

**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 Order)
(Returnable February 23, 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 February 18, 2021 (the "**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**").

Van Meter Affidavit at para 8, Applicant's Motion Record dated February 19, 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.

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 Solicitation Procedures Order (as such term is 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 Van Meter Affidavit.

A. Ninth Amended Plan

7. The Debtors filed the Ninth Amended Plan with the US Court on January 27, 2021. The Ninth Amended Plan is the culmination of extensive negotiations between the Debtors, Imerys and the other Imerys Plan Proponents, the Tort Claimants' Committee, and the FCR, all of whom are proponents of the Ninth Amended Plan.

Van Meter Affidavit at para 15, Motion Record, Tab 2.

First Report of the Information Officer dated February 22, 2021 (the "**First Report**") at para 25.

8. 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.

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

9. 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.

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

10. 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. Following the Effective Date of the Plan, Talc Personal Injury Claims may not be asserted against, among others, the Debtors and the other Protected Parties. Pursuant to the Ninth Amended Plan, Talc Personal Injury Claims include, among other claims, Indirect Talc Personal Injury Claims (such as claims for indemnity, contribution, or reimbursement).

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

First Report at paras 27 and 30.

11. To effectuate the Plan, the Talc Personal Injury Trust will receive the Talc Personal Injury Trust Assets, which will include, among other things, contributions of:
 - (a) \$75 million, a contingent purchase price enhancement of up to \$102.5 million, subject to a reduction mechanism based on the amount of money generated from the sale transaction with Magris Resources, as further described in the Disclosure Statement, and any remaining portion of the proceeds from the sale of the Debtors' assets to Magris Resources pursuant to the Imerys Settlement;
 - (b) \$340 million pursuant to the Rio Tinto/Zurich Settlement (as described in the Ninth Amended Plan); and
 - (c) \$130 million pursuant to the Cyprus Settlement (as described in the Ninth Amended Plan), upon the occurrence of the Cyprus Trigger Date.

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

First Report at para 28.

12. The Plan Proponents believe that there will be substantially more assets available to resolve Talc Personal Injury Claims under the Ninth Amended Plan than would be the case if there were a chapter 7 liquidation. The contributing parties to the Imerys Settlement, the Rio Tinto/Zurich Settlement, and the Cyprus Settlement, are, as a result of the settlements, contributing substantial assets to the Talc Personal Injury Trust, which would not be otherwise available for holders of Talc Personal Injury Claims, as it is unlikely that any of those entities would proceed with the settlements set forth in the Ninth Amended Plan and Disclosure Statement in the absence of the Channeling Injunctions contemplated thereunder.

First Report at para 29.

The Sale

13. A key aspect of the Ninth Amended Plan 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).

Van Meter Affidavit at para 30, Motion Record, Tab 2.

14. The sale process formally commenced on May 15, 2020. Magris Resources was declared the successful bidder on November 11, 2020. On November 17, 2020, the US Court entered the Sale Approval Order that, among other things, authorized and approved of 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 to Magris Resources on February 17, 2021.

Van Meter Affidavit at para 31, Motion Record, Tab 2.

15. The sale closed on February 17, 2021. Given the scale and complexity of the transaction, it understandably took approximately three months to close the transaction. As a result of the sale closing, the North American Debtors are no longer engaged in talc operations.

Van Meter Affidavit at para 33, Motion Record, Tab 2.

Creditor Classes

16. There are seven Classes of claims and Equity Interests under the Ninth Amended Plan. Three of the seven Classes are impaired. Only one of the seven Classes—Class 4, Talc Personal Injury Claims—will be eligible to vote to accept or reject the Ninth Amended Plan. The unimpaired Classes are presumed to accept the Ninth Amended Plan and are therefore not eligible to vote. Unimpaired claims will be paid in full.

Van Meter Affidavit at para 34, Motion Record, Tab 2.

17. The Debtors believe that the proposed creditor classification is appropriate in the circumstances.

Van Meter Affidavit at para 35, Motion Record, Tab 2.

18. Canadian-based creditors will be treated in the same manner as the 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 Ninth Amended 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.

Van Meter Affidavit at para 44, Motion Record, Tab 2.

B. The Solicitation Procedures Order

19. The Solicitation Procedures Order details the manner in which the Debtors will solicit votes on the Ninth Amended Plan. Specifically, the Solicitation Procedures Order:
- (a) approves the Ninth Amended Disclosure Statement for the Ninth Amended Plan;
 - (b) approves the form and manner of the Disclosure Statement Hearing Notice in respect of the Disclosure Statement Hearing;
 - (c) establishes Solicitation Procedures;
 - (d) approves the form and manner of the Direct Talc Personal Injury Claim Solicitation Notice and Certified Plan Solicitation Directive;

- (e) approves the forms of Ballots;
- (f) approves the form, manner, and scope of the Confirmation Notices in respect of the Confirmation Hearing;

Van Meter Affidavit at para 47, Motion Record, Tab 2.

20. The US Court entered the Solicitation Procedures Order on January 27, 2021.

Van Meter Affidavit at para 48, Motion Record, Tab 2.

21. There is no process separate from the process detailed in the Solicitation Procedures Order for Canadian holders of claims or interests in the Debtors and, as such, Canadian holders will be subject to the voting process set out in the Solicitation Procedures Order. Only holders of claims in Class 4 are entitled to vote on the Plan and, as such, the Debtors do not intend to solicit votes from claimants in other classes.

First Report at para 41.

22. The Solicitation Procedures Order was developed in consultation with, among others, the Tort Claimants' Committee and the FCR. The Information Officer was kept apprised of the progress of the Solicitation Procedures Order.

Van Meter Affidavit at para 49, Motion Record, Tab 2.

PART III - ISSUES

23. The sole issue on this motion is whether this Court should recognize the Solicitation Procedures Order.

PART IV - ARGUMENT

A. This Court has the Jurisdiction to Recognize the Solicitation Procedures Order Under Part IV of the CCAA

24. 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.

25. 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.

26. 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).

27. 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

28. Canadian courts often recognize orders approving disclosure statements and solicitation procedures granted by US Courts in Chapter 11 cases that are foreign main proceedings.

BBGI US, Inc. et al. (16 February 2021), Toronto CV-20-00647463-00CL (Ont Sup Ct [Comm List]) Order at para 3(a) ([Information Officer's website](#)).

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

Re Probe Resources Ltd., 2011 BCSC 552 at paras 34, 41 ([CanLII](#)).

29. 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](#)).

30. ITC submits that the Solicitation Procedures Order does not breach any applicable Canadian law and are not inconsistent with any orders that may be granted under the CCAA.

C. The Solicitation Procedures Order Should Be Recognized

31. The Solicitation Procedures Order serves multiple key functions in the Debtors’ restructuring. Most importantly, it (a) approves the Ninth Amended Disclosure Statement and (b) establishes the Solicitation Procedures.

The Ninth Amended Disclosure Statement Represents a Key Restructuring Milestone

32. The Ninth Amended Disclosure Statement is a key milestone in the Debtors’ restructuring because it provides holders of Class 4 claims (Talc Personal Injury Claims) with the necessary information to make an informed judgment when voting on the Ninth Amended Plan.

33. The original Disclosure Statement was filed with the US Court on May 15, 2020. That Disclosure Statement was subsequently amended nine times to incorporate additional disclosures and refinements to, among things, address certain objections. The US Court ultimately determined on January 27, 2021, that the Ninth Amended Disclosure Statement contains “adequate information” and no further information was necessary to hold a vote on the Ninth Amended Plan.

Van Meter Affidavit at paras 53 to 55, Motion Record, Tab 2.

Solicitation Procedures Order at para A, Motion Record, Tab 2 – Exhibit E.

The Solicitation Procedures Order Paves the Path to Confirming the Ninth Amended Plan

34. The Solicitation Procedures Orders creates a framework for bringing the Ninth Amended Plan to fruition. Notably, the Solicitation Procedures detailed in the Solicitation Procedures Order provide a fair and equitable process to solicit votes on the Ninth Amended Plan and will provide a path to confirmation and, ultimately, the Debtors’ emergence from its insolvency proceedings.

Van Meter Affidavit at para 61, Motion Record, Tab 2.

35. The Solicitation Procedures provide for the distribution of Solicitation Packages to holders of Talc Personal Injury Claims and other parties. The Solicitation Packages contain necessary information for impaired creditors, including copies of the Ninth Amended Disclosure Statement and notices of the confirmation hearing.

Van Meter Affidavit at para 63, Motion Record, Tab 2.

36. Applicable Solicitation Packages contains Ballots and instructions on how to complete and return Ballots. All Ballots are to be received by the Solicitation Agent by 4:00 p.m. (ET) on March 25, 2021. Prime Clerk LLC, in its capacity as Solicitation Agent, is to process and tabulate Ballots and file the Voting Certification by April 8, 2021 at 4:00 p.m. (ET). The Confirmation Hearing is to be held on June 21, 22, and 23, 2021, at 10:00 a.m. (ET).

Van Meter Affidavit at paras 63, 65 and 67, Motion Record, Tab 2.

37. The US Court concluded that the Solicitation Procedures “provide a fair and equitable voting process and are consistent with section 1126 of the Bankruptcy Code and the applicable Bankruptcy Rules.” The US Court further wrote that the period during which

the Debtors may solicit votes on the Ninth Amended Plan is “a reasonable and adequate period of time for holders of Claims entitled to vote on the Plan to make an informed decision to accept or reject the Plan and timely return Ballots evidencing such decision.”

Solicitation Procedures Order, paras D and H, Motion Record, Tab 2 – Exhibit E.

The Solicitation Procedures Order is a Necessary Step Forward

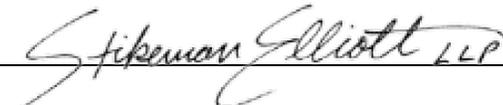
38. Recognizing the Solicitation Procedures Order is in the best interests of the Debtors and their stakeholders because it will allow the Debtors to move expeditiously through the insolvency proceedings to an efficient and value-maximizing conclusion.
39. The Information Officer supports the recognition of the Solicitation Procedures Order.

First Report at para 68.

PART V - RELIEF REQUESTED

40. ITC requests that the Court grant the relief requested in paragraph 5 above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of February 2021.



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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Babcock & Wilcox Canada Ltd (Re)*, 2000 CanLII 22482 (ONSC)
2. *BBGI US, Inc. et al.* (16 February 2021), Toronto CV-20-00647463-00CL (Ont Sup Ct [Comm List])
3. *Massachusetts Elephant & Castle Group Inc (Re)*, 2011 ONSC 4201
4. *Re Hartford Computer Hardware, Inc.*, 2012 ONSC 964
5. *Re Hollander LLC et al.* (6 August 2019), Toronto CV-19-620484-00CL (Ont Sup Ct [Comm List]) Order
6. *Re Probe Resources Ltd.*, 2011 BCSC 552

**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.

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.

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Continuance — other jurisdictions

188 (1) Subject to subsection (10), a corporation may apply to the appropriate official or public body of another jurisdiction requesting that the corporation be continued as if it had been incorporated under the laws of that other jurisdiction if the corporation

(a) is authorized by the shareholders in accordance with this section to make the application; and

(b) establishes to the satisfaction of the Director that its proposed continuance in the other jurisdiction will not adversely affect creditors or shareholders of the corporation.

(2) A corporation that is authorized by the shareholders in accordance with this section may apply to the appropriate Minister for its continuance under the Bank Act, the Canada Cooperatives Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act.

(3) A notice of a meeting of shareholders complying with section 135 shall be sent in accordance with that section to each shareholder and shall state that a dissenting shareholder is entitled to be paid the fair value of their shares in accordance with section 190, but failure to make that statement does not invalidate a discontinuance under this Act.

(4) Each share of the corporation carries the right to vote in respect of a continuance whether or not it otherwise carries the right to vote.

(5) An application for continuance becomes authorized when the shareholders voting thereon have approved of the continuance by a special resolution.

(6) The directors of a corporation may, if authorized by the shareholders at the time of approving an application for continuance under this section, abandon the application without further approval of the shareholders.

(7) On receipt of a notice satisfactory to the Director that the corporation has been continued under the laws of another jurisdiction or under one of the Acts referred to in subsection (2.1), the Director shall file the notice and issue a certificate of discontinuance in accordance with section 262.

(8) For the purposes of section 262, a notice referred to in subsection (7) is deemed to be articles that are in the form that the Director fixes.

(9) This Act ceases to apply to the corporation on the date shown in the certificate of discontinuance.

(10) A corporation shall not be continued as a body corporate under the laws of another jurisdiction unless those laws provide in effect that

(a) the property of the corporation continues to be the property of the body corporate;

- (b) the body corporate continues to be liable for the obligations of the corporation;
- (c) an existing cause of action, claim or liability to prosecution is unaffected;
- (d) a civil, criminal or administrative action or proceeding pending by or against the corporation may be continued to be prosecuted by or against the body corporate; and
- (e) a conviction against, or ruling, order or judgment in favour of or against, the corporation may be enforced by or against the body corporate.

Business Corporations Act, C.Q.L.R. c. S-31.1

DIVISION I

CONTINUANCE UNDER THIS ACT

288. A legal person constituted under the laws of Québec or a jurisdiction other than Québec may, if so authorized to do so by the Act governing it, be continued as a corporation under this Act.

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.

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

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 February 23, 2021)**

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