

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IPACO Consult, Plaintiff, Defendant to the Counterclaim

AND:

Bombardier Inc., Defendant, Plaintiff by Counterclaim

BEFORE: Associate Justice B. McAfee

COUNSEL: J. Teskey and S. Gordon, Counsel, for the Moving Party, the Defendant, Plaintiff by Counterclaim, Bombardier Inc.

L. M. Wagner, F. Griffen and M. Muccilli, Counsel, for the Responding Party, the Plaintiff, Defendant to the Counterclaim, IPACO Consult

HEARD: September 21, 2026

ENDORSEMENT

- [1] This is a motion brought by the defendant, plaintiff by counterclaim, Bombardier Inc. (“Bombardier”), for an order pursuant to Rule 39.02(2) of the *Rules of Civil Procedure* for leave to serve and file the supplementary responding motion record dated May 26, 2026, in response to the motion for summary judgment brought by the plaintiff, defendant to the counterclaim, IPACO Consult (“IPACO”) and other relief.
- [2] This motion was scheduled further to the Civil Practice Court endorsement of Justice Iacobucci dated May 27, 2026.
- [3] IPACO opposes the motion.
- [4] IPACO is an Egyptian company that provides consulting, sales and marketing services in the aviation industry.
- [5] Bombardier is a Canadian public company engaged in, among other things, the design, manufacture, marketing and sale of aircraft.
- [6] In this action IPACO seeks damages in relation to a Sales Representative Agreement dated October 14, 2015, between IPACO and Bombardier (the “SRA”). IPACO alleges that it is owed commission for work performed pursuant to the SRA.
- [7] The statement of claim was issued on January 19, 2021.

- [8] Bombardier's statement of defence is dated June 1, 2021.
- [9] As set out in the amended statement of claim amended on May 31, 2023, IPACO claims damages for breach of contract and/or unjust enrichment and/or *quantum meruit* in the amount of \$10,000,000.00 USD, damages for breach of the duty of good faith in the amount of \$10,000,000.00 USD, punitive damages in the amount of \$5,000,000.00 USD and costs of an audit in the amount of \$300,000.00 USD.
- [10] On June 12, 2023, Bombardier's statement of defence was amended to, among other things, counterclaim against IPACO for its costs incurred of performing the audit.
- [11] IPACO's reply and defence to counterclaim is dated September 6, 2023.
- [12] On June 27, 2025, IPACO served its motion record for summary judgment. In their notice of motion IPACO seeks the amount of \$10,000,000.00 USD for damages for breach of contract and/or failure to perform the contract in good faith and/or unjust enrichment, and/or on the basis of *quantum meruit*, the amount of \$5,000,000.00 USD for punitive damages and the amount of \$300,000.00 USD for costs of an audit. A dismissal of the counterclaim is also sought.
- [13] On August 29, 2025, Bombardier served its responding motion record. On December 17, 2025, cross-examinations were conducted. On March 27, 2026, IPACO served its moving factum. On May 26, 2026, Bombardier served its responding factum.
- [14] On May 26, 2026, Bombardier also served a supplementary responding motion record that is the subject of this motion. Bombardier's supplementary responding motion record consists of an affidavit of Elizabeth Ford, law clerk, affirmed May 26, 2026. The affidavit is three pages in length and there are no exhibits.
- [15] On May 26, 2026, IPACO advised that it did not consent to the delivery of the supplementary responding motion record.
- [16] On May 27, 2026, the parties attended Civil Practice Court. Justice Iacobucci scheduled IPACO's motion for summary judgment for a one day hearing returnable February 9, 2027. Justice Iacobucci also stated that the parties may seek an urgent hearing of the motion for leave to file the supplementary affidavit.
- [17] Rule 39.02(2) of the *Rules of Civil Procedure* provides:
- 39.02(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03.

[18] The applicable test is set out by the Divisional Court in *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, [2009] O.J. No. 4492 (Ont. Div.Ct.) at paras. 13 and 14:

[13] The case law under rule 39.02(2) confirms the criteria to consider in determining whether a party should be granted leave to respond to a matter raised on cross-examination:

- 1) Is the evidence relevant?
- 2) Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?
- 3) Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?
- 4) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

See: *Brock Home Improvement Products Inc. v. Corcoran* (2002), 58 O.R. (3d) 722 (S.C.) at paras. 8-9 and *Nolan v. Canada (Attorney General)* (1997), 38 O.R. (3d) 722 at 727-8 (Gen. Div.).

[14] A flexible, contextual approach is to be taken in assessing the criteria relevant to rule 39.02(2), having regard to the overriding principle outlined in Rule 1.04 of the Rules of Civil Procedure that the rules are to be interpreted liberally to ensure a just, timely resolution of the dispute. An overly rigid interpretation can lead to unfairness by punishing a litigant for an oversight of counsel. See: *Arfanis v. University of Ottawa* (2004), 7 C.P.C. (6th) 371 (Ont. S.C.) at paras. 8 and 15; *BFC Construction Group Inc. v. Ontario Realty Corp.* (2001), 17 C.P.C. (5th) 288 (S.C.) at para. 24; *Nolan v. Canada (Attorney General)*.

[19] As summarized by Justice Perell in *Shah v. LG Chem, Ltd.*, 2015 ONSC 776 (Ont. SC.J.) at para. 23: leave pursuant to Rule 39.02(2) should be “granted sparingly”; the moving party has a “very high threshold” to meet; and the rule should not be used as “a mechanism for correcting deficiencies in the motion materials.”

[20] I am satisfied that the evidence is relevant.

[21] IPACO alleges, among other things, breach of contract, including breach of the SRA arising from an alleged failure to pay commissions to which it claims entitlement.

[22] Bombardier relies on section 3.4 of the SRA and asserts that no commissions are payable under the SRA unless and until it can confirm that such payments would not contravene the SRA or any applicable laws or regulations. Bombardier relies on concerns identified

by Airbus, with whom Bombardier had entered into investment and acquisition agreements.

- [23] On March 8, 2023, Airbus advised Bombardier that, after “[t]aking into account discussions with the [U.S. Department of Justice, Criminal Division, Fraud Section, Foreign Corrupt Practice Act Unit (“DOJ”)],” it required additional information and documents relating to IPACO so that it could “conduct an independent review of IPACO and potential corruption issues.”
- [24] While IPACO asserts that there are no genuine issues requiring a trial, Bombardier asserts that issues requiring a trial arise as to whether the alleged potential corruption-related issues identified by Airbus and the DOJ engage potential breaches of the SRA or applicable legal and regulatory frameworks and whether those concerns preclude payment under the SRA until they are resolved.
- [25] The supplementary responding motion record provides additional evidence concerning the nature of the alleged potential corruption issues.
- [26] I am satisfied that the evidence responds to a matter raised on cross-examination, not necessarily for the first time.
- [27] IPACO’s counsel cross-examined Bombardier’s witnesses, Ms. Panetta and Ms. Cardillo, on the existence of the DOJ investigation and their personal knowledge (see Panetta cross-examination at qq 109-115; Cardillo cross-examination at qq 59-61).
- [28] I am satisfied that granting leave would not result in non-compensable prejudice.
- [29] Bombardier has consented to IPACO’s right to cross-examine on the affidavit of Elizabeth Ford and, if necessary, delivery of reply evidence. There is sufficient time before the hearing for IPACO to reply to the affidavit and cross-examine.
- [30] I am satisfied that there is a reasonable explanation for why the evidence was not included at the outset.
- [31] Despite Bombardier’s requests to Airbus for particulars of the alleged corruption-related issues (see letters dated June 13, 2025, August 28, 2025), Airbus did not identify specific “preliminary red flags” until May 25, 2026. The supplementary motion record was affirmed and served the next day.
- [32] Applying a contextual approach and having regard to the overriding principle in Rule 1.04, I am satisfied that it is in the interests of justice that leave be granted in accordance with Rule 39.02(2).
- [33] While leave has been granted pursuant to Rule 39.02(2), with respect to the issue of weight, if any, to be given to the affidavit for other reasons such as hearsay, I agree with the submissions of Bombardier’s counsel relying on *James v. Chedli*, 2018 ONSC 2559 (Ont.

S.C.J.) at para. 44. Those issues are more appropriately determined by the Judge hearing the motion for summary judgment.

[34] The parties agree that the successful party on this motion is entitled to costs of the motion in the all-inclusive amount of \$35,000.00. Bombardier is successful and, as agreed, is entitled to costs of the motion in the all-inclusive amount of \$35,000.00.

[35] Order to go as follows:

1. Leave pursuant to Rule 39.02(2) is granted to Bombardier to deliver the affidavit of Elizabeth Ford affirmed May 26, 2026, as contained in the supplementary responding motion record, for use at the hearing of IPACO's motion for summary judgment;

2. On consent, costs of the motion are fixed in the all-inclusive amount of \$35,000.00 payable by IPACO to Bombardier.

Associate Justice B. McAfee

Date: October 2, 2026