

**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
(Re: Recognition of Foreign Orders)
(Returnable November 3, 2020)**

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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**") are the North American market leaders in talc production, representing nearly 50% of the market, and 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 Anthony Wilson, sworn October 29, 2020 (the "**Sixth Wilson Affidavit**").
3. On February 13, 2019, the Debtors commenced insolvency proceedings (the "**US Proceedings**") by filing the Petitions with the United States Bankruptcy Court for the District of Delaware (the "**US Court**").

Sixth Wilson Affidavit at para 8, Applicant's Motion Record dated October 29, 2020 (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*¹ and (ii) issued a supplemental order recognizing the First Day Orders and appointing Richter Advisory Group Inc. as the Information Officer.

Sixth Wilson Affidavit at para 11, Motion Record, Tab 2.

¹ RSC 1985, c C-36 [**CCAA**].

5. On April 9, 2020, the US Court entered the AIP Orders that, among other things, approved the 2019 Year-End Bonus Payments and the 2020 Mid-Year Bonus Payment.

Sixth Wilson Affidavit at para 64, Motion Record, Tab 2.

6. On June 1, 2020, the US Court entered the KEIP Order that, among other things, approved a key employee incentive program (the “**Revised KEIP**”) for certain employees of the Debtors.

Sixth Wilson Affidavit at para 70, Motion Record, Tab 2.

7. On July 23, 2020, the US Court entered the Ramboll Retention Order that, among other things, authorized the Debtors to employ and retain Ramboll as their environmental adviser, *nunc pro tunc* to June 25, 2020.

Sixth Wilson Affidavit at paras 59-60, Motion Record, Tab 2.

8. On October 29, 2020, the US Court entered the Stalking Horse Approval Order that, among other things, approved the designation of Magris Resources as the Stalking Horse Bidder and provided related bid protections.

Sixth Wilson Affidavit at paras 52-53, Motion Record, Tab 2.

9. This factum is filed in support of the motion brought by ITC, in its capacity as foreign representative of the Debtors, seeking an order (the “**Recognition Order**”), substantially in the form of the draft order at Tab 3 of the Motion Record, that recognizes and enforces the AIP Orders, KEIP Order, Ramboll Retention Order, and Stalking Horse Approval Order.

PART II - FACTS

10. The relevant facts in connection with this motion are briefly set out below and more fully described in the Sixth Wilson Affidavit.

A. The Third Amended Plan

Overview

11. The Debtors’ stated purpose of the Chapter 11 Cases is to confirm a plan of reorganization that will maximize the value of the Debtors’ assets for the benefit of all stakeholders and include a trust mechanism to address Talc Personal Injury Claims in a fair and equitable manner.

Sixth Wilson Affidavit at para 20, Motion Record, Tab 2.

12. To this effect, the Debtors filed with the US Court the Original Plan on May 15, 2020, along with the related Disclosure Statement.

Sixth Wilson Affidavit at paras 27, Motion Record, Tab 2.

13. On August 12, 2020, the Debtors filed with the US Court the First Amended Plan and the First Amended Disclosure Statement. On October 5, 2020, the Debtors filed with the US Court the Second Amended Plan and the Second Amended Disclosure Statement.

Sixth Wilson Affidavit at paras 29-30, Motion Record, Tab 2.

14. On October 16, the Debtors filed with the US Court the Third Amended Plan and the Third Amended Disclosure Statement. The Third Amended Plan maintains the same general structure and mechanisms as the Original Plan, including the sale of substantially all of the Debtors' assets to one or more purchaser(s) (the "**Sale**"). Unlike the Original Plan, the Third Amended Plan includes language that, among other things, describes the Debtors' intention to obtain debtor-in-possession financing and the designation of Magris Resources as the Stalking Horse Bidder.

Sixth Wilson Affidavit at paras 31, Motion Record, Tab 2.

15. The Tort Claimants' Committee, FCR and Imerys S.A. and its affiliates all support the Third Amended Plan.

Sixth Wilson Affidavit at para 39, Motion Record, Tab 2.

Sale of the Assets

16. The Third Amended Plan contemplates that the Debtors will initiate the Sale pursuant to section 363 of the US Bankruptcy Code. The Sale is intended to make available additional funding for the benefit of the Debtors' Estates, and, ultimately, the Talc Personal Injury Trust. The net proceeds from the Sale(s) less any related expenses will be contributed to the Talc Personal Injury Trust.

Sixth Wilson Affidavit at para 42, Motion Record, Tab 2.

17. The Sale is to happen in accordance with the Bidding Procedures. In accordance with the Bidding Procedures Order, the Debtors filed a notice designating Magris Resources as the Stalking Horse Bidder on October 13, 2020.

Sixth Wilson Affidavit at para 45, Motion Record, Tab 2.

Impact on Canadian Stakeholders

18. Canadian creditors are to be treated in the same manner as US-based creditors. Canadian creditors (other than those with claims in Classes 4 (Talc Personal Injury Claims) and 5a (Non-Debtor Intercompany Claims), and equity interests in Class 6 (Equity Interests in the North American Debtors)) are Unimpaired and their claims will be satisfied in full. Canadian creditors with claims in Classes 5a and 6 have consented to their treatment under the Plan (as Plan Proponents), and any Canadian creditors with claims in Class 4 (Talc Personal Injury Claims) will be treated in the same way as US-based creditors that have claims in Class 4.

Sixth Wilson Affidavit at para 47, Motion Record, Tab 2.

19. Canadian assets will be sold as part of the Sale. These assets include, among others, a talc mine in Timmins, Ontario; a land lease in Penhorwood, Ontario; a distribution centre in Foleyet, Ontario; and a warehouse in Mississauga.

Sixth Wilson Affidavit at para 48, Motion Record, Tab 2.

PART III - ISSUES

20. The issue on this motion is whether the Court should grant the Recognition Order sought by ITC to recognize and enforce, pursuant to s. 49 of the CCAA, the Stalking Horse Approval Order, the Ramboll Retention Order, the AIP Orders and the KEIP Order.

PART IV - ARGUMENT

A. Purpose of Part IV of the CCAA

21. 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.

22. 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 CanLII 22482 (ONSC) [*Re Babcock*] at para 21 ([CanLii](#)).

23. 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. Recognition of the Foreign Orders

24. ITC seeks the recognition and enforcement of the Stalking Horse Approval Order, the Ramboll Retention Order, the AIP Orders, and the KEIP Order granted by the US Court.

25. 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.

26. 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.

27. 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 in which they reside;
- (d) the importance of promoting plans that allow 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 at para 21 ([CanLII](#)).

Xerium Technologies Inc., Re, 2010 ONSC 3974 [**Re Xerium Technologies**] at paras 26-27 ([CanLII](#)).

- 28. ITC submits that the Stalking Horse Approval Order, the Ramboll Retention Order, the AIP Orders, and the KEIP Order 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.
- 29. Indeed, 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) authorize and approve stalking horse bidders and related bid protections

Re Rockport Blocker LLC et al. (14 June 2018), Toronto CV-18-597987-00CL (Ont Sup Ct [Comm List]) Order at para 3(a) ([Monitor's website](#)).

Allied Systems Holdings Inc. et al. (26 June 2013), Toronto CV-12-9757-00CL (Ont Sup Ct [Comm List]) Order at para 3 ([Monitor's website](#)).

- (b) authorize the employment and retention of advisors; and

Re Rockport Blocker LLC et al. (20 July 2018), Toronto CV-18-597987-00CL (Ont Sup Ct [Comm List]) Sale/Final DIP/Retention/Intercompany Transfer Order at para 3(a) ([Monitor's website](#)).

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

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) ([Monitor's website](#)).

30. Each of the Stalking Horse Approval Order, the Ramboll Retention Order, the AIP Orders, and the KEIP Order are appropriate and reasonable in the circumstances:

- (a) the Stalking Horse Approval Order, *inter alia*, maximizes the value obtained for the Sale, thereby improving recoveries by stakeholders. The Stalking Horse process promotes fairness and openness in the conduct of the Sale process through public disclosure of the economic terms of the baseline bid, the use of established bid procedures, the opportunity to submit a superior bid, and an open auction. No objections were made to the proposed Stalking Horse Order before being entered by the US Court on October 29, 2020.

Sixth Wilson Affidavit at para 54, Motion Record, Tab 2.

Eighth Report of the Information Officer dated October 31, 2020 (the "**Eighth Report**") at paras 43-47.

- (b) the Ramboll Retention Order, *inter alia*, approves the retention of Ramboll US Corporation as environmental advisors in connection with the assessment of environmental, health, and safety matters relating to the divestiture of assets and liabilities. The objective of Ramboll's environmental assessments will be to provide prospective purchasers of the Debtors' assets (including ITC's assets located in Canada) with a clear understanding of the environmental risk profile of the Debtors as a whole. Ramboll's review will provide transparency and confidence to prospective purchasers and therefore increase the likelihood of a value maximizing sale. Ramboll's services are essential to the sale of the Debtors' assets.

Sixth Wilson Affidavit at para 62, Motion Record, Tab 2.

Eighth Report of the Information Officer at paras 48-52.

- (c) the AIP Orders, *inter alia*, approve AIP bonus payments that are awarded to certain employees of the Debtors based on prior individual performance and the financial performance of the business. The Year-End AIP Order approves the 2019 Year-End Bonus Payments for two individual employees of ITA in the amounts of \$101,887 and \$54,094. The 2019 Year-End Bonus Payments were paid by ITA and no portion is being allocated to ITC. The Mid-Year AIP Order

approves the 2020 Mid-Year Bonus Payment for one individual employee of ITC in the amount of C\$10,962.70, which ITC will pay in the entirety. All Eligible Employees provide services and value to ITC.

Sixth Wilson Affidavit at paras 64-68, Motion Record, Tab 2.

Eighth Report of the Information Officer at paras 53-61.

- (d) The KEIP Order, *inter alia*, establishes a scheme whereby KEIP Participants are eligible for (a) payments tied to the proceeds of the Sale and (b) incentive payments that are identical to the bonuses each KEIP Participant would receive under the AIP for 2020 (KEIP Participants are not eligible for the AIP in 2020). The structure of the KEIP incents participants to maximize the value of the Sale, which has the effect of benefiting the Debtors' stakeholders. The terms of the KEIP are consistent with market practice in insolvency proceedings. If the Stalking Horse Bid with Magris Resources is consummated, an estimated \$1,193,367 will be payable under the KEIP. Of this sum, approximately \$229,408 will be recharged to ITC; the final amount recharged will be based on ITC's relative contribution to the totality of the Debtors' business. Given that ITC benefits from maximizing the value of the Sale, such an allocation is appropriate.

Sixth Wilson Affidavit at paras 69-80, Motion Record, Tab 2.

Eighth Report of the Information Officer at paras 62-74.

31. The Information Officer was consulted on the selection of the Stalking Horse Bid and supports recognizing in Canada the Stalking Horse Approval Order, Ramboll Retention Order, the AIP Orders, and the KEIP Order.

Sixth Wilson Affidavit at para 55, Motion Record, Tab 2.

Eighth Report of the Information Officer at paras 47, 52, 61, and 74.

32. The impact of these orders, when considered together, is the maximization of value for the benefit of all stakeholders.

Sixth Wilson Affidavit at para 79, Motion Record, Tab 2.

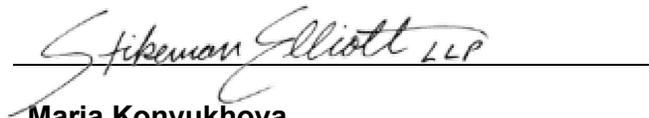
33. For the foregoing reasons, and those set out in the Sixth Wilson Affidavit, the Stalking Horse Approval Order, the Ramboll Retention Order, the AIP Orders, and the KEIP

Order are appropriate and reasonable in these circumstances and should be recognized and enforced in Canada.

PART V - RELIEF REQUESTED

34. 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 November 2020.

A handwritten signature in cursive script that reads "Stikeman Elliott LLP". The signature is written in black ink and is positioned above a horizontal line.

Maria Konyukhova
Nicholas Avis
Stikeman Elliott LLP
Lawyers for the Applicant

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Allied Systems Holdings Inc. et al.* (26 June 2013), Toronto CV-12-9757-00CL (Ont Sup Ct [Comm List]) Order
2. *Babcock & Wilcox Canada Ltd (Re)*, 2000 CanLII 22482 (ONSC)
3. *Re Hollander Sleep Products, LLC et al.* (6 August 2019), Toronto CV-19-620484-00CL (Ont Sup Ct [Comm List]) Recognition Order
4. *Re Imerys Talc Canada Inc. et al.* (3 December 2019), Toronto CV-19-614614-00CL (Ont Sup Ct [Comm List]) Indirect Talc Claims Bar Date and KERP Orders
5. *Re Rockport Blocker LLC et al.* (14 June 2018), Toronto CV-18-597987-00CL (Ont Sup Ct [Comm List]) Order
6. *Re Rockport Blocker LLC et al.* (20 July 2018), Toronto CV-18-597987-00CL (Ont Sup Ct [Comm List]) Sale/Final DIP/Retention/Intercompany Transfer Order
7. *Xerium Technologies Inc., Re*, 2010 ONSC 3974

SCHEDULE "B"
RELEVANT 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.

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

- (f) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
- (g) 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
- (h) 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 (1)(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.

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Proceeding commenced at Toronto

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