly there are no special damages that resulted from this. Accordingly, any damages would be general damages and in that regard I would be limited to the statutory limit of $100.00. I will award $100.00 in connection with this counterclaim.

Disposition and Order

[60] Based on the above I hereby order that the Defendant pay to the Claimant, SMART Innovations Consultancy Incorporated, the sum of $11,866.04, less $100.00, for a total of $11,766.04.

[61] The Claimant is also entitled to costs and I have reviewed Mr. Moir's submission of July 14, 2008. I believe all of the costs are reasonable and allowable under Regulation 15(1) of the Small Claims Court Forms and Procedures Regulations, with the exception of the in-house copying which is stated to be $70.00. Therefore the total amount of costs I will allow is $389.93.

[62] It is hereby ordered that the Defendant, ICDL Canada Limited, pay to the Claimant, SMART Innovations Consultancy Incorporated, as follows:

Debt:	$11,766.04
Costs:	389.93
	$ 12,155.97

DATED at Halifax, Nova Scotia, this 8th day of September, 2008.

Michael J. O'Hara
Adjudicator

Original	Court File
Copy	Claimant(s)
Copy	Defendant(s)