

**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 A PLAN OF COMPROMISE OR ARRANGEMENT
OF ARALEZ PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS
CANADA INC.

Applicants

**FACTUM OF THE APPLICANTS
(Returnable October 25, 2018)**

October 23, 2018

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PART I - OVERVIEW

1. Aralez Pharmaceuticals Inc. and its wholly owned subsidiary Aralez Pharmaceuticals Canada Inc. (collectively, the "**Applicants**") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* (the "**CCAA**") pursuant to the initial order of the Ontario Superior Court of Justice (Commercial List) dated August 10, 2018 (the "**Initial Order**"). Richter Advisory Group Inc. was appointed Monitor of the Applicants (the "**Monitor**") in these proceedings (the "**CCAA Proceedings**").

2. This motion is brought by the Applicants seeking an order substantially in the form of the draft order attached at Tab "3" of the Motion Record, approving the Cross-Border Protocol (as that term is defined below).

PART II - THE FACTS

3. The facts with respect to this motion are more fully set out in the affidavits of Andrew I. Koven sworn August 9, 2018 (the "**Koven Affidavit**") and Adrian Adams sworn

October 19, 2018 (the “**Adams Affidavit**”). Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Adams Affidavit.

4. The Applicants are in the business of acquiring, developing, marketing and selling specialty pharmaceutical products. The Applicants are two entities within a larger corporate structure that includes Aralez Pharmaceuticals Management Inc., Aralez Pharmaceuticals R&D Inc., Aralez Pharmaceuticals U.S. Inc., POZEN Inc., Halton Laboratories LLC, Aralez Pharmaceuticals Holdings Limited, Aralez Pharmaceuticals Trading DAC (collectively, the “**Chapter 11 Entities**” and with the Applicants, the “**Aralez Entities**”).

5. On August 10, 2018, the Applicants were granted creditor protection and related relief under the CCAA pursuant to the Initial Order. On the same day, the Chapter 11 Entities filed voluntary petitions in the United States Bankruptcy Court for the Southern District of New York (the “**U.S. Court**”) under chapter 11 of title 11 of the United States Bankruptcy Code (the “**Chapter 11 Proceedings**” and together with the CCAA Proceedings, the “**Restructuring Proceedings**”).

6. On October 10, 2018, a process to divest substantially all of the Aralez Entities’ assets through one or more sales pursuant to (a) the CCAA with respect to the Applicants and (b) the United States Bankruptcy Code with respect to the Chapter 11 Entities was approved by orders of this Court and the U.S. Court, respectively (the “**Sales Process**”).

Adams Affidavit at para. 11, Applicants’ Motion Record, Tab 2.

A. THE CROSS-BORDER PROTOCOL

7. The cross-border insolvency protocol (the “**Cross-Border Protocol**”) was developed to facilitate the administration of the Restructuring Proceedings in both Canada and the U.S. The Restructuring Proceedings involve nine entities with globally located assets and involve creditors, prospective purchasers and other interested parties located in Canada, the U.S. and elsewhere. While the Cross-Border Protocol is sufficiently flexible to accommodate any cross-border issue that arises in the Restructuring Proceedings, it is specifically designed to ensure that:

- (a) if needed, it could facilitate a joint hearing or court-to-court communications in the event that approval of a sale process or a sale so requires;
- (b) that Restructuring Proceedings are coordinated to avoid, if possible, conflicting or duplicative rulings by the Courts;
- (c) all parties in interest are provided sufficient notice of key issues in both Restructuring Proceedings;
- (d) the substantive rights of all parties in interest are protected; and
- (e) the jurisdictional integrity of the Courts is preserved.

Adams Affidavit at paras. 13 and 15, Applicants’ Motion Record, Tab 2.

8. The salient provisions of the Cross-Border Protocol are summarized in paragraph 17 of the Adams Affidavit. A copy of the Cross-Border Protocol is attached as Schedule “A” to the Cross-Border Protocol order contained at Tab 3 of the Motion Record.

9. The Chapter 11 Entities intend to seek approval of the Cross-Border Protocol from the U.S. Court as soon as possible.

Adams Affidavit at para. 18, Applicants' Motion Record, Tab 2.

PART III - ISSUES

10. The issue on this motion is whether the Court should approve the Cross-Border Protocol.

PART IV - THE LAW

A. THE CROSS-BORDER PROTOCOL SHOULD BE APPROVED

11. The proposed Cross-Border Protocol is intended to facilitate the orderly administration of these Restructuring Proceedings given their international nature.

12. Cross-border protocols have been approved and implemented by courts across Canada in CCAA proceedings where parallel U.S. proceedings have been commenced under Chapter 11. In particular, cross-border protocols have been adopted where "it is clear that there are issues of overlapping jurisdiction that would make a form of cross-border protocol appropriate". A cross-border protocol is particularly desirable if debtors' cross-border operations are highly integrated and ongoing coordination between the Canadian and U.S. courts is necessary to facilitate an upcoming sales process.

Northstar Aerospace, Inc (Re), 2012 ONSC 3974 at paras. 23-24, Applicants' BOA, Tab 1; *Calpine Canada Energy Ltd (Re)*, 2006 ABQB 743 ["*Calpine*"] at paras. 36 and 39, Applicants' BOA, Tab 2; *Barzel Industries Canada Inc, Re*, 2009 CarswellOnt 9132 (Ont. SCJ [Comm List]) at para. 18, Applicants' BOA, Tab 3.

CCAA, section 11.

13. Cross-border protocols have been used to promote efficiency, fairness and consistency in cross border insolvency proceedings. In *Nortel*, Morawetz J. held that cross-

border protocols provide “the basis for communication and cooperation between the Canadian and U.S. courts, while confirming their independence.” In *Eddie Bauer*, Morawetz J. noted some of the benefits of cross-border protocols, including ensuring that:

(i) both the CCAA and the Chapter 11 Proceedings are coordinated to avoid inconsistent, conflicting or duplicative rulings by the Courts; (ii) all parties in interest are provided with sufficient notice of key issues in both proceedings; (iii) the substantive rights of all parties in interest are protected; and (iv) the jurisdictional integrity of the Court is preserved.

Nortel Networks Corp (Re) (2009), 50 CBR (5th) 77 (Ont SCJ [Comm List]) [“*Nortel*”] at para. 42, Applicants’ BOA, Tab 11; *Eddie Bauer of Canada, Inc (Re)* (2009), 55 CBR (5th) 33 (Ont SCJ [Comm List]) at paras. 27-28, Applicants’ BOA, Tab 12.

14. The Cross-Border Protocol negotiated in the Restructuring Proceedings meets these goals by, *inter alia*, establishing principles for issues arising out of the transnational nature of the Restructuring Proceedings and procedures for the Applicants and their stakeholders to file materials and conduct joint hearings. As such, it is in the best interests of the Applicants and their stakeholders that the Cross-Border Protocol be approved.

Adams Affidavit at para. 14-15, Applicants’ Motion Record, Tab 2.

15. As held in *Calpine*, a protocol should not be drafted in a vacuum, and must address the particular circumstances of the case at hand. The proposed Cross-Border Protocol was developed by U.S. and Canadian counsel to the Aralez Entities, with input from the Official Committee of the Unsecured Creditors and the Monitor.

Calpine, 2006 ABQB 743 at para. 39, Applicants’ BOA, Tab 2; Adams Affidavit at para. 16, Applicants’ Motion Record, Tab 2.

16. The Monitor is of the view that the relief requested by the Applicants is both appropriate and reasonable and as such, the Monitor recommends the approval of the Cross-Border Protocol.

The Third Report of the Monitor at para. 23.

PART V - ORDER SOUGHT

17. For all of the foregoing reasons, the Applicants request an order to approve the Cross-Border Protocol.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of October, 2018.

Stikeman Elliott LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Northstar Aerospace, Inc (Re)*, 2012 ONSC 3974
2. *Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2006 ABQB 743
3. *Barzel Industries Canada Inc, Re*, 2009 CarswellOnt 9132 (Ont SCJ [Comm List])
4. *Nortel Networks Corp (Re)* (2009), 50 CBR (5th) 77 (Ont SCJ [Comm List])
5. *Eddie Bauer of Canada, Inc (Re)* (2009), 55 CBR (5th) 33 (Ont SCJ [Comm List])

SCHEDULE "B"
RELEVANT STATUTES

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

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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Court File No: CV-18-603054-00CL

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Proceeding commenced at Toronto

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(RETURNABLE OCTOBER 25, 2018)

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