Docket: N/M/17/2010

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MIRAMICHI

Citation Number: 2010 NBQB 090

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.C-36 AS AMENDED

IN THE MATTER OF ATCON CONSTRUCTION INC., ATCON INDUSTRIAL SERVICES INC., ATCON MANAGEMENT SERVICES INC., ATCON CIVIL LTD., DYCON CONSTRUCTION LTD., ATCON STRUCTURES INC. and ENVIREM TECHNOLOGIES INC., all of which are carrying on business in the Province of New Brunswick

Between:

THE BANK OF NOVA SCOTIA, a Canadian Chartered Bank with a registered office in the City of Saint John, Province of New Brunswick

APPLICANT

- and -

ATCON CONSTRUCTION INC., ATCON INDUSTRIAL SERVICES INC., ATCON MANAGEMENT SERVICES INC., ATCON CIVIL LTD., DYCON CONSTRUCTION LTD., ATCON STRUCTURES INC. and ENVIREM TECHNOLOGIES INC., all of which are carrying on business in the Province of New Brunswick

RESPONDENTS

Before:	Mr. Justice Thomas W. Riordon
Date of hearing:	March 1, 2010
Oral decision:	March 1, 2010
Date of decision:	March 3, 2010

Appearances:

Joshua J. B. McElman, J. Craig McCrea, Q.C. and Jane E. MacEachern	- for the Applicant
No one appearing	- for the Respondents
Howard A. Spalding, Q.C.	- for GE Capital Limited
Robert Creamer and Kelly T. Van Buskirk	- for Caterpillar Financial Services
Natalie LeBlanc and Richard Williams	- for Province of New Brunswick
Jeffrey R.F. Delaney	- for RBC Leasing, EMcap Leasing, KEY Financial Services and GMAC Leasing
Michael J. MacNaughton	- for Ernst & Young Inc.

DECISION

RIORDON, J.:

[1] It is of course necessary for obvious reasons that I decide this application for the appointment of a receiver today. I will give an oral decision reserving the right to make changes in the style or form that do not affect the substance of these reasons.

[2] The Bank of Nova Scotia brings the present application asking that Ernst & Young Inc. be appointed as receiver and receiver manager over all real and personal property of the named companies who are Respondents. It asks that this be allowed without providing security. A parallel application has been brought under the Companies' Creditors Arrangement Act (CCAA) which involves several related companies to those involved in the present proceedings. The Bank asks for an order with terms substantially set out in a draft order attached to its application. The order as drafted and if signed will give very broad powers to the receiver.

[3] Some of the background information in regard to the Respondent companies and related corporations is set out in my decision on the application brought by the Bank under the CCAA. That application for relief asked for by the bank

includes restructuring, continuing to function and selling of business operations as going concerns.

[4] The Bank's application in this matter is made pursuant to Rule 41 of the Rules of Court, Section 33 of the *Judicature Act* and Section 243 of the *Bankruptcy and Insolvency Act.*

[5] The Respondent companies are incorporated under the laws of New Brunswick, have registered offices in Miramichi and carry on business in the provinces of New Brunswick, Newfoundland and Labrador, Alberta and in the North West Territories.

[6] In 1978, Robert Tozer started a small construction company in Miramichi. From a modest beginning the business and Atcon Group grew as a provider of construction services and other commercial operations. Over a period of some 30 years the Acton Group of companies expanded their businesses and geographic marketplace. Those companies have interests and operations in manufacturing wood paneling, construction services including highway and bridge construction, energy services, industrial and environmental services among others. Operations of the Acton companies extended from New Brunswick to Newfoundland and Labrador, Alberta, the North West

Territories, North-eastern United States and Sweden. At its peak, the Acton Group of companies had more than 2000 employees with annual revenues of somewhere in the range of 255 million. Without question the Acton companies have provided much needed employment and income to families, particularly to many in this area. A region which has been hit hard by economic problems and business closures.

[7] Recently, the core construction business of the companies has diminished. It is said that this is as a result of the global economic crisis and the reduction of activity in the oil and gas industry. Obviously those must be very significant factors among others which have resulted in the serious financial issues. As is evident from the application brought under the CCAA much effort has been made to restructure the businesses and keep the companies operating. Upon hearing the application earlier under the CCAA I decided that an Initial Order should issue to allow for restructuring and possible sale of some of the businesses as going concerns.

[8] On June 30, 2009, the Bank extended credit to Atcon Holdings Inc. through seven credit facilities providing a total of $104,275,187.00 in credit. At around that time the

province of New Brunswick guaranteed advances made by the Bank to the Atcon Group to the extent of $63,362,845.00.

[9] In October 2009, the Bank extended additional credit to Atcon so as to implement a restructuring plan that had been developed in August. From my review of documents filed this additional credit established a term loan of $9.4 million. Bank advances are supported by direct security from Atcon, guarantees from associated Atcon companies and also the aforementioned guarantees of the province of New Brunswick.

[10] As of February 22, 2010, the indebtedness from the Atcon Group to the Bank is $99,221,660.51 plus interest, fees, cost and expenses.

[11] Demand for payment of all outstanding obligations was made on February 22, 2010. The Respondent companies were served the next day with Notices of Intention to enforce security in accord with Section 244 of the *Bankruptcy and Insolvency Act*. The Respondent companies have consented to early enforcement of the security and do not oppose the present application. Payment of the outstanding debt has not been made, the Respondent companies have not met their obligations when due.

[12] There are many other secured and unsecured creditors of the Respondent companies. Although not substantiated the Atcon companies are reported to have total indebtedness of somewhere in the range of $250,000,000.00. Some of the unsecured creditors have obtained judgements against the Atcon companies which judgements remain outstanding.

[13] The Bank has the right to seek a court appointed receiver over the Respondent companies and the assets of those companies under the security that it holds.

[14] The foregoing information and much more is contained in much documentation filed in support of this application and in the parallel application pursuant to CCAA. All as is set out in affidavits of Rocco Fabiano and June MacEachern. Mr. Fabiano is the assistant general manager of the Special Accounts Management Division of the Bank of Nova Scotia. He is responsible for administration of the outstanding advances from the Bank to Atcon Holdings Inc., its various subsidiaries and affiliates. Ms. MacEachern is a solicitor with the law firm retained by the Bank to bring the present application.

[15] Mr. Fabiano says in his affidavit that the terms of the credit agreement and the security held have not been respected

and that the Respondent companies are in default. Demands for payment have been made and monies due remains outstanding. Mr. Fabiano says that based on his involvement with the Respondent companies, they are unable to rectify the defaults.

[16] Some of the terms of the various security agreements and the remedies available to the Bank are outlined in paragraphs 20-25 of the affidavit of Mr. Fabiano. They include the right to appoint a receiver or receiver manager. A copy of the general security agreement is attached along with copies of acknowledgements of the Respondent companies.

[17] The Bank says that the Respondent companies no longer have the necessary credit to operate and that they are unable to remedy the defaults and the various interests of the Respondent companies are intertwined. It is maintained that formal court proceedings will allow an orderly administration of the companies. Mr. Fabiano says that a $750,000.00 receivers borrowing charge as suggested by Ernst & Young Inc. is reasonable, he bases this on his past experience.

[18] The jurisdiction to appoint a receiver is found in Section 33 of the *Judicature Act*, Rule 41 of the Rules of Court and Section 243 of the *Bankruptcy and Insolvency Act*.

[19] Section 33 of the *Judicature Act* provides that a receiver may be appointed by interlocutory order of the court in all cases where it appears to the court to be just or convenient that the order should be made.

[20] Rule 41 provides among other things that where an instrument provides for the appointment of a receiver by the court, if it is satisfied that a receiver should be appointed, the court may appoint a suitable person accordingly or make such other order as may be just.

[21] Section 243 of the *Bankruptcy and Insolvency Act* provides that on application by a secured creditor, a court may appoint a receiver if it considers it to be just and convenient to do so. This section of the act sets out what the receiver if appointed can do.

[22] Section 243 of the *Bankruptcy and Insolvency Act* requires that at least 10 days notice be given to the insolvent secured creditor unless the person consents to earlier enforcement. As mentioned earlier in the present instance the Respondent companies have consented to early enforcement.

[23] A receivership is a very powerful tool or remedy of a court to put a person in legal control of a business and in control of assets. The effect of a receivership order is to displace those who would have legal control apart from the appointment of a receiver, such as the directors of a corporation or others with legal control of that business. The definition in the *Bankruptcy and Insolvency Act* of receiver, which of course only applies to that statute is as follow:

> **"receiver" means a person who has been appointed to take, or has taken, possession or control, pursuant to**
>
> **(a) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or**
>
> **(b) an order of a court made under any law that provides for or authorizes the appointment of a receiver or receiver manager,**
>
> **of all or substantially all of**
>
> **(c) the inventory,**
>
> **(d) the accounts receivable, or**
>
> **(e) the other property**

of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

[24] The security agreement given by the Respondents which is in place in favour of the Bank contains the power to appoint a receiver and a receiver manger.

[25] It must of course be determined if there are triggering events to justify the appointment of a receiver, a powerful remedy. In other words are the Respondent companies in default, insolvent, or otherwise in breach of the terms of the security held by the Bank.

[26] In the present instance the Bank says that the Respondent companies no longer have necessary available capital to operate. It says that there is default in the amended security agreement and the security. The Bank has made demand for payment. Mr. Fabiano says that based on his involvement on behalf of the Bank that the Respondent companies cannot rectify the defaults. The Bank has given notice of intention to enforce its security and the companies have consented to early enforcement.

[27] The court has jurisdiction to grant a receivership order as requested. Have the conditions precedent for such an order

been met? Should a receivership order be granted? Is it just or convenient and is it what should or must be done in the present difficult and undoubtedly very unpleasant and unsatisfactory circumstances? A number of considerations must be kept in mind:

1. The cost of a receivership, this is no doubt expensive.

2. A receivership order is a very strong remedy.

3. The risk of dissipation of assets.

4. Will the receivership maximize recovery for all concerned?

5. The number of claimants is relevant and also whether a receiver is needed to bring order to the liquidation.

6. The complexity of the matter.

7. Whether the insolvent business should be operated for a period of time to maximize realized value.

8. Whether the debtor companies did covenant for a receiver on default.

[28] I have considered the foregoing factors and the pros and cons of appointing a receiver. In these circumstances, I think that the options are very limited. The Bank is very aware of the financial crisis faced by the Respondent companies. The Bank has been involved in trying to resolve the situation. An additional credit was approved in October to restructure the corporations without positive results. The Respondent companies do not have any credit to continue operating.

[29] I have read the report of the proposed monitor Ernst & Young Inc. in regard to the parallel proceedings. They have been involved since July 2009, as a consultant to the Bank in reviewing and monitoring the affairs of the Atcon Group companies and in efforts at restructuring. They have looked at the financial information of the companies. The monitor's report prepared says that there are serious cash liquidity problems and that judgements have been signed against the Atcon companies and have been registered in various provinces in Canada. There is evidence that the proceeds of at least one of the contracts in western Canada of one of the companies

or affiliated companies are the subject of garnishment proceedings in the province of Alberta.

[30] Obviously the cost associated with a receivership and the consequences and impact of such an order are concerns. Very often in my limited experience these receiverships take on a life of their own and costs associated are exorbitant.

[31] Nonetheless I can see no viable alternative. Without credit the Respondent companies are unable to operate. They are not able to meet obligations as they are due and they have not been paying obligations in the ordinary course of business. It is therefore my decision and conclusion that the application be allowed and that a receivership order issue as requested. I think that it is necessary and appropriate to do so to achieve the best financial results for creditors and employees of the various companies.

[32] Accordingly Ernst & Young Inc. are hereby appointed as receiver, receiver manager of and over all properties of the Respondent companies without security. I am prepared to sign an order to that effect. The content of the order will be similar to the model order that has been developed by the Commercial List Users Committee of the Superior Court of

Justice in Ontario with appropriate modifications to cover the present situation. I have given a copy of the latest version of the Ontario model in an electronic format to counsel for the Bank and I now ask that he prepare a draft order in that format and bring it to me for review.

[33] The contents of such orders are obviously a concern. In that regard I refer to the decision of Justice Slatter in *Big Sky Living Inc.* [2002] A.J. No. 886. Paragraph 57 reads:

> **"In conclusion, the Applicant has established that it is entitled to an interim receivership order in accordance with s. 47 of the *Bankruptcy and Insolvency Act*. However, the order tendered for signature is overly broad, and overly declaratory and legislative in nature. It purports to affect in general terms the rights of broad and undefined classes of parties who have not received notice of this application. It goes far beyond what is necessary for the protection of the estate of the debtor. It attempts to provide the Interim Receiver with immunities and protections that are not authorized by statute. The Order as presently granted will be extended for a further five days from the date of these Reasons, during which time the Applicant can draft and submit a further order for signature."**

[34] Reference can also be made to the Ontario Court of Appeal decision of *GMAC Commercial Credit Corp. - Canada v. T.C.T. Logistics Inc.*, [2004] O.J. No. 1353. Paragraph 62 of that decision reads:

"As pointed out in such cases as *Big Sky* and *Royal Crest*, and by the bankruptcy judge in this case, the practice of receivers attending on the bankruptcy judge *ex parte*, with a draft order that gives the receiver extensive powers, while at the same time cloaking it with immunity from responsibilities to parties who are not before the court, can no longer be sanctioned. Where unions are involved, the receiver will want to meet with them in order to try to negotiate an accommodation as the basis on which the receiver can proceed to operate the business on an interim basis. There will be leverage, of course, on both sides, as it will normally be in everyone's interest that the business ultimately continue. If the parties can reach an accommodation, then the order can reflect that accommodation, together with a come-back clause to deal with changes in circumstances. If they cannot achieve a consensual accommodation, the bankruptcy judge will be positioned to assist."

[35] In conclusion, I am prepared to sign an order granting the relief requested but not the draft order proposed. The content of the receivership order will be similar to the latest version of the model order developed by the Commercial List Users Committee of the Superior Court of Justice in Ontario with required and appropriate modification. I ask counsel for the Applicant to complete that order and follow the format and submit a draft to me for consideration and approval. I direct that any changes from the model order be either black lined or if submitted electronically using a different color font so that any variations from the model order will be evident. A provision in the order again as in the CCAA matter, in relation to equipment subject to lease agreements with Caterpillar Financial Services Limited will

form part of the terms of the receivership order. That is the equipment not needed for operations and subject to substantiating the validity of security should be returned to them, if issues of security are not in dispute.

[36] In concluding I remind the parties and the receiver of the standard of conduct for receivers which is set out in Section 247 of the *Bankruptcy and Insolvents Act*;

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

Thomas W. Riordon, J.C.Q.B.