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

EIGHTH REPORT OF THE RECEIVER
October 7, 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. was respectively appointed as receiver and receiver manager (the "**Receiver**") of the property, assets and undertakings (collectively, the "**Property**") 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 Management Services Inc., Atcon Civil Ltd., Dycon Construction Ltd., Atcon Structures Inc., Atcon Construction Inc. and Envirem Technologies Inc. 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, among other things, authorizes and empowers the Receiver to:

   (a) take possession and control of the Property;

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

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

   (d) initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or thereafter instituted with respect to any of the Property and to settle or compromise any such proceedings;

   (e) take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations; and

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

3. The purpose of this Eighth Report is to report to this Honourable Court on the status of the consultations between the Receiver and parties with a potential interest in the Subject Amounts (as defined below), which have been conducted pursuant to the direction of this Honourable Court contained in paragraph 21 of the Order of Justice Riordon dated June 18, 2010 (the "**June 18 Order**").

TERMS OF REFERENCE

4. In preparing this Eighth 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 certain 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 Eighth Report or relied upon by the Receiver in preparing this Eighth 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 Eighth Report are in Canadian dollars unless otherwise noted.

6. Capitalized terms not defined in this Eighth 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).

Shell Receivable and Builders' Liens

8. As has been previously reported to this Honourable Court, Atcon Construction Inc. ("**Atcon Construction**") provided various construction and engineering services to affiliates of Shell Canada Limited (collectively, "**Shell Canada**").

9. Pursuant to paragraph 2(a) of the June 18 Order, Shell Canada was directed by this Honourable Court to pay the amount of $8,423,503.30 (collectively, the "**Shell Receivable**") to the Receiver, to be held by the Receiver in accordance with the June 18 Order. Attached hereto as **Appendix "A"** is a copy of the June 18 Order.

10. Pursuant to paragraph 4(a) of the June 18 Order, the Receiver was directed to hold a portion of the Shell Receivable, in the amount of $4,008,291.63 (the "**Builders' Lien Holdback**"), in a separate interest bearing trust account and not pay the Builders' Lien Holdback or any portion thereof except upon further Order of this Honourable Court made on notice to the parties named on the service list in this proceeding.

11. Additionally, pursuant to paragraph 4(b) of the June 18 Order, the Receiver was directed to hold a portion of the Shell Receivable, in the amount of $996,345.70 (together with the Builders' Lien Holdback, the "**Subject Amounts**") in a separate interest bearing trust account in accordance with paragraphs 14 and 15 of the June 18 Order.

12. The establishment of the Builders' Lien Holdback was necessary as a result of the builders' liens filed by Caterpillar Financial Services Limited ("**Caterpillar**"), Emeco Canada Limited ("**Emeco**") and the Receiver against lands leased by Shell Canada under the *Builders' Lien Act* (Alberta) (collectively, the "**Builders' Liens**") and the Order of The Honourable Justice B.E.C. Romaine of the Alberta Court of Queen's Bench dated June 25, 2010 discharging such Builders' Liens (the "**June 25 Order**"). The amount of the Builders' Lien Holdback represents the sum of the principal amounts of the Emeco Builders' Lien (as defined below) and the Caterpillar Builders' Lien (as defined below) and an additional amount of $40,380.41. Attached hereto as **Appendix "B"** is a copy of the June 25 Order.

<u>**Consultations**</u>

13. Pursuant to paragraph 21 of the June 18 Order, this Honourable Court authorized and directed the Receiver to consult with the Bank, Caterpillar, Emeco, Canada Revenue Agency, the Province of New Brunswick and such other interested persons as the

Receiver deemed appropriate concerning the possible resolution of the claims of such persons to the Subject Amounts.

14. The June 18 Order required the Receiver to report to this Honourable Court, by no later than July 31, 2010, on the result of such consultations. The date by which the Receiver was to report to the Court was extended to September 30, 2010 pursuant to the Order of Justice Riordon dated July 28, 2010 and the consent of Caterpillar and Emeco.

15. The Receiver, through its counsel, requested documentation from Caterpillar and Emeco that detailed their respective relationship with Atcon and the basis upon which they were entitled to file a builders' lien in Alberta. The Receiver and its counsel have received and reviewed the documentation received to date, and the Receiver's counsel has discussed matters relating to such documentation with counsel to Caterpillar and Emeco and has requested additional documentation and information from Caterpillar in connection with the Caterpillar Builders' Lien.

Emeco

16. Pursuant to paragraph 6 of the June 18 Order, this Honourable Court held that the Emeco builders' lien in the amount of $228,900.22 (the "**Emeco Builders' Lien**") is a valid and enforceable claim against the Subject Amounts in the amount of $228,900.22 and stands in priority to the claim of the Receiver against any of the Subject Amounts in connection with the Receiver's builders' lien to the extent of the amount $228,900.22.

17. The Receiver understands that on October 1, 2010, Emeco served a notice of motion returnable before this Honourable Court on October 13, 2010 seeking an Order directing the Receiver to pay to Emeco, from the Builders' Lien Holdback, the amount of $228,900.22 on account of the Emeco Builders' Lien, and the amount of $22,890 on account of costs incurred by Emeco in connection with the Emeco Builders' Lien.

18. As noted above, the Receiver and its counsel have reviewed Emeco's documentation with respect to the Emeco Builders' Lien. The Receiver does not oppose the relief that is being sought by Emeco with respect to payment of the amount of $228,900.22 from the

Builders' Lien Holdback in accordance with the June 18 Order on account of the Emeco Builders' Lien.

19. However, the validity and enforceability of the Emeco Builders' Lien, as confirmed in the June 18 Order, extends solely to the amount of $228,900.22, being the face value of the Emeco Builders' Lien. The June 18 Order provides no priority to Emeco for payment from the Builders' Lien Holdback of any amount on account of costs.

20. As discussed in greater detail below, the validity and enforceability of the Caterpillar Builders' Lien against the Subject Amounts has not been determined and thus it is uncertain what amount, if any, Caterpillar may be entitled to claim against the Subject Amounts on account of costs relating to the Caterpillar Builders' Lien. Additionally, as noted above, the portion of the Builders' Lien Holdback in excess of the aggregate face value of the Emeco Builders' Lien and the Caterpillar Builders' Lien is $40,380.41. Emeco's claim for payment of costs of $22,890 represents approximately fifty-seven percent (57%) of this amount, notwithstanding that the face value of the Emeco Builders' Lien represents approximately six per cent (6%) of the aggregate face value of the Emeco Builders' Lien and the Caterpillar Builders' Lien.

21. As a result of the foregoing, the Receiver is of the view that it is inappropriate at this time for payment to be made to Emeco in the amount of $22,890 from the Builders' Lien Holdback on account of its costs in connection with the Emeco Builders' Lien.

<u>Caterpillar</u>

22. As has been previously reported to this Honourable Court, Caterpillar filed a builders' liens against lands leased by Shell Canada in the Province of Alberta with a face value of $3,739,011 in connection with its business relationship with Atcon Construction (the "**Caterpillar Builders' Lien**").

23. As noted above, since the granting of the June 18 Order, the Receiver and its counsel have reviewed the documentation provided by Caterpillar in support of the Caterpillar Builders' Lien to date, and the Receiver's counsel has discussed the contents of the documentation with counsel to Caterpillar and requested additional documentation and

information from Caterpillar in connection with the Caterpillar Builders' Lien. Additionally, the Receiver's counsel has provided its view to the Receiver as to the merits of the Caterpillar Builders' Lien based on the documentation and information provided by Caterpillar to date.

24. Since the date of the June 18 Order, the Receiver, through its counsel, has had numerous discussions with counsel to Caterpillar regarding the Caterpillar Builders' Lien and the Subject Amounts. Such discussions have also included counsel to the Bank, as the Receiver understands that, to the extent that the Bank has valid, perfected and enforceable security against the personal property of Atcon Construction, the Bank will likely be the party with a priority proprietary interest in the Builders' Lien Holdback in the event that the Caterpillar Builders' Lien is not held to be a valid and enforceable claim with priority to the Builders' Lien Holdback.

25. The discussions amongst counsel to the Receiver, Caterpillar and the Bank have been on a without prejudice basis. As a result, particulars of such discussions are not described in detail herein. However, the Receiver is in a position to report to this Honourable Court that the discussions among the parties with respect to the claims to the Builders' Lien Holdback are continuing, and a meeting is to be held in October 2010 with counsel and representatives of the Receiver, the Bank and Caterpillar in attendance.

26. The Receiver is of the view that it is in the best interests of the parties to continue to have discussions in an attempt to reach a resolution of the claims to the Builders' Lien Holdback.

27. As a result, the Receiver recommends to this Honourable Court that an extension of the date by which a resolution is to be achieved, or adjudication process to be agreed to, with respect to the claims against the Builders' Lien Holdback be granted to November 30, 2010.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of October 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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