

**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 December 22, 2021)**

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TO: SERVICE LIST

**ONTARIO
SUPERIOR COURT OF JUSTICE
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**SERVICE LIST
(December 14, 2021)**

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**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
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PART I - OVERVIEW

1. This factum is filed in support of the motion brought by Imerys Talc Canada Inc. (“**ITC**”), in its capacity as foreign representative of itself, Imerys Talc America, Inc. (“**ITA**”) and Imerys Talc Vermont, Inc. (“**ITV**”, and together with ITC and ITA, the “**Debtors**”), seeking an order pursuant to s. 49 of the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) recognizing the Foreign Order 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

2. The relevant facts in connection with this motion are briefly set out below and more fully described in the Affidavit of Eric Danner sworn December 14, 2021 (the “**Second Danner Affidavit**”). Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Second Danner Affidavit.

A. Background

3. The Debtors were formerly in the business of mining, processing, selling and or distributing talc. The Debtors are affiliated entities of Imerys S.A, a French corporation that is the direct or indirect parent entity of over 360 affiliated entities.

Second Danner Affidavit at paras. 6 to 7, Applicant's Motion Record dated December 14, 2021 (the "**Motion Record**"), Tab 2.

4. On February 14, 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**"). The Debtors initiated the Petitions in response to a proliferation of lawsuits claiming that one or more of the Debtors were responsible for personal injuries allegedly caused by exposure to talc.

Second Danner Affidavit at para. 8, Motion Record, Tab 2.

5. On February 20, 2019, this Court (a) made an initial recognition order under Part IV of the CCAA and (b) issued a supplemental order that, among other things, appointed Richter Advisory Group Inc. as the Information Officer. KPMG Inc. replaced Richter Advisory Group Inc. as Information Officer on January 26, 2021.

Second Danner Affidavit at para. 11, Motion Record, Tab 2.

6. ITC, in its capacity as foreign representative of the Debtors, has previously brought several motions before this Court seeking recognition of various orders entered by the US Court in the course of the US Proceeding. These motions and the orders granted by this Court are summarized in the Fourth Report of the Information Officer dated December 15, 2021 (the "**Fourth Report**").

B. The Tenth Amended Plan¹

7. 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. To this end, the Debtors filed with the US Court on January 27, 2021, the Ninth Amended Plan and the Disclosure Statement.

Second Danner Affidavit at para. 16, Motion Record, Tab 2.

8. The US Court entered an order approving the Disclosure Statement on January 27, 2021, and this Court recognized that order on February 23, 2021.

Second Danner Affidavit at para. 17, Motion Record, Tab 2.

9. The Debtors filed the Tenth Amended Plan (the "**Plan**") with the US Court on September 15, 2021, which contained certain updates and modifications to the Ninth Amended Plan.

Second Danner Affidavit at para. 16, Motion Record, Tab 2.

10. The Plan resolves the Talc Personal Injury Claims against the Debtors and the other Protected Parties by channelling all Talc Personal Injury Claims to the Talc Personal Injury Trust, which is to be established under sections 524(g) and 105(a) of the US Bankruptcy Code. The Talc Personal Injury Trust will take ownership of the Talc Personal Injury Trust Assets upon the Effective Date, which it will use to resolve the Talc Personal Injury Claims.

Second Danner Affidavit at para. 18, Motion Record, Tab 2.

11. The Talc Personal Injury Trust Assets include certain settlement interests and the proceeds (less certain deductions) derived from the Sale of substantially all of the Debtors' assets to Magris, which closed on February 17, 2021 and resulted in a cash payment of \$223 million to the Debtors. In addition, pursuant to a global settlement (the

¹ Capitalized terms used in this section that are not otherwise defined have the meaning ascribed to them in the Plan.

“**Global Settlement**”) entered into between the Debtors and Cyprus, among other parties, with respect to the treatment of Talc Personal Injury Claims relating to Cyprus as well as disputes between Cyprus and the Debtors relating to certain insurance proceeds and ownership of indemnification rights, the Talc Personal Injury Trust will receive: i) \$130 million in cash; and iii) the rights to certain insurance policies and indemnities.

Second Danner Affidavit at paras. 18 and 21-22, Motion Record, Tab 2.

12. The voting deadline for the Ninth Amended Plan was 4:00 p.m. (prevailing Eastern Time) on March 25, 2021 and was subject to extension by the Debtors. The tabulation that was released on May 7, 2021, showed 79.83% of votes accepting the Plan and 20.17% of votes rejecting the Plan.

Second Danner Affidavit at paras. 24-25, Motion Record, Tab 2.

13. The US Court was expected to conduct the Confirmation Hearing beginning on November 15, 2021. However, the Confirmation Hearing did not proceed as scheduled. Before the Confirmation Hearing was anticipated to begin, several motions (the “**Voting Motions**”) were brought relating to the propriety of certain votes that were cast in favour of the Ninth Amended Plan. It was alleged that certain votes were impermissibly counted as votes in favour of the Ninth Amended Plan. The US Court’s decision on the Voting Motions would determine whether the Plan received the number of votes required under the US Bankruptcy Code.

Second Danner Affidavit at paras. 26-27, Motion Record, Tab 2.

14. On October 13, 2021, the US Court issued its opinion on the Voting Motions (the “**Voting Decision**”). Due to the US Court’s Voting Decision, the Debtors did not achieve the requisite votes in favour of the Ninth Amended Plan. The Debtors have therefore suspended all remaining deadlines related to confirmation of the Plan, the dates that

were scheduled for the Confirmation Hearing were taken off the calendar, and a new date for a future Confirmation Hearing has not been set.

Second Danner Affidavit at paras. 31-33, Motion Record, Tab 2.

C. The Mediation Order

15. Some of the key remaining open issues facing the Debtors in these Chapter 11 Cases are the resolution of insurance coverage disputes and issues with respect to the Cyprus Settlement. As a result, the Debtors determined that the efficient resolution of the Chapter 11 Cases would be facilitated by the appointment of a mediator(s) to help reach a resolution of these outstanding issues before any eventual Confirmation Hearing.

Second Danner Affidavit at paras. 55-58, Motion Record, Tab 2.

16. To this end, on November 30, 2021 the US Court granted the Debtors' request for the issuance of an order (the "**Mediation Order**"), *inter alia*:
- (a) authorizing Kenneth R. Feinberg, Esq. to serve as a mediator to mediate: i) all issues relating to the Cyprus Settlement and related issues (the "**Global Settlement Issues**"); and ii) all issues related to the resolution of disputes over the obligations of certain insurers that issued insurance policies to the Cyprus Debtor and its past and present affiliates (the "**Insurance Issues**", and together with the Global Settlement Issues, the "**Mediation Issues**"); and
 - (b) providing that the mediation with respect to the Insurance Issues proceed jointly between Lawrence W. Pollack, Esq. and Mr. Feinberg (together, the "**Mediators**") and that Mr. Pollack assist Mr. Feinberg in mediating disputes with respect to the Global Settlement Issues, as appropriate.

Second Danner Affidavit at paras. 40-41, Motion Record, Tab 2.

17. The parties that are ordered to participate in the mandatory mediation pursuant to the Mediation Order are listed in Schedule "C" to this factum.

Second Danner Affidavit at para. 42, Motion Record, Tab 2.

18. The Mediators' fees and expenses (the "**Mediation Fees**") are to be shared equally between the Debtors and the Cyprus Debtor. Mr. Feinberg's fees are capped at: i) a flat monthly fee of up to \$125,000 for custodian work and work associated with the exchange of information; ii) a flat monthly fee of \$250,000 for work associated with mediation of the Insurance Issues with the Insurers; and iii) a flat monthly fee of \$300,000 for work associated with the Global Settlement Issues. Mr. Pollack's fees are capped at \$300,000 in the aggregate.

Second Danner Affidavit at para. 54, Motion Record, Tab 2.

19. The term of the Mediation expires on February 28, 2022, which may be extended by further order of the US Court.

Second Danner Affidavit at para. 44, Motion Record, Tab 2.

PART III - ISSUES

20. The issue on this motion is whether this Court should recognize and enforce the Foreign Order in Canada pursuant to s. 49 of the CCAA.

PART IV - ARGUMENT

A. This Court has the Jurisdiction to Recognize the Foreign Order

21. This Court has recognized the Chapter 11 Cases as "foreign main proceedings" pursuant to Part IV of the CCAA. When a foreign main proceeding has been recognized under Part IV of the CCAA, s. 49 of the CCAA 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.

CCAA, s. 49(1).

22. The Court's discretion is broad. Section 50 of the CCAA 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 in the circumstances". 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, 61(1) and (2).

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."

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

Re Babcock & Wilcox Canada Ltd. (2000), 5 B.L.R. (3d) 75 (ONSC) [**Babcock & Wilcox**] at para. 21 ([CanLII](#)).

See also *Re Hollander Sleep Products, LLC*, 2019 ONSC 3238, at para. 41 ([CanLII](#)).

24. Canadian courts do not lightly second-guess the decisions made by a US court in a foreign main proceeding. In a recognition proceeding under Part IV, Canada has an "ancillary role". A Canadian court typically only refuses to recognize an order of another court in situations where s. 61(2) of the CCAA is triggered, which provides that nothing in the CCAA "prevents the court from refusing to do something that would be contrary to public policy." Canadian courts have held that this exception to recognition should be

interpreted narrowly and it is not a justification to deny recognition of the foreign law or relief granted thereunder solely because the law of a foreign jurisdiction is different than Canadian law.

CCAA, s. 61(2).

See e.g. *Babcock & Wilcox* at para. 21 ([CanLII](#)).

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

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

25. In cross-border insolvencies, Canadian and U.S. 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: as businesses become more internationalized, those businesses will have a significant number of assets and also carry-on business 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.

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

26. ITC submits that the Foreign Order does not breach any applicable Canadian law and is not inconsistent with any order that may be granted under the CCAA. On the contrary, courts have appointed individuals to serve as mediator within CCAA proceedings on several occasions.

JTI-MacDonald Corp., Re, Amended and Restated Initial Order dated March 8, 2019 at paras. 41-46 ([Monitor's Website](#)).

Imperial Tobacco Company Ltd., and Imperial Tobacco Canada Ltd., Amended and Restated Initial Order dated March 12, 2019 at paras. 39-44 ([Monitor's Website](#)).

Rothmans, Benson & Hedges Inc., Re, Amended and Restated Initial Order dated April 5, 2019 at paras. 40-45 ([Monitor's Website](#)).

Laurentian University of Sudbury, 2021 ONSC 951 ([Monitor's Website](#)).

B. The Foreign Order Should Be Recognized by this Court

27. The Foreign Order is appropriate and reasonable in the circumstances:

- (a) ***The Mediators Are Highly Qualified*** – Mr. Feinberg is one of the U.S.'s leading experts in mediation and alternative dispute resolution. He has achieved successful results having acted as mediator in the insolvency context and in mediating matters involving insurance coverage disputes. Mr. Pollack has extensive experience serving as a mediator and resolving insurance related issues. He is intimately familiar with the Chapter 11 Cases having been involved in prior mediation sessions involving the Debtors and certain insurers and in assisting to achieve the Cyprus Settlement.

Second Danner Affidavit at paras. 48-53, Motion Record, Tab 2.

- (b) ***The Mediators' Fees Are Reasonable*** – The Mediation Fees are commensurate with the experience and capabilities of the Mediators and the anticipated difficulty of the Mediation. There are at least 20 Mediation Parties that are required to participate in the Mediation. Additionally, disputing the Mediation Issues at Plan confirmation will be an expensive and time-intensive endeavour. Payment of the Mediation Fees, which will be a shared expense between the Debtors and the Cyprus Debtor, at this stage to compensate the highly capable Mediators for their intensive efforts to reach a resolution in advance of Plan confirmation is a prudent trade-off.

Second Danner Affidavit at paras. 42, 54 and 56, Motion Record, Tab 2.

(c) **Mediation Benefits The Debtors' Estates** – The mandatory Mediation represents a net-benefit to the Debtors' estates. Issues relating to insurance coverage and the Cyprus Settlement are some of the key gating issues remaining in these Chapter 11 Cases. The Mediation Order maximizes efficiencies by utilizing the complementary expertise of the two Mediators to achieve an orderly resolution of the Mediation Issues and to avoid being consumed by copious amounts of contentious litigation. Ultimately, the Debtors' estates, and the Talc Personal Injury Claimants, will benefit from the resolution of the Mediation Issues on a consensual basis in advance of Plan confirmation. The proposed process for doing so embodied in the Mediation Order represents the best chance to achieve this objective.

Second Danner Affidavit at paras. 55 to 58, Motion Record, Tab 2.

28. The recognition of the Mediation Order is not anticipated to cause any material prejudice to Canadian stakeholders. Recognition of the Mediation 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.

Second Danner Affidavit at para. 59, Motion Record, Tab 2.

29. The Information Officer supports the recognition of the Foreign Order.

Fourth Report at para 54.

30. For these reasons, the Foreign Representative submits that it is appropriate for this Court to recognize and enforce in Canada the Foreign Order.

PART V - RELIEF REQUESTED

31. ITC respectfully requests that this Court issue an order substantially in the form included at Tab 3 of the Motion Record that recognizes and enforces the Foreign Order in Canada.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of December 2021.

Ben Muller

Maria Konyukhova
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Lawyers for the Applicant

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Babcock & Wilcox Canada Ltd (Re)* (2000), 5 B.L.R. (3d) 75 (ONSC) ([CanLII](#))
2. *Hartford Computer Hardware Inc (Re)*, 2012 ONSC 964 (CanLII)
3. *Imperial Tobacco Company Ltd., and Imperial Tobacco Canada Ltd.*, Amended and Restated Initial Order dated March 12, 2019 ([Monitor’s Website](#)).
4. *JTI-MacDonald Corp., Re*, Amended and Restated Initial Order dated March 8, 2019 ([Monitor’s Website](#)).
5. *Laurentian University of Sudbury*, 2021 ONSC 951 ([Monitor’s Website](#))
6. *Massachusetts Elephant & Castle Group Inc (Re)*, 2011 ONSC 4201 ([CanLII](#))
7. *Re Hollander Sleep Products, LLC*, 2019 ONSC 3238 ([CanLII](#))
8. *Rothmans, Benson & Hedges Inc., Re*, Amended and Restated Initial Order dated April 5, 2019 ([Monitor’s Website](#)).

**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;
- (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

- (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.

[...]

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

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

**SCHEDULE “C”
LIST OF MEDIATION PARTIES**

- a) the Debtors;
- b) the TCC;
- c) the FCR;
- d) the Cyprus Debtor;
- e) CAMC;
- f) the Cyprus TCC;
- g) the Cyprus FCR;
- h) Century Indemnity Company, Federal Insurance Company and Central National Insurance Company of Omaha (collectively, the “**Century Insurers**”);
- i) Columbia Casualty Company, Continental Casualty Company, the Continental Insurance Company, as successor to CAN Casualty of California and as successor in interest to certain insurance policies issued by Harbor Insurance Company, Stonewall Insurance Company (now known as Berkshire Hathaway Specialty Insurance Company), National Union Fire Insurance Company of Pittsburgh PA, and Lexington Insurance Company to the extent that they issued policies to Cyprus Mines Corporation prior to 1981 (collectively, the “**Cyprus Historical Excess Insurers**”);
- j) Travelers Casualty and Surety Company (f/k/a The Aetna Casualty and Surety Company) and The Travelers Indemnity Company (collectively, “**Travelers**”); and

k) TIG Insurance Company, as successor by merger to International Insurance Company, International Surplus Lines Insurance Company, Mt. McKinley Insurance Company (formerly known as Gibraltar Insurance Company), Fairmont Premier Insurance Company (formerly known as Transamerica Premier Insurance Company), Everest Reinsurance Company (formerly known as Prudential Reinsurance Company), and The North River Insurance Company (collectively, the “**Riverstone Insurers**” and with the Century Insurers, Cyprus Historical Excess Insurers and Travelers, the “**Insurers**”),

(collectively, the “**Mediation Parties**”).

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

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Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(Returnable December 22, 2021)**

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