

**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 & Substitution of Information Officer)
(Returnable January 26, 2020)**

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

Nicholas Avis LSO#: 76781Q
Tel: (416) 869-5504
navis@stikeman.com
Fax: (416) 947-0866

Lawyers for the Applicant

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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 January 21, 2021 (the "**Eighth Wilson 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**").

Eighth Wilson Affidavit at para 8, Applicant's Motion Record dated January 21, 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.

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

5. On November 17, 2020, the US Court entered the Sale Approval Order that, among other things, approved the sale of substantially all of the Debtors' assets to Magris Resources.

Eighth Wilson Affidavit at para 22, Motion Record, Tab 2.

6. This factum is filed in support of the motion brought by ITC, in its capacity as foreign representative of the Debtors, seeking:

- (a) an order (the "**Recognition Order**"), substantially in the form of the draft order at Tab 3 of the Motion Record, recognizing the Continuance Order (as defined and described below) in respect of the jointly administered proceeding of the Debtors under title 11 of the United States Code (the "**US Bankruptcy Code**"); and
- (b) an order (the "**Substitution Order**"), substantially in the form of the draft order at Tab 4 of the Motion Record:
 - (i) approving the reports of Richter Advisory Group Inc. ("**Richter**") filed in respect of the CCAA recognition proceedings to date, including the Tenth Report dated January 21, 2021 (the "**Tenth Report**"), in its capacity as the Information Officer, and the activities set out therein (such reports, the "**Information Officer Reports**");
 - (ii) discharging Richter as Information Officer in these proceedings effective as of 5:00 p.m. on the date the order sought is granted;
 - (iii) releasing Richter from liability upon termination of its role as Information Officer;
 - (iv) approving the professional fees and disbursements of the Information Officer and its legal counsel;
 - (v) appointing KPMG Inc. ("**KPMG**") as the Information Officer effective as of the time of Richter's discharge as Information Officer; and
 - (vi) such further and other relief as counsel may advise and this Court deems just.

PART II - FACTS

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

A. Overview

8. 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. On January 21, 2021, the Debtors filed with the US Court the Seventh Amended Plan and the Seventh Amended Disclosure Statement.

Eighth Wilson Affidavit at paras 14-17, Motion Record, Tab 2.

9. A key aspect of the Debtors' Seventh Amended Plan is the sale of substantially all of the Debtors' assets to Magris Resources, with the net proceeds from the sale (less any related expenses and all amounts used to fund the administrative expenses and costs of the Chapter 11 Cases and any reserves required pursuant to any confirmed plan of reorganization following the closing of the Sale) being contributed to the Talc Personal Injury Trust.

Seventh Wilson Affidavit at para 17, Motion Record, Tab 2 – Exhibit A.

10. 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 on November 17, 2020. This Court recognized the Sale Approval Order on November 25, 2020.

Eighth Wilson Affidavit at para 22, Motion Record, Tab 2.

11. The Debtors are working with Magris Resources to implement the sale. The Debtors are hopeful that the transaction will close in the first quarter of 2021.

Eighth Wilson Affidavit at paras 23, Motion Record, Tab 2.

B. Continuing ITC as a Business Corporation in Quebec

12. In connection with the sale to Magris Resources, each of the Debtors anticipate that, following the closing of the transaction, they will cease all operations and the sole remaining director on their respective boards will be the current independent director. This director is expected to deal with post-Sale and post-plan implementation

responsibilities, including managing environmental liabilities and making necessary distributions. The independent director is not a Canadian resident.

Eighth Wilson Affidavit at para 25, Motion Record, Tab 2.

13. ITC is federally incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (“**CBCA**”). Pursuant to s. 105(3) of the CBCA, at least 25% of ITC’s directors must be resident Canadians if ITC remains a CBCA corporation.

CBCA, s. 105(3).

14. To avoid the time and expense of identifying and appointing an additional Canadian resident to be a director of ITC, the Debtors have determined that it is in the best interests of their estates to continue ITC’s corporate existence under the laws of the Province of Quebec, specifically the *Business Corporations Act*, CQLR c S-31.1 (the “**QBCA**”). The QBCA does not require that any directors of a corporation be resident Canadians.

Eighth Wilson Affidavit at para 27, Motion Record, Tab 2.

15. On January 8, 2021, the US Court entered the Continuance Order that, among other things, authorized and empowered ITC to effectuate the continuance of its corporate existence under the QBCA.

Eighth Wilson Affidavit at para 15, Motion Record, Tab 2.

C. Substituting the Information Officer

16. The Debtors are seeking a court order substituting the Information Officer from Richter to KPMG, effective as of 5:00 p.m. on the date that an order is made in respect of this relief (if granted).
17. Richter’s representative with functional carriage over this matter and the Debtors’ primary contact recently transferred his practice to the restructuring group at KPMG. The Debtors are of the view that having the same representative continue as the Information Officer will provide informational benefits and cost efficiencies to the Debtors and their estates.

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

18. KMPG has agreed to act as the information officer in this proceeding going forward. Richter does not oppose the relief being sought.

Eighth Wilson Affidavit at para 31, Motion Record, Tab 2.

19. In connection with the substitution of the Information Officer, the Debtors are seeking an order approving the Information Officer's Reports and the fees and disbursements of the Information Officer and its counsel.

Eighth Wilson Affidavit at para 32-33, Motion Record, Tab 2.

PART III - ISSUES

20. The issues on this motion are whether this Court should:
- (a) recognize the Continuance Order;
 - (b) substitute the Information Officer from Richter to KPMG;
 - (c) approve the Information Officer's Reports and the activities detailed therein; and
 - (d) approve the fees and expenses of the Information Officer and its counsel.

PART IV - ARGUMENT

A. This Court should recognize the Continuance Order

21. 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.

22. 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.

23. 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).

24. 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).

25. 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).

26. The continuation of a CBCA corporation to the QBCA is a normal course corporate action. The CBCA permits the continuance of a corporate entity to the QBCA and *vice versa*. When continued as a corporation, ITC will be subject to substantially the same obligations as a CBCA corporation.

CBCA, s. 188.

QBCA, s. 288.

27. The benefits of continuing ITC's corporate existence under the QBCA are significant. In particular, the Debtors will be able to have the same non-Canadian resident act as director of all three entities. This avoids the time and expense of identifying and appointing an additional Canadian resident to be a director of ITC post-sale. The Debtors believe that the only impact of ITC's continuance under the QBCA would be the incurrance of minimal administrative fees. The Debtors do not believe that the continuance will not impose material burdensome obligations on ITC or otherwise interfere with the Debtors' restructuring.

Eighth Wilson Affidavit at para 28, Motion Record, Tab 2.

28. Accordingly, it is appropriate for this Court to recognize the Continuation Order so that ITC can continue its corporate existence under the QBCA.

B. This Court should grant the Substitution Order

It is appropriate to substitute the Information Officer from Richter to KPMG

29. Section 49(1), as noted above, gives this Court broad discretion to make any order that it considers appropriate. The Debtors believe that it is appropriate in the circumstances for the Court to exercise its discretion to grant an order discharging Richter from its role as Information Officer and substituting Richter with KPMG as the new Information Officer.

CCAA, s. 49(1).

30. The Information Officer's representative who has transferred his practice to KPMG has significant knowledge relating to the Debtors' restructuring. There will be, accordingly, informational benefits and cost efficiencies if the same representative continues to act as

the Information Officer. The Debtors are unaware of any negative material consequences to substituting the Information Officer.

Eighth Wilson Affidavit at para 30, Motion Record, Tab 2.

The activities, fees and disbursements of the Information Officer and its counsel should be approved

31. The proposed Substitution Order approves the Information Officer's activities to date, as detailed in the Information Officer's Reports. This Court has not previously approved any of the Information Officer's activities.

Eighth Wilson Affidavit at para 32, Motion Record, Tab 2.

32. In *Re Target Canada Co*, the Court wrote that a request to approve a CCAA monitor's report "is not unusual" and that "there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process."

Re Target Canada Co, 2015 ONSC 7574 at paras 2 and 22 ([CanLII](#)).

33. The Debtors believe that it is fair and reasonable in the circumstances to approve the Information Officer's Reports. The Information Officer carried out its activities in a manner consistent with the provisions of the CCAA and in compliance with the orders of this Court.

Eighth Wilson Affidavit at para 32, Motion Record, Tab 2.

34. The Debtors further seek approval of the fees and disbursements of (i) the Information Officer for the period January 31, 2019 to January 18, 2021, inclusive; (ii) Aird & Berlis LLP, as counsel to the Information Officer for the period January 31, 2019 to August 19, 2020, inclusive; and (iii) Osler, Hoskin & Harcourt LLP, as counsel to the Information Officer for the period August 13, 2020 to January 17, 2021, inclusive. The breakdown of the fees and disbursements are in the Tenth Report.

Tenth Report at paras 70-72.

35. In approving the fees and disbursements of a CCAA Monitor and its counsel, the Court must consider whether those fees were "fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process."

Nortel Networks Corp, Re, 2017 ONSC 673 ([CanLII](#)) at para 13, citing *Winalta Inc, Re*, 2011 ABQB 399 ([CanLII](#)) at para 30.

36. The Debtors believe that these same principles should apply to the approval of the fees and disbursements of the Information Officer and its counsel. In the Debtors' view, the fees and disbursements of the Information Officer and its legal counsel are fair and reasonable in the circumstances and should be approved.

Eighth Wilson Affidavit at para 33, Motion Record, Tab 2.

Tenth Report at paras 73.

37. The Debtors further believe that it is fair and reasonable to approve Richter's post-January 18, 2021 fees and disbursements as they relate to work that needs to be completed before Richter can be discharged as Information Officer, up to a maximum of C\$25,000 (excluding applicable taxes), without further order of the Court.

Eighth Wilson Affidavit at para 33, Motion Record, Tab 2.

PART V - RELIEF REQUESTED

38. ITC requests that the Court grant the relief requested in paragraph 6 above.

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



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. *Massachusetts Elephant & Castle Group Inc (Re)*, 2011 ONSC 4201
3. *Re Hartford Computer Hardware, Inc.*, 2012 ONSC 964
4. *Re Target Canada Co*, 2015 ONSC 7574
5. *Nortel Networks Corp, Re*, 2017 ONSC 673
6. *Winalta Inc, Re*, 2011 ABQB 399

**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.

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

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Maria Konyukhova LSO#: 52880V
Tel: (416) 869-5230
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Nicholas Avis LSO#: 76781Q
Tel: (416) 869-5504
navis@stikeman.com
Fax: (416) 947-0866

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