

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. (THE "DEBTORS")

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
(Returnable April 3, 2019)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Maria Konyukhova LSO#: 52880V
Tel: (416) 869-5230
mkonyukhova@stikeman.com

Patricia Joseph LSO#: 75535Q
Tel: (416) 869-5642
pjoseph@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicant,
Imerys Talc Canada, Inc.

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 IMERYYS TALC AMERICA, INC., IMERYYS TALC VERMONT, INC.,
AND IMERYYS TALC CANADA INC. (THE "DEBTORS")

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

PART I - OVERVIEW

1. The Applicant, Imerys Talc Canada Inc. ("**ITC**" or the "**Applicant**"), brings this motion under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), seeking an order which recognizes certain orders granted by the United States Bankruptcy Court for the District of Delaware (the "**US Court**") in respect of the Applicant and several related companies.
2. Imerys Talc America, Inc. ("**ITA**"), Imerys Talc Vermont, Inc ("**ITV**" and together with ITC, the "**Debtors**") are the North American market leaders in talc production, representing nearly 50% of the market, and are affiliated entities of Imerys S.A, a world leader in mineral-based specialties for the industry.
3. On February 13, 2019 (the "**Filing Date**"), the Debtors filed voluntary petitions for relief pursuant to Chapter 11 of Title 11 ("**Chapter 11**") of the United States Code (the "**US Code**") (collectively, the "**Petitions**" and each a "**Petition**") with the US Court (the "**US Proceedings**").

Affidavit of Alexandra Picard, sworn March 28, 2019 (the "**Second Picard Affidavit**"), Applicant's Motion Record dated March 29, 2019 (the "**Motion Record**"), Tab 2.
4. On February 14, 2019, the US Court granted the Petitions along with various interim orders (the "**First Day Orders**"), which were recognized by the Ontario Superior Court of Justice (Commercial List) (the "**Court**") on February 20, 2019.

Second Picard Affidavit, 10, Motion Record, Tab 2.

5. On March 19, 22 and 26, 2019, the US Court granted various orders in the US Proceedings (the "**Foreign Orders**"), the details of which are reviewed in the Second Picard Affidavit.

Second Picard Affidavit, 12, Motion Record, Tab 2.

6. ITC has brought this motion to seek an order, substantially in the form of the draft order at Tab 3 of the Motion Record for and order recognizing the following Foreign Orders:
- (a) an order extending the time for filing schedules and statements (the "**Schedules and Statements Order**");
 - (b) an order authorizing the employment and retention of KCIC LLC as insurance and valuation consultant (the "**KCIC LLC Retention Order**");
 - (c) an order authorizing the employment and retention of Prime Clerk LLC as administrative advisor (the "**Prime Clerk LLC Retention Order**");
 - (d) an order authorizing the employment and retention of Richards, Layton & Finger, P.A. as US co-counsel (the "**Richards, Layton & Finger, P.A. Retention Order**");
 - (e) an order authorizing the employment and payment of professionals utilized in ordinary course of business (the "**Ordinary Course Professionals Order**");
 - (f) an order establishing procedures for interim compensation for professional services and reimbursement of professional expenses (the "**Interim Compensation and Reimbursement Order**");
 - (g) an order authorizing the employment and retention of Stikeman Elliott LLP as Canadian counsel (the "**Stikeman Retention Order**");
 - (h) an order (i) authorizing, but not directing, the Debtors to pay certain prepetition claims as described in the Second Picard Affidavit held by (a) Shippers in an amount not to exceed USD\$3.3 million on a final basis (b) Lien Claimants in an

amount not to exceed USD\$1.4 million on a final basis and (c) Royalty Interest Owners in an amount not to exceed USD\$900,000 on a final basis, each absent further order of the Court, (ii) authorizing, but not directing, the Debtors to pay 503(b)(9) Claims in an amount not to exceed USD\$300,000 absent further order of the Court; (iii) and confirming the administrative expense priority status of orders for goods not delivered until after the filing date (the “**Outstanding Orders**”) and authorizing, but not directing, the Debtors to pay prepetition amounts related to the Outstanding Orders (the “**Final Lien Claimants Order**”);

- (i) an order (i) authorizing, but not directing, the Debtors to pay prepetition obligations owed to certain critical vendors, up to USD\$1.1 million on a final basis, absent further order of the Court; and (ii) authorizing financial institutions to honor and process related checks and transfers (the “**Final Critical Vendor Order**”);
- (j) an order (i) authorizing, but not directing, the Debtors to pay prepetition obligations owed to foreign vendors, up to USD\$1.4 million on a final basis, absent further order of the Court; and (ii) authorizing financial institutions to honor and process related checks and transfers (the “**Final Foreign Vendor Order**”);
- (k) an order (i) authorizing, but not directing, the Debtors to pay Taxes and Fees (as defined in the First Day Declaration), whether accrued prior to, on or after the commencement of the US Proceedings, up to USD\$1.505 million on a final basis, absent further order of the Court; and (ii) authorizing financial institutions to honor and process related checks and transfers (the “**Final Taxes Order**”);
- (l) an order (i) authorizing the Debtors to (a) pay prepetition insurance and bonding obligations, up to USD\$700,000 for insurance obligations and bonding obligations, absent further order of the Court, (b) maintain their postpetition insurance coverage, and (c) maintain their bonding program, and (ii) authorizing financial institutions to honor and process related checks and transfers (the “**Final Insurance and Bonding Order**”);
- (m) an order (i) authorizing the Debtors to pay certain prepetition workforce obligations, including compensation, expense reimbursements, benefits, and related obligations, not exceeding the amount of USD\$2.587 million on a final

basis, absent further order of the Court, and (ii) authorizing financial institutions to honor and process related checks and transfers (the “**Final Workforce Obligations Order**”);

- (n) an order with respect to utilities providers: (i) prohibiting utility service providers from altering or discontinuing service on account of prepetition invoices; (ii) approving an adequate assurance deposit as adequate assurance of postpetition payment to the utilities; and (iii) establishing procedures for resolving any subsequent requests by the utilities for additional adequate assurance of payment (the “**Final Utilities Order**”);
- (o) an order (i) authorizing the ability to honor prepetition obligations owed to customers and to otherwise continue customer programs, and (ii) authorizing financial institutions to honor and process related checks and transfers not exceeding the amount of USD\$1.9 million in the aggregate, absent further order of the Court (the “**Final Customer Programs Order**”);
- (p) an interim order authorizing, but not directing, maintenance of existing cash management system, including maintenance of existing bank accounts, checks and business forms, authorizing continuation of existing deposit practices, and approving the continuation of (and administrative expense priority status of) certain ordinary course intercompany transactions (the “**Second Interim Cash Management Order**”); and
- (q) an order authorizing the filing of (i) a consolidated master list of creditors, a list of the thirty law firms with the most significant representations of Talc Claimants, based on the volume of filings, potential scope, and type of alleged liability of the Debtors, or related factors, in lieu of a list of the holders of the thirty largest unsecured claims, and (ii) approving certain notice procedures for talc claimants (the “**Final Limit Notice and Approve Notice Procedures Order**”).

Second Picard Affidavit, 12, Motion Record, Tab 2.

7. Any capitalized terms not otherwise defined herein shall have the meanings given to such terms in the Second Picard Affidavit.

PART II - FACTS

8. The relevant facts in connection with this motion are more fully set out in the Second Picard Affidavit.

PART III - ISSUES

9. The issue on this motion is whether the Court should grant the Order sought by the Applicant recognizing the Foreign Orders pursuant to section 49 of the CCAA?

PART IV - ARGUMENT

A. Purpose of Part IV of the CCAA

10. Part IV of the CCAA establishes a process and system for addressing cross-border and multi-national insolvencies. Section 44 of the CCAA states that the purpose of the CCAA cross-border regime is to promote:
- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
 - (b) greater legal certainty for trade and investment;
 - (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
 - (d) the protection and the maximization of the value of debtor company's property; and
 - (e) the rescue of financially troubled businesses to protect investment and preserve employment.

CCAA, s. 44.

11. The underlying basis of Part IV of the CCAA is the principle of comity and cooperation between courts of various jurisdictions, whereby 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 Carswell Ont 704 (Ont. S.C.J. [Commercial List]) [*Re Babcock*], 21, BOA, Tab 1.

12. In cross-border insolvencies, Canadian and US courts routinely seek to complement, coordinate and, where appropriate, accommodate the proceedings of the other court in order 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, 9-10, BOA, Tab 1, citing *Taylor v Dow Corning Australia Pty. Ltd.* (December 18, 1997), Doc. 8438/95 (Australia Vic. Sup. Ct.).

Order in the Application of Modular Space Corporation dated January 25, 2017 (Ont. S.C.J. [Commercial List]), BOA, Tab 2.

B. Recognition of the Foreign Orders

13. ITC seeks the recognition of the Foreign Orders that were granted by the US Court.
14. Section 49 of the CCAA provides that the Court may make any order that it considers appropriate if it is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors.

CCAA, s. 49.

15. Section 50 of the CCAA further provides that an order made under Part IV of the CCAA, including pursuant to section 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.

16. Canadian courts have considered the following factors when considering whether they should recognize a foreign order, including an order made in a Chapter 11 proceeding:
- (a) principles of comity and the need to encourage cooperation between courts of various jurisdictions;
 - (b) the need to accord respect to foreign bankruptcy and insolvency legislation unless in substance generally it is so different from the bankruptcy and insolvency laws of Canada or diverges radically from the processes in Canada;
 - (c) whether stakeholders will be treated equitably, and in particular, whether recognition will ensue that, to the extent possible, stakeholders are treated equally, regardless of the jurisdiction to which they reside;
 - (d) the importance of promoting plans that allow the enterprises to reorganize globally, especially where there is established interdependence on a transnational basis. To the extent reasonably practical, one jurisdiction should take "charge" of the principal administration of the enterprise's reorganization, where this approach will facilitate a potential reorganization and which will respect the claims of stakeholders in all jurisdictions and does not detract from the net benefits that may be available from alternative approaches;
 - (e) that the appropriate level of court involvement depends to a significant degree upon the court's nexus to the enterprise;
 - (f) that where one jurisdiction is to have an ancillary role, the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments regarding the reorganizational efforts in the foreign principal jurisdiction and stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction; and
 - (g) that all affected stakeholders receive effective notice as is reasonably practicable in the circumstances

Re Babcock, 21, BOA, Tab 2.

Xerium Technologies Inc., Re, 2010 ONSC 3974 at paras 26 -27, BOA Tab 4.

17. ITC submits that the Foreign Orders meet the above criteria, do not breach any applicable Canadian law, and are not inconsistent with any orders that may be granted under the CCAA.
18. Further, Canadian courts have consistently recognized orders similar to the Foreign Orders.

Motion Order in the Application of Rockport Blocker, LLC dated June 14, 2018 (Ont. S.C.J. [Commercial List]) (without schedules), BOA, Tab 3.

Motion Order in the Application of Modular Space Corporation dated January 25, 2017 (Ont. S.C.J. [Commercial List]), BOA, Tab 2.

19. ITC submits that recognition of the Foreign Orders is necessary to ensure that the true purpose of the CCAA is satisfied and the Debtors have the best opportunity to restructure.
20. The Information Officer, subsequent to a review of the information provided by the Debtors, recommends the recognition of the Foreign Orders by the Court.

First Report of the Information Officer Richter Advisory Group Inc., dated April 1, 2019 at para 81.

21. Accordingly, the Applicant requests that the Court recognize the Foreign Orders.

PART V - RELIEF REQUESTED

22. The Applicant requests that the Court grant the Order in the form included at Tab 3 of the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of April, 2019.



Maria Konyukhova
Patricia Joseph
Stikeman Elliott LLP

Lawyers for the Applicant,
Imerys Talc Canada Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Babcock & Wilcox Canada Ltd. (Re)*, 2000 Carswell Ont 704 (Ont. S.C.J. [Commercial List]).
2. Motion Order in the Application of Modular Space Corporation dated January 25, 2017 (Ont. S.C.J. [Commercial List]).
3. Motion Order in the Application of Rockport Blocker, LLC dated June 14, 2018 (Ont. S.C.J. [Commercial List]) (without schedules).
4. *Xerium Technologies Inc., Re*, 2010 ONSC 3974.

SCHEDULE "B"

STATUTES

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

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;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company's property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

Interpretation

Definitions

45. (1) The following definitions apply in this Part.

"foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.

"foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests.

"foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding. "foreign proceeding" means a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

"foreign representative" means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

- (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or
- (b) act as a representative in respect of the foreign proceeding.

Centre of debtor company's main interests

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

Recognition of Foreign Proceeding

Application for recognition of a foreign proceeding

46. (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

Documents that must accompany application

- (2) Subject to subsection (3), the application must be accompanied by
- (a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;
 - (b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and
 - (c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

Documents may be considered as proof

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)(a) and (b) as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

Other evidence

(4) In the absence of the documents referred to in paragraphs (2)(a) and (b), the Court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

Translation

(5) The Court may require a translation of any document accompanying the application.

Order recognizing foreign proceeding

47. (1) If the Court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the Court shall make an order recognizing the foreign proceeding.

Nature of foreign proceeding to be specified

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

Order relating to recognition of a foreign main proceeding

48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

- (a) staying, until otherwise ordered by the Court, for any period that the Court considers necessary, all proceedings taken or that might be taken against the debtor company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
- (d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Scope of order

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

When subsection (1) does not apply

(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.

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

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

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

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts

(3) The making of an order under paragraph (l)(a) does not preclude the commencement or the continuation of proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.

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.

Obligations of foreign representative

53. If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

- (a) without delay, inform the court of
 - (i) any substantial change in the status of the recognized foreign proceeding,
 - (ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and
 - (iii) any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and
- (b) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

Court not prevented from applying certain rules

61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy

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

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

AND IN THE MATTER OF IMERYYS TALC AMERICA, INC., IMERYYS TALC VERMONT, INC., AND
IMERYYS TALC CANADA INC. (THE "DEBTORS")

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM OF THE APPLICANT
(returnable April 3, 2019)

STIKEMAN ELLIOTT LLP

Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Maria Konyukhova LSO#: 52880V

Tel: (416) 869-5230
mkonyukhova@stikeman.com

Patricia Joseph LSO#: 75535Q

Tel: (416) 869-5642
pjoseph@stikeman.com
Fax: (416) 947-0866

Lawyers for the Debtors