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The Hazards of Dual-Filed Reorganization Proceedings in Canada and the United States

RACHELLE F. MONCUR AND ROWENA WHITE

This article discusses some of the challenges that may arise in dual-filed proceedings as a result of the inconsistencies between the law and practice applicable in a proceeding in Canada under the Companies' Creditors Arrangement Act, on the one hand, and a Chapter 11 case in the United States, on the other.

Large corporate reorganization proceedings are rarely confined to a single jurisdiction. While the commencement of ancillary insolvency proceedings in foreign jurisdictions is common, in rarer cases a debtor entity may — depending on the location of its assets, the location of its main operations and creditors, the extent of available ancillary foreign relief, and the demands of its key stakeholders and debtor-in-possession lenders — choose to commence concurrent plenary insolvency proceedings in two jurisdictions. In particular, financially distressed North American companies with assets, operations and creditors in both the United States and Canada have, at times, chosen to commence concurrent reorganization proceed-

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Rachelle Moncur is a lawyer in the restructuring group at Thornton Grout Finnigan LLP, located in Toronto. Rowena White is a lawyer in the restructuring group at Allen & Overy LLP, located in the firm's New York office. Thornton Grout Finnigan LLP and Allen & Overy LLP acted as Canadian and U.S. counsel, respectively, to the Canadian monitor in the cross-border insolvency proceedings of AbitibiBowater Inc. and certain of its Canadian and U.S. affiliates discussed in this article.

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ings under both the Companies' Creditors Arrangement Act[1] in Canada and Chapter 11 of the United States Bankruptcy Code.[2] While managing cross-border restructuring proceedings is never straightforward, such "dual-filed" proceedings are particularly difficult to coordinate.

A debtor that has commenced parallel plenary reorganization proceedings under both the CCAA and Chapter 11 becomes subject to two complex, and often conflicting, statutory regimes. The task of reconciling these differences will place a significant burden on any debtor that chooses to reorganize in this manner and will likely result in increased costs to the estate and the potential for delay in the respective proceedings. Moreover, a dual-filed debtor's burden is compounded by the fact that, at the commencement of the dual-filed proceedings, it will be very difficult, if not impossible, to predict the issues that will arise and how they may be resolved. Accordingly, to the extent that dual-filed proceedings are necessary, careful planning is required.

This article discusses some of the challenges that may arise in dual-filed proceedings as a result of the inconsistencies between the law and practice applicable in a CCAA proceeding, on the one hand, and a Chapter 11 case, on the other, with particular reference to the recent cross-border cases of AbitibiBowater Inc. and certain of its Canadian and U.S. affiliates, seven of which were the subject of dual-filed proceedings under the CCAA and Chapter 11.[3]

GENERAL IMPLICATIONS OF DUAL-FILED PROCEEDINGS

Operating in Two Systems

A debtor that commences parallel plenary proceedings under both the CCAA and Chapter 11 will inevitably face a number of logistical and technical difficulties as it seeks to conduct its reorganization within two statutory frameworks. Because the two statutes establish different procedural rules and, in some contexts, provide inconsistent substantive rights to creditors and inconsistent powers to the debtor, it may be necessary for each proceeding to accommodate foreign concepts in order to satisfy all applicable requirements of the two jurisdictions and to ensure the fair and

equal treatment of all stakeholders. Moreover, in addition to reconciling the technical differences between the Bankruptcy Code and the CCAA, the debtor must deal with two sets of statutorily appointed participants in the proceedings, the roles and responsibilities of which may not be readily understood or easily accommodated in the parallel process.

In many cases, the result will be that the comparatively flexible regime under the CCAA must bend to accommodate the extensive and often highly prescriptive provisions of the Bankruptcy Code. The CCAA is a relatively short statute and, although enacted in 1933, use of the CCAA to effect large corporate reorganizations has only become commonplace over the past two decades. The CCAA affords substantial flexibility to those organizations that choose to restructure within its framework. In contrast, the Bankruptcy Code is a long and complex statute, supported by the equally prescriptive Federal Rules of Bankruptcy Procedure and more than a century of supplemental case law. In dual-filed proceedings, the extensive provisions of the Bankruptcy Code will implicate not only substantive issues of, for example, claims treatment and plan formation, but also noticing requirements (which tend to be more onerous under the Bankruptcy Code and related rules than under the CCAA), standing, and the extent to which court approval must be sought in respect of actions taken by a debtor during the pendency of the case.

Even in circumstances where the requirements of the CCAA and the Bankruptcy Code are substantially similar, some duplication of effort will be inevitable. By way of example, non-ordinary course asset sales will require the approval of two courts, and the bidding procedures, stalking horse protections, auctions and notification procedures must conform with the legal requirements and customary practice in both Canada and the United States.

Balancing the Roles of the Key Participants in CCAA and Chapter 11 Cases

Under both the CCAA and Chapter 11, the debtor's prepetition management generally remains in control of the entity during the pendency of the reorganization (known in both cases as a "debtor-in-possession" or "DIP"). However, both statutes establish certain oversight roles to be per-

formed during the case in order to protect the interests of all creditors, or a subset of creditors, and the integrity of the system as a whole. Where parallel plenary proceedings have been commenced, it is particularly important to reconcile the various functions of such participants and to provide a means of coordinating their respective roles in cases of conflict or overlap. Depending on the particular circumstances of the case, the exercise of rights and powers by such non-debtor participants may heavily influence the nature and progress of the proceedings.

The CCAA provides for the mandatory appointment of a person to monitor the business and financial affairs of the debtor company during the CCAA proceedings.[4] The monitor appointed in CCAA proceedings is an officer of the court and reports periodically with respect to the management and operations of the debtor. The monitor has an obligation to act independently and must consider not only the interests of the debtor, but also the interests of all of the creditors and those interested in the affairs of the debtor.[5] The monitor assumes an active role in the claims process, the resolution of intercompany, creditor and employee issues, approval of the termination of contracts, bidding procedures and the disposition of assets.[6] The monitor also investigates the financial condition of the debtor, its assets and liabilities, and the operation of its business, and participates in the formulation of the debtor's plan of compromise or arrangement, all of which is similar to the mandate attributable to the statutory committee of unsecured creditors ("UCC") appointed in Chapter 11 cases, as described below.

Monitors are not appointed in Chapter 11 cases and the Bankruptcy Code does not provide for any single participant in a Chapter 11 case with a similar role. Rather, similar functions to those performed by a monitor in a CCAA proceeding may be fulfilled by a combination of Chapter 11 participants, including the UCC, the United States Trustee, and, in some cases, an "examiner" appointed under Section 1104 of the Bankruptcy Code.

While not mandatory in every case, a UCC is generally appointed in large Chapter 11 proceedings to act as an advocate of the debtor's prepetition unsecured creditors. The UCC is entitled to, among other things, consult with the debtor concerning the administration of the case, investigate the financial condition of the debtor, its assets and liabilities and the operation of its business, and participate in the formulation of the Chap-

ter 11 plan.[7] This is the case even in circumstances where the unsecured creditors are clearly "underwater" and do not hold an economic stake in the process. The UCC is a fiduciary of the unsecured creditors it represents, but is not a fiduciary of the debtor or the estate generally. As such, the UCC may constitute a formidable opponent of the debtor, its secured creditors, and/or equity holders in a Chapter 11 case.

In dual-filed proceedings, there is an interplay between the monitor and the UCC. The input and consent of both the monitor and the UCC will be required in respect of many matters throughout the duration of the cases. At times, the monitor and the UCC may be at odds, particularly given that the mandate of the monitor is to act independently and in the best interests of the debtor and its creditors, while the UCC's mandate is to act solely in the interests of the estate's unsecured creditors. Some examples of the compromises reached as a result of the extensive consultation between the monitor and the UCC in the Abitibi proceedings are described throughout this article.

In addition to the monitor and the UCC, a dual-filed debtor must also interact and cooperate with certain other Chapter 11 and CCAA participants. For example, the United States Trustee, a bankruptcy "watchdog" established by the U.S. Department of Justice, will appear and participate in every Chapter 11 case and is responsible for supervising the administration of the case. The bankruptcy court may also appoint an independent "examiner" to investigate and report on the conduct, assets, liabilities and financial condition of a Chapter 11 debtor, its business operations, and any other matter relevant to the formulation of a plan of reorganization.[8] Both the CCAA and the Chapter 11 processes may also include the appointment of a chief restructuring officer to assist the debtor companies in restructuring their affairs.[9]

While each of the participants in a CCAA or Chapter 11 case plays an important role in the respective regimes, particular care must be taken in the context of a dual-filed proceeding to manage the impact of such participation on the parallel process. For example, if two statutory participants are tasked under statute or by court order with investigating the same claims or conduct of the debtor, there is a risk of unnecessary duplication of effort or inconsistent findings that must subsequently be reconciled by

the two courts. Where a particular action or process requires the consent of multiple entities in the two proceedings, any withholding of such consent will delay the resolution of the issue in both jurisdictions and the negotiation of a satisfactory consensual resolution may require more time and resources than would otherwise be the case. In addition, the costs associated with two sets of statutorily appointed parties must be considered prior to commencing parallel plenary proceedings.

RECONCILING INCONSISTENCIES IN DUAL-FILED PROCEEDINGS

Dual-filed proceedings may also lead to a number of procedural and substantive issues that complicate the administration of the cases. Accordingly, each proceeding must consider and often accommodate the foreign concepts of the other proceeding in order to satisfy the applicable requirements of each jurisdiction.

Procedural Considerations

The Claims Procedure

A number of procedural issues arose throughout the Abitibi proceedings, primarily in respect of the claims process and, in particular, the treatment of claims filed against the dual-filed debtors. These issues related to, among other things, differences in the form of proofs of claim, the jurisdiction in which such claims were to be filed and subsequently adjudicated, the filing of duplicate claims in both proceedings (often for contradictory amounts), and the treatment of scheduled claims in the Chapter 11 proceedings.

Claims against a debtor in Chapter 11 proceedings are typically scheduled. The Bankruptcy Code requires that a debtor file a schedule of assets and liabilities within 14 days of the commencement of the case,[10] which schedule constitutes *prima facie* evidence of the validity and amount of the claims of creditors, unless such claims are scheduled as disputed, contingent or unliquidated.[11] Creditors whose claims are scheduled as dis-

puted, contingent or unliquidated, or whose claims are not scheduled at all, must file a proof of claim by a date fixed by the court in order to have their claim considered in the Chapter 11 case.[12] By contrast, claims procedure orders are issued in CCAA proceedings, which detail the procedures to be followed in respect of filing claims and the review and determination of such claims. In a CCAA case, there is no equivalent of the scheduling of claims as in a Chapter 11 proceeding; however, given the flexible nature of the CCAA, a debtor subject to dual-filed proceedings may choose to integrate such scheduled claims into its claims process.

In the Abitibi proceedings, the Canadian court issued a number of claims procedure orders which set forth the procedures to be followed in respect of the filing of certain claims against the CCAA debtors, including the dual-filers, and identified the procedures to be followed in reviewing and determining such claims. In addition, the U.S. bankruptcy court modified the usual Chapter 11 process by issuing an order confirming that any person or entity asserting a claim against a dual-filer should file its proof of claim pursuant to the procedures established in the CCAA proceedings. Such proofs of claim, timely filed with the monitor against any dual-filer, were deemed to be timely filed claims against the dual-filers in the Chapter 11 proceedings. In order to have their claims accepted in the CCAA proceedings, creditors of dual-filers were not permitted to simply rely upon the schedule of claims filed in the Chapter 11 case as described above.

Both the Canadian court and the bankruptcy court also approved a "Cross-Border Claims Protocol" in the Abitibi proceedings (not to be confused with the cross-border protocols dealing with general procedural issues that are typically approved by both courts at the commencement of a cross-border proceeding). Cross-border claims protocols are often prepared in consultation between the debtors, the monitor and the UCC. The purpose of a cross-border claims protocol is to establish an efficient and consistent procedure with respect to the review and determination of claims that have been filed against debtors that are subject to dual-filed proceedings and to ensure, to the extent possible, that the universe of claims against such debtors is identical in both proceedings. A cross-border claims protocol is necessary to coordinate the claims processes in both the Chapter 11 proceedings and the CCAA proceedings, which, al-

though similar in purpose, are different in a number of important respects. In particular, the claims processes in the two jurisdictions differ in respect of the dissemination of claim information and the roles to be performed by the monitor and the UCC in the CCAA and Chapter 11 proceedings, respectively.

The Cross-Border Claims Protocol that was approved in the Abitibi-Bowater proceedings addressed a number of issues, including those associated with the mailing of claims packages to all known creditors and the filing of claims in each of the proceedings. In order to simplify and coordinate the claims process with respect to the dual-filers, all claims against the dual-filers were required to be filed with the monitor in the CCAA proceedings rather than in the Chapter 11 proceedings, although the role of the monitor in reviewing such claims was modified to address certain concerns raised by the UCC. For example, the monitor was required to review each proof of claim filed against a dual-filer, but was not permitted to accept, amend or disallow any claim or part thereof for an amount in excess of CDN$100,000 unless, prior to such intended treatment, the monitor consulted with the UCC. With respect to claims below the $100,000 threshold, the monitor was permitted to accept, amend or disallow any such claim filed against a dual-filer without advance notice to the UCC; provided, however, that the monitor was required to provide the UCC with periodic reports identifying such claims. In addition, the monitor was not permitted to accept, amend or disallow any intercompany claims against any of the dual-filers without first consulting with the UCC.

As is customary for these types of protocols, nothing in the Cross-Border Claims Protocol implemented in the AbitibiBowater proceedings affected the substantive rights of any party, nor did it determine the choice of law applicable to the determination and ultimate allowance and treatment of claims filed in the insolvency proceedings. While not the subject of this article, the potential jurisdictional implications of the cross-border claims procedures adopted in a dual-filed proceeding must be considered during the drafting of procedural orders and disclosures to creditors, as the impact of the claims process followed by a particular creditor (and the question of which court should determine such impact) could potentially give rise to complex and uncertain litigation during the reorganization proceedings.

The Sanction and Confirmation Hearings

Where there are dual-filed debtors, both the CCAA plan and the Chapter 11 plan are usually conditional upon implementation of the other. Without a sanction order in the CCAA proceedings and a confirmation order in the U.S. proceedings, a plan of reorganization may fail to be implemented. Furthermore, the delay in the issuance of either of these orders may result in additional costs to the estates.

Although the end result is often the same, the path to implementation in the two processes is often very different. These differences may frustrate those participants in the proceedings who are unfamiliar, and perhaps unsatisfied, with the parallel proceeding. In CCAA proceedings, for example, the Canadian court relies heavily on the monitor to not only comment on the fairness of the CCAA plan and make recommendations in respect thereof, but to also bring various parties with competing interests together in an attempt to achieve a consensus outside of the courtroom. Any remaining adversarial issues are often addressed with the Canadian court in a summary fashion. By contrast, in Chapter 11 cases, which do not involve any court-appointed officer acting in a role equivalent to the monitor, the parties and the court place greater reliance on the adversarial system to reach a fair resolution, often resulting in a more lengthy confirmation process. Although the participants in a Chapter 11 case do, of course, often engage in extensive out-of-court negotiations prior to the confirmation hearing, in many cases dissatisfied parties will ultimately choose to have their disputes play out before the U.S. bankruptcy court. Chapter 11 participants who are accustomed to such traditional methods of dispute resolution may view the CCAA process as lacking transparency or due process. CCAA participants, on the other hand, may view the U.S. system as unnecessarily lengthy and adversarial and, as a result, more inefficient and expensive.

In the AbitibiBowater proceedings, the Amended and Restated Plan of Reorganization and Compromise filed in the CCAA proceedings was approved by the Canadian court on September 23, 2010, following a one-day hearing that included the hearing of objections of certain bondholders. Implementation of the Canadian plan was conditional upon implementation of the U.S. plan and vice versa. The confirmation hearing in the Chapter 11 proceedings commenced on September 24, 2010, and, after six

days of argument and three subsequent telephonic hearings (heard over a two-month period), the U.S. Debtors' Second Amended Joint Plan of Reorganization was confirmed by the bankruptcy court on November 23, 2010, a full two months later. Accordingly, the implementation date for both plans did not occur until December 9, 2010.

The delay in the Chapter 11 proceedings was due, in part, to the fact that a number of parties in interest objected to confirmation of the U.S. plan, including certain bondholders and several shareholders, each of whom participated in the confirmation hearing. By contrast, any opposition to the application by the debtors for an order sanctioning the plan in Canada was either addressed by agreement among the parties in the sanction order or was dismissed by the Canadian court. It was estimated at the Canadian sanction hearing that the cost per month to the Abitibi estate of any delay in emergence from the CCAA process would be approximately $30 million, on account of professional fees, financing costs (including interest on a portion of the debtors' exit financing that closed in October 2010), and costs associated with the delay in implementing cost reductions set forth in new collective bargaining agreements that did not become effective until emergence.

Substantive Considerations

In addition to the procedural issues presented by dual-filed proceedings, differences in the substantive law applicable in the respective proceedings complicates the administration of the cases and creates further challenges for the debtor, the monitor and the UCC. Reconciling these differences will often require the dual-filed debtor to adopt, for both proceedings, the outcome required in one proceeding that is most favorable to the affected creditors (and therefore, in many instances, more expensive for the estate). Some common examples of substantive inconsistencies between the CCAA and Chapter 11 affecting secured and unsecured creditors — which are by no means exhaustive — are discussed below.

Claim Treatment: Secured Creditors' Right to Adequate Protection

For secured creditors, one of the key distinctions in the treatment of claims and creditor rights under the CCAA, on the one hand, and the Bank-

ruptcy Code, on the other, is the availability of the remedy of "adequate protection," a right provided under the Bankruptcy Code for which there is no equivalent under the CCAA. A secured creditor[13] may seek "adequate protection" in a Chapter 11 case to protect its interest in property of the debtor from diminution in value caused by the automatic stay, the debtor's use, sale or lease of property, or the grant of a new lien on such property to a postpetition lender. Adequate protection may be provided in a variety of forms: a cash payment or periodic cash payments, additional or replacement liens on the original collateral or other property of the debtor, or such other relief as will result in the secured creditor receiving the "indubitable equivalent" of its interest in the debtor's property.[14]

To the contrary, the CCAA and Canadian case law do not recognize the concept of adequate protection and, as a result, in dual-filed cases the potential exists for inconsistent relief being granted in the debtors' respective cases in each jurisdiction. Dual-filed debtors have sought to reconcile this conflict by seeking authorization of an "adequate protection charge" by the Canadian court in recognition of the relief granted in the parallel U.S. proceeding rather than as a free-standing remedy under the CCAA. For example, in the AbitibiBowater proceedings, the initial order issued by the Canadian court contained provisions granting a charge over the property of the Bowater entities that were subject to the CCAA order, many of whom were dual-filers. This charge was referred to in the initial order as the "Bowater Adequate Protection Charge" and was intended as security for the diminution in value, if any, of the security held by the Bowater bank syndicate after the date of the issuance of the initial order.

Claim Treatment: Unsecured Creditors and Priority Claims

Unsecured creditors also enjoy certain enhanced rights in Chapter 11 cases to which they are not entitled in a CCAA proceeding. One of the key differences in this respect is the distribution regimes for unsecured claims under the Bankruptcy Code and the CCAA. While the CCAA does not rank unsecured claims in any particular priority, the Bankruptcy Code establishes a complex hierarchy of priority claims, requiring that each category of priority creditors be paid in full before any creditor in a lower

category receives any distribution. Section 507 of the Bankruptcy Code establishes ten categories of priority claims, including "administrative expense" claims allowed under Section 503(b); certain claims for unpaid wages; certain claims for contributions to employee benefits plans; claims of individuals for certain amounts held on deposit by the debtor;[15] and certain claims of a governmental unit for taxes, customs duties or penalties.[16] The enhanced rights available under Chapter 11 will result in inconsistent entitlements for unsecured creditors of a dual-filed debtor company that must be considered and, ultimately, reconciled.

Section 503(b)(9) of the Bankruptcy Code provides for the cash payment of claims by suppliers for the value of any goods received by the debtor within 20 days before the commencement of the case, where such goods were sold to the debtor in the ordinary course of business. This priority status is a key benefit to suppliers of a Chapter 11 debtor and one that is not afforded to suppliers of a CCAA debtor.

To deal with this conflict in the AbitibiBowater proceedings, the debtors, in consultation with the monitor and the UCC, modified the CCAA claims process and the CCAA plan so as to allow supplier creditors filing claims against dual-filers to receive the same priority treatment as those suppliers that filed claims against the U.S. debtors in the Chapter 11 proceedings. In this respect, the dual-filers and the monitor recognized that all prepetition suppliers of the dual-filers, whether domiciled in the United States or in Canada, should be treated equally.

Prepetition wage claims are also treated differently under the two regimes. The Bankruptcy Code provides employees of the debtor with a priority claim for wages, salary and certain other entitlements, to a specified maximum amount that is currently US$11,725 for cases commenced on or after April 1, 2010.[17] In contrast, under the CCAA, employees hold unsecured claims that do not have priority status. While the CCAA prohibits the court from sanctioning a plan of arrangement or compromise unless the plan provides for the payment of all amounts the employees would be qualified to receive under the Bankruptcy and Insolvency Act,[18] this requirement does not give rise to the same level of priority treatment provided under the Bankruptcy Code. The differences in treatment of prepetition wage claims is relevant not only in dual-filed cases, but also in cross-border group re-

structurings where some companies are in Chapter 11 and others are under CCAA protection — for example, where employees of a corporate group are formally employed by different entities and continue to work for the debtors during the course of the CCAA and Chapter 11 cases, equality of treatment between co-workers will be important for maintaining employee morale. It may be necessary in such cases to provide *all* employees with the priority treatment available under the Bankruptcy Code, even where the employer entity is a CCAA debtor that is not obligated to do so.

In the AbitibiBowater proceedings, the debtors, the monitor and the UCC recognized this difference in treatment for employees of the U.S. debtors and the dual-filers on one hand, and the CCAA debtors on the other, and provided for a supplemental distribution in cash to such present or former employees who held a proven claim and were employed by the CCAA debtors on or after the date of filing; provided, however that this supplemental distribution would not exceed CDN$5 million. It should be noted, however, that providing priority payments for unsecured creditors in Canada, where unsecured creditors are generally treated equally, may lead to other unsecured creditors demanding similar treatment or voting against a plan that provides for unequal treatment. This is a risk that should be considered in the context of attempting to treat creditors of dual-filers the same on both sides of the border.

In addition to consistent treatment for statutory priority claims, consideration must be given to the treatment of claims filed by creditors generally. Other issues that may arise include, for example, a creditor's right to include postpetition interest on its claim, vulnerability of transactions to being set aside under applicable avoidance law and the impact of such avoidance actions on the relevant creditor's claims against the debtor, and the rules applicable to the assumption, assignment or rejection of "executory contracts."

For the most part, the debtors in the AbitibiBowater proceedings used the flexible nature of the CCAA to conform the treatment of creditors in Canada to that prescribed under Chapter 11. In some cases, however, the U.S. debtors brought applications before the bankruptcy court to effect equal treatment for creditors in instances where the CCAA process dictated the ultimate outcome. One such example was the treatment of claims

filed on behalf of eligible employees with respect to a synergy bonus program that was in place prior to the date of filing. The matter was referred to a claims officer in the CCAA proceedings for a hearing on the merits and a determination as to the validity of such claims. The claims officer ultimately confirmed that the synergy bonus was properly due and owing and thus a valid claim in the CCAA proceedings. The affected debtors were of the view that all employees eligible for the synergy bonus should have their claims increased on account of their respective synergy bonus entitlement. Therefore, in the CCAA proceedings, the monitor revised the claims of the affected employees by increasing the allowed claim of each employee by the amount of their respective synergy bonus. In the Chapter 11 proceedings, in deference to the determination made by the CCAA claims officer and accepted by the CCAA debtors and the monitor, the U.S. debtors sought and obtained the permission of the bankruptcy court to similarly revise the claims of the U.S. employees so as to ensure consistent treatment of all Abitibi employees, regardless of which side of the border their employer had filed its case.

THE HAZARDS OF DUAL-FILED PROCEEDINGS

Ultimately — as recently demonstrated throughout the AbitibiBowater proceedings — the overall impact of a dual-filed proceeding on the debtor and its stakeholders is likely to be twofold. In the first place, the nature of the respective statutes is such that the process under the CCAA will, in many cases, need to be modified to accommodate a number of mandatory Chapter 11 requirements, which may hamper the speed and flexibility with which a CCAA proceeding would otherwise be conducted. Second, where the two regimes conflict — as they often will — generally the outcome that is more favorable to the affected creditors must be adopted in both proceedings. In other words, the dual-filed debtor may end up adopting the least appealing (and most expensive) aspects of both regimes. The dual-filed debtor will also face, for the duration of the proceedings, the additional procedural challenges of coordinating the respective roles of the various statutory participants, minimizing duplication of effort, dealing with "cultural" differences and managing the expectations of its stakeholders and the preferences of the

respective courts. The downside of commencing a dual-filed proceeding is therefore potentially quite substantial.

It may be the case that, as the extent of the discretionary relief available under Chapter 15 of the Bankruptcy Code and Part IV of the CCAA continues to be more clearly defined by the courts, the use of dual-filed plenary proceedings may decrease, with debtors and other participants relying instead on the protections available in the relevant ancillary proceedings. The issues discussed in this article provide only a handful of examples of the procedural and substantive differences that dual-filed debtors must navigate during the course of the respective reorganization proceedings. Although there are a number of readily identifiable inconsistencies, such as the treatment of priority payments to creditors of dual-filed debtors, other issues will inevitably arise throughout the proceedings that will require careful consideration and may consume substantial resources of the estates.

NOTES

[1] Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA").

[2] 11 U.S.C. § 1101 *et seq.* ("Chapter 11"). Recent cross-border insolvency proceedings that have included "dual-filed" debtors include *In re AbitibiBowater Inc., et al.*, Case No. 09-11296 (Bankr. D. Del.); *In the Matter of the Plan of Compromise or Arrangement of AbitbiBowater Inc., et al*, Case No. 500-11-036133-094 (Quebec); *In re Smurfit-Stone Container Corporation, et al.*, Case No. 09-10235 (Bankr. D. Del.); *In the Matter of the Plan of Compromise or Arrangement of Smurfit-Stone Container Canada Inc., et al.*, Case No. CV-09-7966-00CL (Ontario); *In re Quebecor World (USA) Inc., et al.*, Case No. 08-10152 (Bankr. S.D.N.Y.); *In the Matter of the Companies' Creditors Arrangement Act: Quebecor World Inc., et al.*, Case No. 500-11-032338-085 (Quebec); *In re Pope & Talbot, Inc., et al*., Case No. 07-11738 (Bankr. D. Del.); *In the Matter of a Plan of Compromise or Arrangement of Pope & Talbot Ltd., et al.*, Case No. S077839 (British Columbia).

[3] The Abitibi Group, a global producer of newsprint and forest products headquartered in Montreal, Quebec, commenced cross-border proceedings under Chapter 11 and the CCAA in April, 2009. In total, 74 cases were filed (35 cases under Chapter 11 and 39 cases under the CCAA). Seven Abitibi

entities commenced "dual-filed" cases under both Chapter 11 and the CCAA. The AbitibiBowater companies emerged from bankruptcy following the implementation of the respective Canadian and U.S. plans of reorganization in December 2010.

[4] CCAA, § 11.7.

[5] *Re United Used Auto & Truck Parts Ltd.* (1999), 12 C.B.R. (4th) 144 (B.C. S.C.), among other cases.

[6] CCAA, § 23.

[7] 11 U.S.C. § 1103.

[8] 11 U.S.C. § 1106.

[9] Both courts may also appoint additional committees of creditors or of equity holders if necessary to assure their adequate representation, and the formation of unofficial, or "ad-hoc," committees is also common. In addition, the CCAA process may include the appointment of an information officer in an effort to keep the Canadian court apprised of the status and progress of the Chapter 11 proceedings in respect of those U.S. debtors who have sought (and obtained) an order in Canada recognizing the U.S. foreign proceedings (that is, Chapter 11 debtors that are affiliated with the CCAA debtors, but are not the subject of dual-filed cases).

[10] 11 U.S.C. § 521(a)(1)(B); Fed. R. Bankr. P. 1007.

[11] Fed. R. Bankr. P. 3003(b)(1).

[12] Creditors with correctly scheduled claims may also choose to file a proof of claim, but are not required to do so in a Chapter 11 case.

[13] In addition to creditors holding a consensual and perfected security interest in property of the debtor, the right to adequate protection may be extended to other creditors with an interest in the debtors' property; for example, co-owners of property, creditors with a right to recover property under a consignment, and creditors holding a right of setoff.

[14] 11 U.S.C. § 361. Adequate protection may not, however, be provided in the form of an administrative expense claim (although if the adequate protection granted to a creditor ultimately fails to sufficiently compensate such creditor for the diminution in value of the relevant property, the creditors' claim for failure of adequate protection takes priority over other administrative expenses). *See* 11 U.S.C. § 507(b).

[15] Currently capped at US$2,600 for cases commenced after April 1, 2010.

[16] The Bankruptcy Code also provides priority status for certain other claims, which are unlikely to be applicable to an entity that has also petitioned for

relief under the CCAA, including domestic support obligations; "gap" creditors in involuntary cases (creditors holding ordinary-course claims that arose between the date of the filing of the involuntary petition and the entry of an order for relief); certain claims arising out of the debtor's storage of grain or fish; capital maintenance obligations of federal depository institutions; and certain death or personal injury claims where the debtor was driving while intoxicated. *See* 11 U.S.C. § 507(a).

[17] 11 U.S.C. § 507(a)(4). This priority treatment extends only to entitlements earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first.

[18] CCAA, § 6(5). In a bankruptcy or receivership in Canada, the Bankruptcy and Insolvency Act creates a charge against a debtor's current assets in favor of employees to a maximum of CDN$2000 under the Wage Earner Protection Program. In addition, a preferred claim in the maximum amount of CDN$1,000 may be permitted in priority to the claims of unsecured creditors.