

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF IMERYS TALC AMERICA, INC., IMERYS TALC VERMONT, INC.,
AND IMERYS TALC CANADA INC.**

**APPLICATION OF IMERYS TALC CANADA INC., UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED**

**FACTUM OF THE APPLICANT
(Re: Recognition of Foreign Orders)
(Returnable April 19, 2021)**

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PART I - OVERVIEW

1. Imerys Talc Canada Inc. ("**ITC**"), Imerys Talc America, Inc. ("**ITA**") and Imerys Talc Vermont, Inc. ("**ITV**", and together with ITC and ITA, the "**Debtors**") were formerly the North American market leaders in talc production and represented nearly 50% of the market. The Debtors are affiliated entities of Imerys S.A ("**Imerys**"), a French corporation that is the direct or indirect parent entity of over 360 affiliated entities (the "**Imerys Group**").
2. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Affidavit of Ryan Van Meter sworn April 15, 2021 (the "**Second Van Meter Affidavit**").
3. On February 13, 2019, the Debtors commenced insolvency proceedings (the "**US Proceeding**") by filing the Petitions with the United States Bankruptcy Court for the District of Delaware (the "**US Court**").

Second Van Meter Affidavit at para 8, Applicant's Motion Record dated April 15, 2021 (the "**Motion Record**"), Tab 2.
4. On February 20, 2019, this Court (i) made an initial recognition order under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("**CCAA**") and (ii) issued a supplemental order recognizing the First Day Orders and appointing Richter Advisory Group Inc. as the Information Officer. KPMG Inc. replaced Richter Advisory Group Inc. as Information Officer on January 26, 2021.

Second Van Meter Affidavit at para 11, Motion Record, Tab 2.

5. This factum is filed in support of the motion brought by ITC, in its capacity as foreign representative of the Debtors, seeking an order recognizing the CRO Order and the AIP Order (as such terms are defined herein) in respect of the jointly administered proceeding of the Debtors under title 11 of the United States Code (the “**US Bankruptcy Code**”), substantially in the form of the draft order at Tab 3 of the Motion Record.

PART II - FACTS

6. The relevant facts in connection with this motion are briefly set out below and more fully described in the Second Van Meter Affidavit.

A. Ninth Amended Plan

7. The Debtors filed the Ninth Amended Plan with the US Court on January 27, 2021. That same day, the US Court entered an order approving the Ninth Amended Disclosure Statement and scheduled a hearing on confirmation of the Ninth Amended Plan to begin on June 21, 2021. This Court recognized the order approving the Ninth Amended Disclosure Statement, among other things, on February 23, 2021.

Second Van Meter Affidavit at paras 15 and 16, Motion Record, Tab 2.

8. On April 13, 2021, the Debtors requested that the US Court enter an order adjourning the hearing on confirmation of the Ninth Amended Plan so that it begins on August 16, 2021. The US Court has not yet entered this order.

Second Van Meter Affidavit at para 16, Motion Record, Tab 2.

9. If confirmed and consummated, the Ninth Amended Plan provides for, among other things, a global settlement (the “**Imerys Settlement**”) of issues among the Debtors, Imerys, the Tort Claimants’ Committee and the FCR. The Ninth Amended Plan also implements (a) the Rio Tinto/Zurich Settlement and (b) the Cyprus Settlement. The Rio Tinto/Zurich Settlement resolves disputes over (a) alleged liabilities relating to the Rio Tinto Corporate Parties’ prior ownership of the Debtors, (b) alleged indemnification obligations of the Rio Tinto Corporate Parties, and (c) the amount of coverage to which the Debtors claim to be entitled under the Talc Insurance Policies issued by the Zurich Corporate Parties and the Rio Tinto Captive Insurers. The Cyprus Settlement resolves (a) the treatment of Talc Personal Injury Claims relating to Cyprus, (b) disputes between Cyprus and the Debtors regarding entitlement to certain insurance proceeds between

Cyprus and the Debtors, and (c) disputes between Cyprus and the Debtors regarding ownership of certain indemnification rights.

Second Van Meter Affidavit at paras 15, 18 and 19, Motion Record, Tab 2.

10. The Imerys Settlement, the Rio Tinto/Zurich Settlement, and the Cyprus Settlement pave the way for a consensual resolution of the Chapter 11 Cases and these CCAA proceedings. The Imerys Settlement secures a recovery for the benefit of the Debtors' creditors, additional valuable assets that will be provided to the Talc Personal Injury Trust, and additional cash recovery by virtue of the sale of the Debtors' assets. The Rio Tinto/Zurich Settlement and the Cyprus Settlement will also generate substantial recoveries for the holders of Talc Personal Injury Claims.

Second Van Meter Affidavit at paras 18 and 19, Motion Record, Tab 2.

11. The primary purpose of the Ninth Amended Plan is to provide a mechanism to permanently channel the Talc Personal Injury Claims against the Debtors to the Talc Personal Injury Trust, which would assume liability of such claims on the Effective Date.

Second Van Meter Affidavit at para 17, Motion Record, Tab 2.

Second Report of the Information Officer dated April 15, 2021 (the "**Second Report**") at para 21.

The Sale

12. A key aspect of the Imerys Settlement is the sale of substantially all of the Debtors' assets pursuant to s. 363 of the US Bankruptcy Code, the proceeds of which are to be contributed to the Talc Personal Injury Trust (less certain deductions).

Second Van Meter Affidavit at para 21, Motion Record, Tab 2.

13. On November 17, 2020, the US Court entered the Sale Approval Order that, among other things, authorized and approved the Sale of the Debtors' assets free and clear to Magris Resources. This Court recognized the Sale Approval Order on November 25, 2020. The Debtors consummated the Sale on February 17, 2021.

Second Van Meter Affidavit at paras 22 and 23, Motion Record, Tab 2.

14. As a result of the closing of the Sale, the Debtors are no longer engaged in talc operations.

Second Van Meter Affidavit at para 23, Motion Record, Tab 2.

15. The majority of the Debtors' management and key employees transitioned to Magris Resources as part of the Sale. As a result, the Debtors' engaged the services of Mr. Eric Danner and CohnReznick to take over the management and administration of the Debtors' post-Sale operations and affairs, including in connection with the ongoing Chapter 11 Cases and these CCAA proceedings.

Second Van Meter Affidavit at para 24, Motion Record, Tab 2.

16. Mr. Danner is a CPA and partner with CohnReznick's Restructuring & Dispute Resolution practice. Mr. Danner has over 20 years of experience in providing financial consulting and economic analysis to publicly and privately held companies. Mr. Danner has worked in crisis management situations creating and implementing turnaround business plans and has acted in chief restructuring officer, chief financial officer and chief operating officer roles in both out-of-court and bankruptcy contexts. CohnReznick is a financial advisory firm based in New York with extensive experience in restructuring and providing financial and operational guidance to companies in distressed situations.

Second Van Meter Affidavit at paras 27, 28 and 31, Motion Record, Tab 2.

PART III - ISSUES

17. The issue on this motion is whether this Court should recognize and enforce in Canada, pursuant to s. 49 of the CCAA, the CRO Order and the AIP Order.

PART IV - ARGUMENT

A. This Court has the Jurisdiction to Recognize the CRO Order and AIP Order Under Part IV of the CCAA

18. This Court has recognized the US Proceeding as a "foreign main proceeding" pursuant to Part IV of the CCAA. When a foreign main proceeding has been recognized under Part IV of the CCAA, s. 49 empowers this Court to make any order that it considers appropriate to protect the debtor's property or the interests of one or more creditors. The Court's discretion is broad: an order under Part IV "may be made on any terms and conditions that the court considers appropriate in the circumstances".

CCAA, s. 49(1) and 50.

19. Section 50 of the CCAA further provides that an order made under Part IV of the CCAA, including pursuant to s. 49, may be made on any terms and conditions that the Court

considers appropriate. Once an order recognizing a foreign proceeding is made, the Court is required to cooperate, to the maximum extent possible with the foreign representative and the foreign court, so long as the requested relief is not inconsistent with the CCAA or which would raise concerns regarding public policy.

CCAA, s. 50.

20. The central principle animating the exercise of the Court's discretion under Part IV is comity, which is embodied in ss. 44(a) and 52(1) of the CCAA. Pursuant to the principle of comity, a Canadian court will accord respect to "the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada."

Babcock & Wilcox Canada Ltd (Re), 2000 CanLII 22482 (ONSC) [*Re Babcock*] at para 21 ([CanLII](#)).

CCAA, ss. 44(a) and 52(1).

21. In cross-border insolvencies, Canadian and US courts routinely seek to complement, coordinate and, where appropriate, accommodate the proceedings of the other court to enable cross-border enterprises to successfully restructure. Comity and cooperation are increasingly important in the restructuring context because as businesses become more internationalized those businesses will have a significant number of assets and also carry on businesses in several jurisdictions. Without coordination by the courts of cross-border restructuring proceedings, the result would be multiple proceedings with the likely consequence of inconsistent court orders and decisions and general uncertainty as to the direction and effect on creditors and stakeholders in various jurisdictions of the restructuring proceedings.

Re Babcock at paras 9-10 ([CanLII](#)), citing *Taylor v Dow Corning Australia Pty Ltd*. (December 18, 1997), Doc 8438/95 (Australia Vic Sup Ct).

B. Canadian Courts Have Recognized Similar Orders in Other Part IV Proceedings

22. The relief being sought by ITC is not unusual. There are numerous instances where Canadian courts have recognized similar orders entered pursuant to the US Bankruptcy Code that:

- (a) designate a chief restructuring officer or authorize the debtors to retain a financial advisory firm to perform certain management functions; and

Re Brooks Brothers Group, Inc. et al. (25 September 2020), Toronto CV-20-00647463-00CL (Ont Sup Ct [Comm List]) Recognition, Approval and Vesting Order at para 3(a) ([Information Officer's website](#)) (order recognizing the appointment of a chief restructuring officer).

Re Rockport Blocker, LLC et al. (14 June 2018), Toronto CV-18-597987-00CL (Ont Sup Ct [Comm List]) Order at para 3(e) ([Information Officer's website](#)) (order recognizing the retention of a financial advisory firm to provide certain financial functions).

- (b) authorize and approve key employee incentive programs intended to maximize the value of a sale under the US Bankruptcy Code by incentivizing optimal performance.

Re Hollander Sleep Products, LLC et al. (6 August 2019), Toronto CV-19-620484-00CL (Ont Sup Ct [Comm List]) Recognition Order at para 3(b) ([Information Officer's website](#)).

Re Imerys Talc Canada Inc. et al. (3 December 2019), Toronto CV-19-614614-00CL (Ont Sup Ct [Comm List]) Order (Indirect Talc Claims Bar Date and KERP Orders) at para 3(b) ([Information Officer's website](#)).

23. This Court has already recognized, as part of these proceedings, an order entered by the US Court that approved AIP payments similar to the payments contemplated by the AIP Order.

Second Van Meter Affidavit at para 42, Motion Record, Tab 2.

Re Imerys Talc Canada Inc. et al. (3 November 2020), Toronto CV-19-614614-00CL (Ont Sup Ct [Comm List]) Order (Recognition of Foreign Orders) at para 3(c) and (d) ([Information Officer's website](#)).

24. Canadian courts do not lightly second-guess the decisions made by a US court in a foreign main proceeding. In a foreign non-main proceeding under Part IV, Canada has an “ancillary role”. As long as the US Court’s orders are not contrary to public policy or the purposes of the CCAA, Canadian courts will give deference to the judgment of a US Court charged with overseeing a restructuring.

Re Babcock at para 21 ([CanLII](#)).

Hartford Computer Hardware Inc (Re), 2012 ONSC 964 at paras 16 to 18 ([CanLII](#)).

Massachusetts Elephant & Castle Group Inc (Re), 2011 ONSC 4201 at para 39 ([CanLII](#)).

25. ITC submits that the CRO Order and AIP Order do not breach any applicable Canadian law and are not inconsistent with any orders that may be granted under the CCAA.

C. The CRO Order and AIP Order Should Be Recognized

26. Both the CRO Order and the AIP Order are appropriate and reasonable in the circumstances:

- (a) The CRO Order, *inter alia*, authorizes the retention of Mr. Eric Danner and CohnReznick. The services of Mr. Danner, CohnReznick, and the Additional Personnel provided by CohnReznick are necessary because the Debtors lost the majority of their management and key employees as part of the Sale. Mr. Danner, CohnReznick and the Additional Personnel will, among other things, provide the Debtors with the resources, capabilities and experiences necessary for the confirmation of the Ninth Amended Plan and, ultimately, a successful restructuring; and

Second Van Meter Affidavit at paras 26, 32 and 34, Motion Record, Tab 2.

- (b) the AIP Order, *inter alia*, approves a 2020 year-end bonus payment for the Eligible Employee in the amount of C\$41,589. This bonus payment is part of the Debtors' AIP, which is intended to incent employees. Bonuses under the AIP measure overall performance in the fiscal year based on (i) the Debtors' financial objectives and (ii) safety objectives and the individual employee's personal performance. The Eligible Employee has already received their mid-year bonus of C\$10,963. The Eligible Employee's 2020 year-end bonus payment is now due and owing.

Second Van Meter Affidavit at paras 38 to 42, Motion Record, Tab 2.

Second Report at paras 27 to 33.

27. Recognizing both the CRO Order and AIP Order are in the best interests of the Debtors and their stakeholders because such recognition will assist the Debtors with moving expeditiously through their insolvency proceedings to an efficient and value-maximizing conclusion.

28. The Information Officer supports the recognition of the CRO Order and AIP Order.

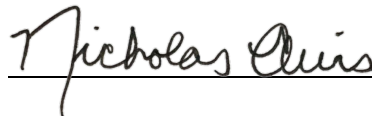
Second Report at para 57.

29. For the foregoing reasons, and those set out in the Second Van Meter Affidavit, the CRO Order and AIP Order are appropriate and reasonable in the circumstances and should be recognized and enforced in Canada.

PART V - RELIEF REQUESTED

30. ITC requests that the Court grant the relief requested in paragraph 5 above and issue an order the form included at Tab 3 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of April 2021.

A handwritten signature in black ink that reads "Nicholas Avis". The signature is written in a cursive style and is positioned above a horizontal line.

Maria Konyukhova
Nicholas Avis
Stikeman Elliott LLP
Lawyers for the Applicant

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Babcock & Wilcox Canada Ltd (Re)*, 2000 CanLII 22482 (ONSC)
2. *Hartford Computer Hardware Inc (Re)*, 2012 ONSC 964
3. *Massachusetts Elephant & Castle Group Inc (Re)*, 2011 ONSC 4201
4. *Re Rockport Blocker, LLC et al.* (14 June 2018), Toronto CV-18-597987-00CL (Ont Sup Ct [Comm List]) Order
5. *Re Hollander Sleep Products, LLC et al.* (6 August 2019), Toronto CV-19-620484-00CL (Ont Sup Ct [Comm List]) Recognition Order
6. *Re Imerys Talc Canada Inc. et al.* (3 December 2019), Toronto CV-19-614614-00CL (Ont Sup Ct [Comm List]) Order (Indirect Talc Claims Bar Date and KERP Orders)
7. *Re Brooks Brothers Group, Inc. et al.* (25 September 2020), Toronto CV-20-00647463-00CL (Ont Sup Ct [Comm List]) Recognition, Approval and Vesting Order
8. *Re Imerys Talc Canada Inc. et al.* (3 November 2020), Toronto CV-19-614614-00CL (Ont Sup Ct [Comm List]) Order (Recognition of Foreign Orders)

**SCHEDULE “B”
RELEVANT STATUTES**

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended—————

Purpose

44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

...

Other orders

49 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) If the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

Terms and conditions of orders

50 An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

Cooperation — court

52 (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

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Court File No: CV-19-614614-00CL

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Proceeding commenced at Toronto

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