Court File No. M/C/___/___

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION AND IN BANKRUPTCY AND INSOLVENCY

JUDICIAL DISTRICT OF MIRAMICHI

IN THE MATTER OF THE RECEIVERSHIP OF:

ATCON GROUP INC., ATCON HOLDINGS INC., ATCON PROPERTY HOLDINGS INC., ATCON VENEER PRODUCTS INC, and ATCON LOGISTICS INC.

PURSUANT TO Section 33 of The *Judicature Act,* R.S.N.B. 1973, Ch. J-2, Rule 41, Rules of Court, New Brunswick and Section 243 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3

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 GROUP INC., ATCON HOLDINGS INC., ATCON PROPERTY HOLDINGS INC., ATCON VENEER PRODUCTS INC, and ATCON LOGISTICS INC., all of which are carrying on business in the Province of New Brunswick

RESPONDENTS

AFFIDAVIT OF ROCCO FABIANO

I, **Rocco Fabiano**, of the Town of Thornhill, Province of Ontario, **MAKE OATH AND SAY:**

1. I am the Assistant General Manager of the Special Accounts Management division of The Bank of Nova Scotia (the "**Bank**") and am responsible for the administration of the outstanding advances from the Bank to Atcon

Holdings Inc. ("**Atcon**") and its various subsidiaries and affiliates (collectively, the "**Companies**" and individually a "**Company**").

2. As such, I have personal knowledge of the matters to which I herein depose, except where stated to be on information and belief and in such cases I do verily believe the truth of same. Certain of the information contained in my affidavit has been provided to me by other representatives of the Bank. In those cases I verily believe the information to be true but have not stated the name of the person who provided me with the information. In addition, certain information has been provided to me by Ernst & Young Inc. ("**E&Y**"), who, as described below, was engaged by the Bank to assist it in reviewing the business, property and affairs of the Companies. Additionally, the information provided by E&Y was primarily based on information provided to E&Y by the Companies. Unless otherwise stated, I verily believe that information to be true.

Incorporation of Affidavit

3. I refer to my affidavit of this same date filed in support of the parallel proceeding requesting relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended in relation to the following Companies:

   a. Atcon Construction Inc. ("**Construction**"),
   b. Atcon Industrial Services Inc. ("**Industrial**"),
   c. Atcon Management Services Inc. ("**Management**"),
   d. Atcon Civil Inc. ("**Civil**"),
   e. Dycon Construction Inc. ("**Dycon**"), and
   f. Atcon Structures Inc. ("**Structures**")

   (the "**CCAA Affidavit**").

4. Any capitalized terms not defined herein have the defined meaning provided in the CCAA Affidavit.

5. In an attempt to eliminate some duplication, I rely on the contents of the CCAA Affidavit which I hereby affirm remain true.

Loans and Security

6. As set out in more detail in the CCAA Affidavit, the Bank extended credit to Atcon pursuant to the Credit Agreement through a total of seven (7) facilities which provided a total of $104,275,187.00 in available credit.

7. The Province of New Brunswick (the "**Province**") guaranteed Atcon's indebtedness to the Bank under four of the various credit facilities. The guarantees total $63,362,845.00.

8. In October 2009, the Bank extended additional credit to Atcon pursuant to the First Amendment (the Credit Agreement as amended by the First Amendment is hereinafter sometimes referred to as the ("**Amended Credit Agreement**"). This credit facility was extended in Facility E in order for Atcon to implement a restructuring plan the Companies had developed in August 2009 (the "**Restructuring Plan**").

9. The Bank's advances are secured by direct security from Atcon and guarantees from each of the Related Guarantors. The Respondents, Atcon Group Inc., Atcon Holdings Inc., Atcon Property Holdings Inc., Atcon Veneer Products Inc, and Atcon Logistics Inc., are Related Guarantors and sometimes hereafter referred to as the "**Receivership**

Companies".

Current Advances

10. In summary, the Bank has operating advances (the "**BNS Line**") and term advances (collectively referred to as the "**BNS Term Debt**") to Atcon which are supported by the Ministerial Guarantees and cross-guarantees and security from the Related Guarantors.

11. The total of the principal amount of the BNS Line and BNS Term Debt as at February 19, 2010 amounted to $85,858,815.51 plus interest thereon from January 22, 2010. Further, the $13,362,845.00 LOC was due and owing as of February 22, 2010.

12. As a result, the Receivership Companies' indebtedness totalled $99,221,660.51 as at February 22, 2010 plus interest, fees, costs and expenses thereon in accordance with the Amended Credit Agreement.

Other Interested Parties, Current Financing and Indebtedness

13. As set out in further detail in the CCAA Affidavit, there are various equipment financiers with registrations under the applicable *Personal Property Security Act* ("**PPSA**") registration systems in the Operating Jurisdictions.

14. I understand from my dealings with the Companies that the security held

by the various secured creditors against them is cross guaranteed and their total indebtedness is approximately $250,000,000.00.

15. Further, there are a number of unsecured creditors who have obtained judgments against certain of the Companies including the Receivership Companies.

Events Of Default

16. There have been defaults under the Amended Credit Agreement and the Security (the "**Defaults**").

17. By letters dated February 22, 2010, Atcon and the Related Guarantors were advised of their respective obligations and payment in full of all obligations pursuant to the Amended Credit Agreement was demanded.

18. Based upon my involvement with the Receivership Companies, on behalf of the Bank, the Receivership Companies are unable to rectify the Defaults.

19. On February 23, 2010, together with the demands for payment, the Bank served notice upon the Companies in accordance with the provisions of section 244 of the BIA, as amended. Copies of the Bank's notices together with Atcon's and the Related Guarantors' consent to the early enforcement by the Bank of the Security are attached hereto and marked as **Exhibit "A"**.

RIGHT TO APPOINT A RECEIVER

20. Pursuant to the Credit Agreement dated April 4, 2006 between Atcon and MG (the "**MG Credit Agreement**"), which was assigned to the Bank as of June 30, 2009, upon any event of default, the Bank is granted the right to commence any legal actions or proceedings, including those provided for in the MG Credit Agreement or in the Subordinated Debt Security. The Bank further has the right to take such other actions and commence such other proceedings as may be permitted at law or in equity.

21. The Subordinated Debt Security includes a General Security and Movable Hypothec Agreement dated April 4, 2006, entered pursuant to the MG Credit Agreement. This agreement was entered into by the Receivership Companies and specifically provides at Article 6.01(a) that the Bank may appoint a receiver or a receiver manager. A copy of the General Security and Movable Hypothec Agreement is attached hereto and marked as **Exhibit "B"**.

22. The Debentures dated April 1, 2006, which are part of the Subordinated Debt Security, each provide in their covenants and conditions that the Bank may enter into proceedings in any court of competent jurisdiction for the appointment of a receiver or a receiver manager of all or any part of the charged property. A copy of the Debenture executed by Atcon Group Inc. is attached hereto and marked as **Exhibit "C".** With the exception of Atcon Logistics, all of the Receivership Companies granted the Bank a dbenture in the form attached as Exhibit "B".

23. A separate Credit Agreement dated April 4, 2006 was entered into between Atcon and Roynat, which was also assigned to the Bank as of June 30, 2009 (the "**Roynat Credit Agreement**"). The Roynat Credit

Agreement also provides that upon any event of default, the Bank is granted the right to commence any actions or proceedings as permitted at law or in equity.

24. Pursuant to the Amended Credit Agreement, the Bank is also provided the right to exercise any right or recourse and proceed by any action, suit, remedy or proceeding authorized or permitted by law, including those proceedings contemplated under any security granted or arising out of the Credit Agreement.

25. As part of the financing provided to Atcon by the Bank in June of 2009, each of the Related Guarantors, including the Receivership Companies, entered into an acknowledgment and confirmation agreement wherein they confirm the validity and enforceability of the Bank's Security. A copy of this agreement is attached hereto and marked as **Exhibit "D"**.

NEED FOR A RECEIVER

26. The Receivership Companies no longer have the necessary credit available in order to operate.

27. There are numerous secured creditors with interests in the assets of certain of the Receivership Companies; which interests are intertwined between the Companies by way of cross-guarantees.

28. The Receivership Companies are unable to remedy the Defaults under the Amended Credit Agreement.

29. A formal Court proceeding will allow for the orderly administration of the Receivership Companies.

Receiver's Borrowing Charge

30. I am advised by E&Y that $750,000 for the Receiver's Borrowings Charge, as defined in the draft order, is reasonable in the circumstances based on its past experience.

Relief Sought

31. The Bank is seeking the requested relief as it considers it appropriate in the circumstances given the numerous parties with an apparent interest in the Receivership Companies. The Bank seeks an order substantially in the form attached as Schedule "A" to the Notice of Application filed with this affidavit.

32. I make this affidavit in support of the within application for the appointment of Ernst & Young Inc. as a receiver and a receiver manager, the powers and duties of which are more particularly set out in the draft order attached to the Notice of Application.

SWORN TO at the City of Toronto, in the Province of Ontario, this 25th day of February 2010.
BEFORE ME:

A Notary Public in and for the Province of Ontario
SAM RAPPOS

Being a Solicitor