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

TWENTIETH REPORT OF THE RECEIVER
(Airport Hanger)
July 19, 2011

INTRODUCTION AND PURPOSE

1. In connection with the applications of The Bank of Nova Scotia 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. ("**Atcon Logistics**") pursuant to the Receivership Order dated March 2, 2010 (the "**March 2 Order**"); and

   (b) Atcon Construction Inc., Atcon Management Services Inc., Atcon Civil Ltd., Dycon Construction Ltd., Atcon Structures Inc. and Envirem Technologies Inc. (now known as 058545 N.B. Inc.) pursuant to an Order dated March 30, 2010 granted in these proceedings (the "**March 30 Order**", and the March 30 Order together with the March 2 Order, the "**Receivership Order**).

2. The Receivership Order authorized 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) engage consultants, appraisers, agents and experts, among other persons, to assist with the exercise of the Receiver's powers and duties;

   (d) market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(e) sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business with the approval of this Court in respect of any transaction in which the purchase price exceeds $100,000 or the aggregate purchase price of all transactions less than $100,000 exceeds $1,000,000; and

(f) apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property.

3. The purpose of this Twentieth Report is to report to this Honourable Court on the status of matters relating to the Airport Hanger (as defined below) and recommend that this Honourable Court grant an Order:

(a) authorizing the Receiver to sell the Airport Hanger to MAC (as defined below), authorizing and approving the execution of the APS (as defined below) by the Receiver, authorizing and directing the Receiver to take such steps and execute such additional documents as may be necessary or desirable for the completion of the Airport Hanger sale transaction, vesting the Airport Hanger in and to MAC free and clear of any liens or encumbrances upon delivery of the Receiver's Certificate to MAC, and authorizing and empowering the Receiver to utilize the net sale proceeds of the Airport Hanger for the purpose of making payments (including interim payments) required or permitted by the Receivership Order; and

(b) declaring that the lease dated December 1, 2010 entered into between MAC and Bryce (as defined below) is void and of no force or effect, and that Bryce has no interest, including without limitation a leasehold interest, whatsoever in the Leased Premises (as defined below) and the Airport Hanger.

TERMS OF REFERENCE

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

6. Capitalized terms not defined in this Twentieth 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).

AIRPORT HANGER

<u>Background</u>

8. EYI was appointed as Receiver of the Property of Atcon Logistics pursuant to the March 2 Order. Following its appointment, and in accordance with the provisions of the Receivership Order, the Receiver performed a review of the books, records and asset listings of Atcon Logistics.

9. The Property of Atcon Logistics includes an airport hanger (the "**Airport Hanger**") that was purchased by Logistics for $150,000 in December 2005. The Receiver understands that the Airport Hanger had an assessed tax value of approximately $143,700 in 2010. The Receiver previously reported to this Honourable Court with respect to matters concerning the Airport Hanger in its Fifteenth Report dated December 1, 2010 (the

"**Fifteenth Report**"). A copy of the Fifteenth Report (without appendices) is attached hereto as **Appendix "A"**.

10. The land that the Airport Hanger is situated on, which is approximately 1714 m² in size, is municipally known as 50 Airport Road, Miramichi, New Brunswick and is identified as Parcel 2 on Airport Apron, West side of Plan of Survey 92-14-2 (the "**Leased Premises**"). The Receiver understands that the Leased Premises is owned by the Miramichi Airport Commission (1993) Inc. ("**MAC**").

11. The Leased Premises is subject to a 20-year lease between Atcon Logistics and MAC dated November 29, 2005 (the "**Logistics Lease**"). A copy of the Logistics Lease is attached hereto as **Appendix "B"**. The Logistics Lease commenced on December 1, 2005 and has a termination date of November 30, 2025.

12. The Logistics Lease provides for rental payments of $1,000 plus HST per annum plus increases, payable in one annual instalment on December 1. The Logistics Lease also requires Atcon Logistics to pay the real property taxes, utilities and local improvements, and maintain insurance, among other things.

13. Since its appointment on March 1, 2010, the Receiver has made the annual rental payment, maintained insurance and paid the property taxes that have accrued since March 1, 2010.

14. Pursuant to paragraph 10 of the Receivership Order, no person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, license or permit in favour of or held by Atcon Logistics, without the written consent of the Receiver or leave of this Honourable Court. As of the date of this Twentieth Report, the Receiver has not consented to the termination or assignment of the Logistics Lease and MAC has not sought the leave of this Honourable Court with respect thereto.

15. As a result, it is the Receiver's view that the Logistics Lease with respect to the Leased Premises is currently effective and enforceable between the Receiver, acting on behalf of Atcon Logistics, and the MAC.

Sale to Bryce

16. As is described in greater detail in the Fifteenth Report, the Receiver entered into a listing arrangement with RE/MAX 3000 Ltd./Ltee ("**Re/Max**") for the marketing and sale of the Airport Hanger on October 29, 2010. Bryce Holdings Inc. ("**Bryce**") submitted a formal offer to purchase the Airport Hanger for $160,000 on November 10, 2010.

17. On November 12, 2010, the Bryce offer was accepted by the Receiver. The agreement was subject to Bryce securing a satisfactory lease agreement with MAC and the approval of this Honourable Court, as described in paragraphs 19 and 20 of the Fifteenth Report.

18. The Receiver received written confirmation from Bryce on November 30, 2010 in a Waiver of Condition executed by Bryce (the "**Waiver**") that it had secured a satisfactory lease agreement with MAC. A copy of the Waiver is attached hereto as **Appendix "C"**.

19. The Receiver has been informed by Mr. Dale Mattinson, Airport Manager at MAC, that a lease agreement was entered into between Bryce and MAC dated December 1, 2010. The Receiver has not seen a copy of this lease, but has been informed by Mr. Mattinson that the lease is substantially in the same form as the Logistics Lease and that the lease does not specifically provide that it is conditional on a closing of the sale of the Airport Hanger to Bryce or on a termination of the Logistics Lease by MAC or the Receiver.

20. The sale of the Airport Hanger to Bryce was approved by this Honourable Court on December 3, 2010. A copy of the Approval and Vesting Order dated December 3, 2010 (the "**Approval and Vesting Order**") is attached hereto as **Appendix "D"**. As provided for in the Approval and Vesting Order, the vesting of the Airport Hanger in and to Bryce was to occur upon the Receiver delivering a Receiver's Certificate to Bryce. It is the Receiver's understanding that no specific closing date was established by the parties. This understanding is reflected in the Waiver provided by Bryce, which provides that the "[c]losing date [is] to be determined once vendors have court approval."

21. On the morning of December 14, 2010, Mr. Harry H. Williamson, Q.C., New Brunswick counsel to the Receiver, advised the Re/Max agent that he anticipated that the sale transaction would close on or before December 17, 2010. However, Mr. Williamson had

a doctor's appointment in the afternoon of December 14, 2010, and following that appointment, was required to spend the next four days in hospital to receive necessary medical attention.

22. In the afternoon of December 17, 2010, Mr. Williamson received a report from the Re/Max agent advising that Bryce had taken the position that, if the transaction did not close that afternoon, Bryce would not be willing to complete the transaction. On that day, Mr. Williamson arranged to forward documents to Ms. Ellen Cook, counsel representing Bryce in the sale transaction, requesting her agreement as to the contents of the documents. Mr. Williamson advised Ms. Cook that the closing could take place early the following week. Ms. Cook mentioned that she had amended the statement of adjustments to remove the HST component, which Mr. Williamson took to mean that she was in agreement with the rest of the documents.

23. The closing documents were executed by the Receiver on December 20, 2010 and faxed copies were in Mr. Williamson's possession on December 20, 2010. Mr. Williamson sent a confirmation letter to Ms. Cook on December 20, 2010 confirming her verbal advice from that morning that the sale transaction was dead because the "self imposed December 17 deadline had been missed" and questioning Bryce's ability to arbitrarily choose a closing date without notice. A copy of the letter dated December 20, 2010 is attached hereto as **Appendix "E"**. Mr. Williamson followed up with Ms. Cook on January 6, 2011 with respect to this matter.

24. On January 20, 2011, counsel to Bryce, Mr. Gerald Smith, Q.C., wrote to Mr. Williamson on a "without prejudice" basis with respect to matters relating to the sale transaction and the Airport Hanger. Borden Ladner Gervais LLP ("**BLG**"), counsel to the Receiver, and Mr. Smith exchanged correspondence in February 2011 with respect to the Airport Hanger. As Mr. Smith's correspondence was characterized as being on a "without prejudice" basis, the Receiver is not in a position to disclose the contents of the correspondence.

25. However, the Receiver is in a position to confirm that, as of February 23, 2011, the sale transaction with Bryce was terminated. On February 24, 2011, BLG notified MAC of the

termination of the sale agreement with Bryce. Attached hereto as **Appendix "F"** and is a copy of the letter from BLG to MAC dated February 24, 2011, a copy of which was sent to Mr. Smith.

26. It is the Receiver's position that Bryce breached its agreement with the Receiver with respect to the Airport Hanger in failing to close the sale transaction. To date, the Receiver has not taken steps in respect of this breach, but reserves its rights to do so if the Receiver deems it to be appropriate.

27. The Receiver has been informed by Mr. Mattinson that Bryce has sent lease and property tax payments to MAC with respect to the Leased Premises, and that MAC has returned all such payments to Bryce and/or has not deposited any cheques received from Bryce.

Sale to MAC

28. The Receiver instructed Re/Max to re-list the property on February 24, 2011. The Receiver received an offer that was subsequently rescinded due to financing issues. A second offer was received but was not accepted by the Receiver due to the quantum of the purchase price offered.

29. As noted in the Fifteenth Report, MAC previously made unsolicited offers to the Receiver for the purchase of the Airport Hanger prior to the listing of the Airport Hanger. Following discussions between the Receiver and MAC, an agreement of purchase and sale was executed between MAC and the Receiver on April 13, 2011 for the sale of the Airport Hanger (the "**APS**"). A copy of the APS is attached hereto as **Appendix "G"**.

30. The purchase price under the APS is $140,000. MAC has provided a $5,000 deposit to be held in trust, pending completion or other termination of the agreement and to be credited towards the purchase price on completion. The APS is conditional upon the Receiver obtaining Court approval of the sale transaction, and nullifying the lease agreement between MAC and Bryce on or before April 27, 2011, failing which the offer was null and void. The deadline date was subsequently extended to August 31, 2011.

31. In a letter dated April 18, 2011, BLG informed Mr. Smith that the Receiver was in discussions with a potential purchaser for the Airport Hanger. BLG informed Mr. Smith that it was the Receiver's view that any lease entered into between Bryce and MAC was conditional upon the closing of the sale transaction. In the letter, a copy of which was sent to MAC, BLG informed Mr. Smith that MAC shared this view, as MAC had confirmed this to the Receiver. BLG noted the Receiver's understanding that Bryce was making various representations in the local marketplace that it had a binding lease agreement in place with MAC with respect to the Leased Premises, which the Receiver was of the view was in violation of paragraph 10 of the Receivership Order. A copy of the April 18, 2011 letter is attached hereto as **Appendix "H"**.

32. Between April 19, 2011 and June 23, 2011, Mr. Smith and BLG communicated in writing regarding matters relating to the Airport Hanger. As Mr. Smith's correspondence was characterized as being on a "without prejudice" basis, the Receiver is not in a position to disclose the contents of the correspondence. However, the Receiver is in a position to report that, to date, the Receiver and Bryce have not agreed to a settlement of the outstanding matters between them with respect to the Airport Hanger.

RELIEF SOUGHT BY THE RECEIVER

33. It is the Receiver's view that it has made sufficient efforts to obtain the best price possible for the sale of the Airport Hanger. The APS provides for a purchase price of $140,000, which is approximately 88% of the purchase price of the sale of the Airport Hanger to Bryce that was previously approved by this Honourable Court. The Receiver is of the view it has taken all fair, reasonable and ethical steps to obtain the best price for the Airport Hanger by conducting a sale process and completing an APS that preserved the integrity and fairness of the sale process and a sale by an officer of this Honourable Court.

34. As a component of the sale transaction to MAC, the Receiver is requesting that this Honourable Court grant an Order declaring that any lease agreement between Bryce and MAC is null and void. It is the Receiver's view that such relief is appropriate, as such

relief is necessary for the Receiver to be in a position to realize upon the Airport Hanger for the benefit of the stakeholders of Atcon Logistics.

35. Furthermore, it is the Receiver's view, as well as MAC's, that the Bryce lease was executed in anticipation of Bryce concluding its acquisition of the Airport Hanger pursuant to the agreement of purchase and sale approved by this Honourable Court on December 3, 2010, which agreement Bryce unilaterally declared to be terminated on December 17, 2010. It is the Receiver's view that, as the Logistics Lease was, and continues to be, in good standing, any sale of the Airport Hanger to Bryce required the Receiver to agree to an assignment or termination of the Logistics Lease. As noted above, the Logistics Lease was entered into in December 2005, has not been terminated or assigned, and is in good standing. As well, the Receiver has not been asked to terminate or assign the Logistics Lease. As a result, it is the Receiver's view that any leasehold interest acquired by Bryce is subordinate to the Receiver's interests in the Leasehold Premises under the Logistics Lease.

36. Accordingly, the Receiver respectfully requests that this Court grant an order:

(a) authorizing the Receiver to sell the Airport Hanger to MAC, authorizing and approving the execution of the APS by the Receiver, authorizing and directing the Receiver to take such steps and execute such additional documents as may be necessary or desirable for the completion of the Airport Hanger sale transaction, vesting the Airport Hanger in and to MAC free and clear of any liens or encumbrances, and authorizing and empowering the Receiver to utilize the net sale proceeds of the Airport Hanger for the purpose of making payments (including interim payments) required or permitted by the Receivership Order; and

(b) declaring that the lease dated December 1, 2010 entered into between MAC and Bryce (as defined below) is void and of no force or effect, and that Bryce has no interest, including without limitation a leasehold interest, whatsoever in the Leased Premises (as defined below) and the Airport Hanger.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of July, 2011

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

By:

George C. Kinsman, CA•CIRP
Senior Vice President

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