Court File No. N/M/17/10

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
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., ATCON LOGISTICS INC., ATCON CONSTRUCTION INC., ATCON MANAGEMENT SERVICES INC., ATCON CIVIL LTD., DYCON CONSTRUCTION LTD., ATCON STRUCTURES INC. AND ENVIREM TECHNOLOGIES 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, ATCON LOGISTICS INC., ATCON CONSTRUCTION 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

FOURTH REPORT OF THE RECEIVER
June 25, 2010

INTRODUCTION AND PURPOSE

1. In connection with the applications of The Bank of Nova Scotia (the "**Bank**") pursuant to section 33 of the *Judicature Act* (New Brunswick), Rule 41 of the Rules of Court of New Brunswick, and section 243 of the *Bankruptcy and Insolvency Act* (Canada) that were heard by The Honourable Mr. Justice Riordon of the Court of Queen's Bench of New Brunswick on March 1, 2010 and March 30, 2010, Ernst & Young Inc. ("**EYI**") was respectively appointed as receiver and receiver manager (the "**Receiver**") of the property, assets and undertakings of:

   (a) Atcon Group Inc., Atcon Holdings Inc., Atcon Property Holdings Inc., Atcon Veneer Products Inc. and Atcon Logistics Inc. pursuant to the Receivership Order dated March 2, 2010 (the "**March 2 Order**"); and

   (b) Atcon Construction Inc. ("**Atcon Construction**"), Atcon Management Services Inc., Atcon Civil Inc., Dycon Construction Inc., Atcon Structures Inc. and Envirem Technologies Inc.[1] pursuant to an Order dated March 30, 2010 (the "**March 30 Order**", and together with the March 2 Order, the "**Receivership Order**").

2. The Receivership Order authorizes the Receiver to, among other things:

   (a) take possession and control of the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

   (b) receive, preserve and protect the Property, or any parts thereof;

   (c) receive and collect all monies and accounts now owed or thereafter owing to the Respondents and exercise all remedies of the Respondents in collecting such monies;

[1] Pursuant to paragraph 4 of the March 30 Order, the appointment of the Receiver in relation to Envirem was of no force or effect until the issuance by the Monitor of the Monitor's Certificate in accordance with the Order of the Court dated March 22, 2010 in order to complete the Transaction, as such term is defined therein, or until further order of the Court. The Monitor issued the Monitor's Certificate on April 28, 2010. Additionally, Envirem Technologies Inc. changed its name to 0585456 N.B. Inc. effective April 28, 2010.

(d) settle, extend or compromise any indebtedness owing to the Respondents;

(e) sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business, subject to Court approval in the event certain monetary thresholds are exceeded; and

(f) apply to the Court for advice and directions in the discharge of its powers and duties under the Receivership Order.

3. The purpose of this Fourth Report is to report to this Honourable Court on the status of the Pennecon Receivable (as defined herein) and recommend that this Honourable Court grant an Order:

(a) approving the Pennecon Settlement Agreement (as defined herein) and the execution of the Pennecon Settlement Agreement by the Receiver; and

(b) authorizing and empowering the Receiver to:

(i) pay a portion of the Pennecon Amount (as defined herein), in the amount of $268,223.77, to Canada Revenue Agency ("**CRA**") in connection with the HST Requirement to Pay (as defined herein); and

(ii) utilize the balance of the Pennecon Amount, in the amount of $2,954,161.23, for the purpose of making payments (including interim payments) required or permitted by the Receivership Order.

TERMS OF REFERENCE

4. In preparing this Fourth Report, the Receiver has been provided with, and has relied upon unaudited historical financial statements, other unaudited financial information and projections prepared by the Respondents, the books and records of the Respondents, discussions with the management and employees of the Respondents, and other information from various sources. The Receiver has assumed that the information it has been provided is accurate and complete. The Receiver did not audit, review or otherwise attempt to verify the accuracy or completeness of the information. Accordingly, the Receiver expresses no opinion or other form of assurance with respect to the information presented in this Fourth Report or relied upon by the Receiver in preparing this Fourth

Report. Further, the nature of the Receiver's work completed in these proceedings will not necessarily disclose errors, misstatements, irregularities or illegal acts, if such exist, on the part of the Respondents, or its officers or employees or in the information.

5. All references to monetary amounts in this Fourth Report are in Canadian dollars unless otherwise noted.

6. Capitalized terms not defined in this Fourth Report are as defined in the Receivership Order.

7. Copies of Court materials in these proceedings may be obtained from the Receiver's website established in connection with the Respondents (www.ey.com/ca/atcon).

PENNECON

Vale Inco Project and the Pennecon-Atcon LP

8. As has previously been reported to this Honourable Court, Atcon Construction provided equipment rental and management services in connection with the construction of the Vale Inco Long Harbour Nickel Processing Plant located in Long Harbour, Newfoundland and Labrador (the "**Vale Inco Project**"). The background regarding the relationship between Atcon Construction and the Vale Inco Project is set out below.

9. In December 2008, a joint venture of Penney Construction Ltd. ("**Penney**") and Atcon Construction was awarded the contract to supply all labour, material, tools and equipment required to complete all civil earthworks for plant site development of the Long Harbour Nickel Processing Plant Site. The Receiver understands that the Penney Group is a business consortium compromised of companies involved in, among other things, heavy civil services and infrastructure developments.

10. In the winter of 2008 and throughout 2009, Penney and Atcon Construction engaged in discussions and negotiations regarding the terms of their joint venture with respect to the Vale Inco Project. The terms of a limited partnership agreement were negotiated, whereby Pennecon Atcon Limited Partnership, a limited partnership governed by the laws of Newfoundland & Labrador (the "**Pennecon-Atcon LP**"), would be formed for

the purpose of completing all work for Contract CC-0001-Earthworks-Plant Site Development for the Vale Inco Project (the "**Vale Inco Contract**") and Contract CC-0006 Route 202 Upgrade. Attached hereto as **Appendix "A"** is a copy of a Certificate from the Department of Government Services of Newfoundland & Labrador confirming that the Pennecon-Atcon LP was registered under *The Limited Partnership Act* (Newfoundland & Labrador) as of May 27, 2009 (the "**Certificate**").

11. The Receiver understands, based on its discussions with former Atcon Construction management and employees and representatives of the Pennecon-Atcon LP that a limited partnership agreement was never executed by Atcon Construction or Penney, and that the undated limited partnership agreement attached hereto as **Appendix "B"** represents the final version of the agreement that was negotiated by Atcon Construction and Penney (the "**LP Agreement**").

12. Pursuant to the terms of the LP Agreement, and confirmed by the information stated in the Certificate, Atcon Construction and Penney are limited partners in the Pennecon-Atcon LP, and Pennecon Atcon JV General Partner Inc. (the "**Pennecon GP**") is the general partner in the Pennecon-Atcon LP. Attached hereto as **Appendix "C"** is a copy of Newfoundland & Labrador Department of Government Services report for the Pennecon GP dated June 24, 2010.

13. Additionally, the LP Agreement provides the following:

    (a) the term of the joint venture was to commence on May 29, 2009 and continue until terminated/dissolved in accordance with the LP Agreement;

    (b) the initial capital contribution to the Pennecon-Atcon LP was approximately fifty-five per cent (55%) by Penney and forty-five per cent (45%) by Atcon Construction, resulting in Penney and Atcon Construction holding approximately 55% and 45% of the units of the Pennecon-Atcon LP respectively; and

    (c) profit and loss were to be allocated to each of Penney and Atcon Construction at the end of each fiscal year on a *pro rata* basis according to their capital contributions.

14. The Receiver understands that, in accordance with its initial capital contributions to the Pennecon-Atcon LP, Penney and Atcon Construction hold approximately 55% and 45% of the issued shares of the Pennecon GP.

Pennecon Services Agreement

15. In connection with the Vale Inco Project, the Pennecon-Atcon LP subcontracted the work to be performed under the Vale Inco Contract to Pennecon Heavy Civil Ltd. ("**PHCL**"). To complete the services under the Vale Inco Contract, the Receiver understands that PHCL required Atcon Construction to provide certain management services and rent equipment to PHCL. As a result, PHCL, the Pennecon-Atcon LP and Atcon Construction negotiated the terms of an agreement whereby:

(a) PHCL would have the right to use certain specified equipment from June 1, 2009 to April 30, 2010, and Atcon Construction would receive rental payments from PHCL for the use of such equipment; and

(b) Atcon Construction would provide personnel that would provide management services, as required by PHCL, in connection with the Vale Inco Contract.

16. The Receiver understands, based on its discussions with former Atcon Construction management and employees and representatives of PHCL, that an agreement setting out the terms of the equipment rental and management services was never executed by Atcon Construction, PHCL or the Pennecon-Atcon LP. However, the Receiver also understands that the agreement dated June 1, 2009 attached hereto as **Appendix "D"** represents the agreement that was negotiated by Atcon Construction, PHCL and the Pennecon-Atcon LP (the "**Pennecon Services Agreement**").

Pennecon Receivable and CRA

17. The Receiver has confirmed that, as of May 1, 2010, the aggregate amount of $3,558,810.55 was owed to Atcon Construction by PHCL with respect to equipment rentals and management services provided to April 30, 2010 under the Pennecon Services Agreement (the "**Pennecon Receivable**").

18. As has been previously reported to this Honourable Court, on March 26 and March 29, 2010, Canada Revenue Agency ("**CRA**") issued Requirements to Pay to PHCL pursuant to section 227(4) of the *Income Tax Act* (Canada) with respect to employee income tax, CPP and EI source deductions that were originally assessed against Ledwell. Additionally, CRA issued Requirements to Pay dated June 11, 2010 to the Pennecon-Atcon LP and the Pennecon GP pursuant to section 227(4) of the *Income Tax Act* (Canada) with respect to employee income tax, CPP and EI source deductions that were originally assessed against Ledwell. CRA also issued a Requirement to Pay dated February 26, 2010 to PHCL pursuant to the section 317(3) of the *Exicse Tax Act* (Canada) for unremitted HST (the "**HST Requirement to Pay**", and collectively, the "**Pennecon Requirements to Pay**"). A copy of the HST Requirement to Pay is a attached as **Appendix "E"**.

19. In addition to the Pennecon Requirements to Pay, Notices of Assessment dated May 28, 2010 were issued by CRA to PHCL, whereby CRA directly assessed PHCL as being liable to CRA to the extent of the Pennecon Receivable as a result of the failure of PHCL to make payment to CRA in connection with the Pennecon Requirements to Pay.

20. On June 18, 2010, this Honourable Court granted an Order with respect to the funds held by Shell Canada with respect to services performed by Atcon Construction in the Albian Oil Sands in the Province of Alberta (the "**June 18 Order**"). Attached hereto as **Appendix "F"** is a copy of the June 18 Order.

21. Pursuant to paragraph 15 of the June 18 Order, on the consent of the Receiver, the Bank, the Province of New Brunswick, Caterpillar Financial Services Limited ("**Caterpillar**") and Emeco Canada Ltd., the CRA Non-Deemed Trust Holdback (as defined in the June 18 Order), is also treated as a substitute for and deemed to be a portion of the Pennecon Receivable, so that CRA is entitled to assert its claims under the Pennecon Requirements to Pay (excluding the HST Requirement to Pay) against the CRA Non-Deemed Trust Holdback for payment of accrued penalties and interest on the unremitted employee income tax, CPP and EI source deductions, and for payment of unpaid employer contributions.

Pennecon Settlement Agreement

22. In May 2010, the Receiver entered into discussions with PHCL and the Pennecon-Atcon LP with respect to payment of the outstanding Pennecon Receivable.

23. PHCL and the Pennecon-Atcon LP informed the Receiver that a portion of the Pennecon Receivable, in the amount of $336,425 (the "**Disputed Amount**"), was disputed by PHCL and the Pennecon-Atcon LP, and PHCL and the Pennecon-Atcon LP were of the view that the Pennecon Receivable should be reduced by the amount of the Disputed Amount. The Receiver understands that the Disputed Amount represents amounts relating to alleged overcharges and repairs to Atcon Construction equipment that were paid for by PHCL and/or the Pennecon-Atcon LP.

24. Additionally, the Pennecon GP informed the Receiver of its position that Atcon Construction was indebted to the Pennecon-Atcon LP for interest, management fees and other administrative expenses under the LP Agreement totalling approximately $815,000 (the "**LP Fees**"), and that the Pennecon Receivable should be reduced by the amount of the LP Fees.

25. The negotiations among the Receiver, PHCL and the LP culminated in the execution of a settlement agreement dated May 27, 2010 (the "**Pennecon Settlement Agreement**"), a copy of which is attached as **Appendix "G"**. The Pennecon Settlement Agreement provides, among other things, as follows:

   (a) payment to the Receiver by the Pennecon-Atcon LP of the amount of $3,222,385 (the "**Pennecon Amount**") upon the granting of a Court-order approving the Pennecon Settlement Agreement and the Receiver obtaining a letter from CRA confirming that payment of the Pennecon Amount to the Receiver pursuant to the Court-order will not be considered to be in violation of the Pennecon Requirements to Pay and that the Notices of Assessment will be vacated;

   (b) the parties will negotiate in good faith with respect to the Disputed Amount, and in the event that a consensual resolution cannot be reached, the dispute will be subject to arbitration;

(c) the Pennecon GP waives, releases and discharges Atcon Construction of the LP Fees; and

(d) the Receiver will take steps to transfer or assign Atcon Construction's units in the Pennecon-Atcon LP and shares in the Pennecon GP to Penney or its nominee.

26. Additionally, the Pennecon Settlement Agreement provides that the Receiver will negotiate exclusively up to June 25, 2010 with Penney, Pennecon GP and the Pennecon-Atcon LP with respect to the potential sale of certain Atcon Construction equipment. Based on the terms of the Pennecon Settlement Agreement, the exclusivity period expires as of the date of this Report, and no agreement for the disposition of the equipment has been finalized among the parties. The Receiver expects that, notwithstanding the expiry of the exclusivity period, the parties will continue to discuss the possibility of a sale transaction with respect to the equipment in the near future.

27. The Receiver is of the view that the Pennecon Settlement Agreement represents a fair and reasonable settlement of the matters relating to the Pennecon Receivable. In the event that the Pennecon Settlement Agreement was not entered into, it is likely that PHCL and the Pennecon GP would have attempted to set off the Disputed Amount and the LP Fees against the Pennecon Receivable. The exercise of such set-offs would have potentially resulted in no funds being available to the Atcon Construction receivership estate in a timely manner and the necessity of time consuming and costly litigation for the Receiver to attempt to recover any amount of the Pennecon Receivable.

28. Additionally, it is the Receiver's view that there is no realizable value in Atcon Construction's interest in the units of the Pennecon-Atcon LP and the shares of the Pennecon GP for the benefit of the Atcon Construction receivership estate. As has been previously disclosed to the Honourable Court, the profit earned by the Pennecon-Atcon LP for work performed through February 2010 had been entirely eroded by extensive losses incurred during the December 2009 to February 2010 period. As a result, the Pennecon-Atcon LP operated in a net deficit position for an amount equal to approximately $1.8 million as at February 18, 2010, and Atcon Construction's prorated share of this deficit was approximately $815,000, being the LP Fees.

29. The Receiver has been advised by PHCL that PHCL does not intend to bid or perform additional work through Pennecon-Atcon LP after the current Vale Inco Contract work is completed. The Receiver understands that Atcon Construction's share of the estimated profit from the remaining Vale Inco Contract work is not expected to exceed the amount of the LP Fees owed by Atcon Construction. Consequently, Atcon Construction's share of the Pennecon-Atcon LP final profit would be nil or negative at the conclusion of the Vale Inco Contract.

30. As a result, the Receiver believes that it is appropriate for the Receiver, in order to secure the payment of the Pennecon Amount, to release Atcon Construction's interest in the units of the Pennecon-Atcon LP and the shares of the Pennecon GP as part of the Pennecon Settlement Agreement, as there is no value in such assets for the Atcon Construction receivership estate.

Distribution of Pennecon Amount

CRA

31. As noted above, the HST Requirement to Pay issued to PHCL is dated February 26, 2010, which pre-dates the bankruptcy of Atcon Construction, which occurred on April 26, 2010. The Receiver understands that, upon the receipt of the HST Requirement to Pay, a portion of the Pennecon Receivable, in the amount listed on the HST Requirement to Pay, became property of the Crown.

32. As a result, the Receiver proposes that, in the event that the Pennecon Settlement Agreement is approved by this Honourable Court, a portion of the Pennecon Amount received by the Receiver, in the amount of $268,223.77, be paid to CRA.

Balance of Pennecon Amount and Mechanics Lien Matters

33. On Saturday, June 19, 2010, counsel to the Receiver was advised, pursuant to an e-mail message from counsel for Caterpillar, that Caterpillar was considering filing a mechanics lien against the property upon which the Vale Inco Project is being constructed (the "**Vale Inco Property**") in connection with unpaid rental amounts that Caterpillar claims are owing to it by Atcon Construction for equipment allegedly used on the Vale Inco

Project. The Receiver understands that the alleged Caterpillar unpaid rental amounts total $928,786.13.

34. Counsel to Caterpillar requested that the Receiver's motion materials with respect to the Pennecon Amount be served late in the week of June 21, 2010, so that, in the event a mechanics lien was filed by Caterpillar against the Vale Inco Property, the Caterpillar mechanics lien could be addressed in the Receiver's motion materials.

35. During the afternoon of June 25, 2010, counsel to Caterpillar sent to the Receiver the correspondence and Caterpillar claim for lien documents attached hereto as **Appendix "H"**. The Receiver understands, based on advice it has received from its legal counsel, that, as of June 25, 2010, no person was in a position to file claims for mechanics lien under the *Mechanics Lien Act* (Newfoundland & Labrador) with respect to the Pennecon Amount.

36. As a result, it is the Receiver's view that the Pennecon Amount, less the amount of $268,223.77 to be paid to CRA, is the Property of Atcon Construction. The Receiver has been authorized and empowered by the Receivership Order to take control of the Property and collect all monies owing to Atcon Construction. As a result, the Receiver is seeking a Court-Order authorizing and empowering the Receiver, upon receipt of the Pennecon Amount, to use the balance of the Pennecon Amount, in the amount of $2,954,161.23, for the purpose of making payments (including interim payments) required or permitted by the Receivership Order.

RELIEF SOUGHT BY THE RECEIVER

37. The Receiver respectfully requests that this Honourable Court grant an Order in the form submitted by the Receiver:

    (a) approving the Pennecon Settlement Agreement and the execution of the Pennecon Settlement Agreement by the Receiver; and

    (b) authorizing and empowering the Receiver to:

(i) pay a portion of the Pennecon Amount, in the amount of $268,223.77, to CRA in connection with the HST Requirement to Pay; and

(ii) utilize the balance of the Pennecon Amount, in the amount of $2,954,161.23, for the purpose of making payments (including interim payments) required or permitted by the Receivership Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of June 2010

ERNST & YOUNG INC.
in its capacity as the Court-appointed Receiver of the Respondents and not in its personal or corporate capacity

By:

Paul D. Hickey, CA•CIRP
Senior Vice President

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