Supreme Court: Environmental Orders Can Be Subject to Bankruptcy Law

When a company files for bankruptcy, its creditors must typically file claims against the company's estate for any debts owed to them. The estate then pays these claims in an order specified by the bankruptcy laws. And often these claims are settled, resulting in the creditors getting paid less than they were owed. Suppose a province issues remediation orders to a company that subsequently files for bankruptcy. Are such orders subject to insolvency law' In other words, can the province force the company to fulfill these environmental obligations before paying its creditors' The Supreme Court of Canada recently decided exactly that issue. Here's a look at its decision.

THE CASE

What Happened: A company closed its operations in NL due to financial problems and began the debt restructuring process under the *Companies' Creditors Arrangement Act* (CCAA). The NL government issued five remediation orders to the company but it didn't comply with them. NL asked the court to rule that its orders weren't claims subject to the CCAA. The company argued that because the orders were monetary in nature, they were subject to the CCAA. The court ruled that the orders *were* subject to the CCAA. The province appealed to the Supreme Court of Canada.

What the Court Decided: The Supreme Court ruled that environmental orders requiring the remediation of contaminated property can, if three requirements are met, be considered monetary claims and thus subject to the CCAA and insolvency proceedings.

The Court's Reasoning: The Court said that not all regulatory orders are monetary in nature and thus subject to an insolvency proceeding. To determine whether a regulatory order, such as a remediation order, is a monetary claim under the CCAA, the Court spelled out a three-prong test:

1. There must be a debt, liability or obligation to a creditor;
2. That debt, liability or obligation must have arisen before the time limit for inclusion in the CCAA claims process; and
3. It must be possible to attach a monetary value to the debt, liability or obligation.

Here, the first criterion was met because NL had identified itself as a creditor by resorting to environmental protection enforcement mechanisms. The second requirement was also satisfied because the environmental damage that the orders addressed had occurred before the CCAA proceedings. The case turned on the third requirement, raising the issue of whether orders that aren't expressed in monetary terms can be translated into such terms.

Claims can be filed in insolvency proceedings even if they're contingent on an event that hasn't happened yet provided that the event isn't too remote or speculative. In the context of an environmental protection order, there must be sufficient indication that the regulatory body that triggered the enforcement mechanism will ultimately do the remediation work and then assert a claim for reimbursement of the remediation costs. If there's sufficient certainty in this regard, the order can be subject to the bankruptcy process.

The lower court's assessment of the facts in this case, particularly its finding that the orders were the first step towards performance of the remediation work by NL, can only lead to the conclusion that it was sufficiently certain that the province would perform the remediation work and thus fall within the definition of a creditor with a monetary claim, concluded the Court. It added that subjecting remediation orders to the claims process doesn't extinguish the company's environmental obligations; it merely ensures that the province's claim will be paid in accordance with bankruptcy law. Therefore, subjecting environmental protection orders to the claims process isn't an invitation to corporations to restructure in order to avoid their environmental liabilities, explained the Court [*Newfoundland and Labrador v. Abitibi-Bowater Inc.*, [2012] SCC 67 (CanLII), Dec. 7, 2012].

ANALYSIS

The lower court had ruled that NL was essentially trying to jump to the head of the creditors' line. That is, forcing the company to comply with the environmental orders would give NL more of a priority over the claims of the company's other creditors than what was already provided for in the CCAA. The Supreme Court essentially agreed. It also explained that making the company's estate pay to comply with the remediation orders would shift the burden of paying for such remediation to its third-party creditors, who weren't responsible for the contamination. And such an outcome would violate the 'polluter-pays principle,' which underlies Canadian environmental law. (For more on this principle, see 'Environmental Incidents: Part 1: 'Polluter Pays' & Liability for Costs of Emergency Environmental Measures.') The *Abitibi* decision provides a useful framework for assessing environmental claims in bankruptcy and provides guidance for courts, creditors and insolvent companies with pollution issues.