

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF MIRAMICHI

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

- and -

**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

AND

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, 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

SUPPLEMENTARY 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. 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.
3. This affidavit is supplementary to my affidavit of February 25, 2010 filed in support of the initial application having Court File No. N/M/16/10 (the “**CCAA Proceedings**”) for relief under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended (the “**CCAA Affidavit**”) in relation to:
 - 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**”),(collectively, the “**CCAA Companies**”).
4. This affidavit is also supplementary to my affidavit of February 25, 2010 filed in support of the initial application having Court File No. N/M/17/10 (the “**Receivership Proceedings**”) for the appointment of a receiver (the “**Receivership Affidavit**”) over the assets and undertaking of:
 - a. Atcon Holdings Inc. (“**Atcon**”),
 - b. Atcon Group Inc. (“**Group**”),
 - c. Atcon Property Holdings Inc. (“**Property**”),
 - d. Atcon Veneer Products Inc. (“**Veneer**”),and

e. Atcon Logistics Inc. (“**Logistics**”),

(collectively, the “**Receivership Companies**”; and collectively, the Receivership Proceedings and the CCAA Proceedings are sometimes referred to as the “**Atcon Proceedings**”).

5. This affidavit together with the CCAA Affidavit and the Receivership Affidavit are in response, and opposition, to:
 - a. the motion of the CCAA Companies for the amendment of the initial order of this Court dated March 2, 2010 in the CCAA Proceedings granting the relief set out therein (the “**Initial Order**”); and
 - b. the motion of the Receivership Companies for a stay of the order of this Court dated March 2, 2010 granting the relief set out therein (the “**Receivership Order**”).
6. Any capitalized terms not defined herein have the defined meaning provided in the CCAA Affidavit.
7. I have read the affidavit of Robert W. Tozer (the “**Tozer Affidavit**”), sworn to on Friday March 12, 2010 and received by me at the end of that day. Mr. Tozer’s affidavit does take various facts out of context and I am not aware of the basis for various allegations and opinions contained in the Tozer Affidavit as, for the most part, no evidence is provided in support of such allegations and opinion. The following is an attempt to address certain of Mr. Tozer’s allegations in the time available.

Prior to the Atcon Proceedings

8. As set out in the CCAA Affidavit, the Companies failed to pay their obligations as they arose and in June of 2009, the Province of New Brunswick (the “**Province**”) issued further guarantees totaling \$50,000,000 of Atcon’s indebtedness to the Bank. In total, the Province has guaranteed \$63,362,845.00 of Atcon’s indebtedness.

9. By August 2009, it was clear that the Companies had a serious working capital shortage and required a further significant equity injection or other arrangement that would provide the Companies with sufficient working capital. Mr. Tozer, President, and Ms. Katrina Donovan, Vice President Finance and CFO (collectively, hereinafter referred to as “**Management**”) of the Companies concurred at that time that there were errors in their reporting to the Bank and that the Companies could not satisfy their existing liabilities as they became due.
10. In August and September 2009, Management developed its Restructuring Plan, which it presented to the Province and the Bank. Although the Bank was in a position to enforce the Bank’s Security, Management appeared to be working towards a solution through the Restructuring Plan. The Bank, the Province, Atcon, the Related Guarantors and Mr. Tozer entered into a forbearance agreement dated as of September 22, 2009 (the “**Forbearance Agreement**”).
11. Atcon, in consultation with, and as required by, the Province and the Bank, established an advisory board to give advice to the Companies on their restructuring efforts (the “**Advisory Board**”). The support of these parties was required as a result of the fundamental failure of the Companies to operate successfully.

Attempted Restructuring

12. The Companies were always under the control and direction of Mr. Tozer. The Province, the Bank and the Advisory Board could only make recommendations to the Companies. For the most part, Mr. Tozer rejected advice given to him and the Companies by the Bank. Mr. Tozer continued to make all decisions of the Companies.
13. Despite being provided adequate time, the Companies were not able to carry out the Restructuring Plan or abide by the terms of the Forbearance Agreement. I have

consulted with Ms. Patti Davis of the Bank over the weekend and she confirmed that Mr. Tozer's recollection of the statements made by her as stated in paragraph 17 of his affidavit is not accurate. I have been advised by Ms. Patti Davis that, at no time, did she expressly or impliedly state that "the date (January 31, 2010) meant nothing and not to worry about it".

14. The Companies' most recent business plan was presented to the Bank and the Province in the first week of January 2010. This plan did not address the Companies' fundamental problems and did not provide for the payment of its obligations to all of its creditors.

The Proceedings

15. During the week of February 15th to 19th the Bank had numerous calls with Mr. Tozer and his advisors, Stewart McKelvey and PricewaterhouseCoopers Inc. ("PWC"). These calls were to discuss the Companies' serious inability to meet their obligations. On or about February 18, 2010 the Bank advised Mr. Tozer and his advisors that it contemplated filing two applications, one for receivership of certain of the Companies and one for protection under the CCAA with respect to other Companies. At no point did the Bank advise or suggest to Mr. Tozer that all of the Companies would be included in the contemplated CCAA Proceeding but in fact advised the opposite.
16. On February 18, 2010, there was a telephone conference call between the Bank, Mr. Tozer, Stewart McKelvey, PWC, EYI and Cox & Palmer regarding the Companies. The discussions included the possibility of a new corporation being incorporated by Mr. Tozer. The discussion included the idea that this new corporation could acquire Construction's assets at fair market value. Mr. Tozer asked that the Bank provide financing. The Bank refused this request at that time as it did not have sufficient information. All parties understood the importance of the Contracts to proceed with

a restructuring concept of a new corporation acquiring certain assets at fair market value, namely the:

- a. Engineering, Procurement and Construction Contract between Shell Canada Energy and Construction (the “**Shell Contract**”);
- b. Agreement for Earth Moving, Construction and Related Services between Albian Sands Energy Inc. and Construction (the “**Albian Contract**”); and
- c. Equipment rental and management services agreement between Pennecon Atcon Limited Partnership, Pennecon Heavy Civil Ltd. and Construction pursuant to the Pennecon Atcon Limited Partnership Agreement (“**Pennecon Contract**”);

all of which are described in more detail in the CCAA Affidavit.

17. On February 22, 2010, Mr. Tozer asked that Ledwell Construction Labour Limited, a corporation under the laws of Alberta (“**Ledwell**”), be included in the contemplated CCAA Proceedings. This request was rejected by the Bank. Mr. Tozer did not request that all of the Companies be included in the CCAA Proceedings. I am advised by Josh McElman of Cox & Palmer, solicitors for the Bank, that Mr. Tozer is the sole director of Ledwell. Again, this was the only additional corporation that Mr. Tozer specifically requested the Bank to include in the CCAA Proceedings.
18. As set out in the CCAA Affidavit, 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 and section 244 Notices of Intention to Enforce Security were served on the Companies. On February 23, 2010 Mr. Tozer signed the various consents of the Companies to the early enforcement by the Bank of its Security. The signed consents were delivered to Stewart McKelvey by a representative of Atcon and subsequently delivered to the Bank’s counsel, copies of which are attached as Exhibit “K” to the CCAA Affidavit.

19. I am advised by Josh McElman of Cox & Palmer, solicitors for the Bank, that on February 26, 2010, the Receivership Companies and the CCAA Companies were each duly served with two service packages which included the Notice of Application and supporting materials for each of the Receivership Proceedings and the CCAA Proceedings respectively. The service of the Companies is more particularly set out in the Affidavits of Service of Robert Smith which were previously filed and form part of the records on the Atcon Proceedings.

The February 28, 2010 Telephone Call

20. As set out in paragraph 29 of the Tozer Affidavit, I, along with Jameel Sethi of the Bank, Matthew Harris and Paul Hickey of Ernst & Young Inc. (“EYI”) had a telephone call with Mr. Tozer on February 28, 2010 (the “Telephone Call”).
21. The Tozer Affidavit does not accurately reflect what was said during the Telephone Call. During the Telephone Call we discussed the importance of the CCAA Proceedings and the Receivership Proceedings. Mr. Tozer and the Bank both acknowledged that the Contracts were key to any possibility of a new corporation acquiring some assets at fair market value and continuing to operate subsequent to a restructuring.
22. During the Telephone Call Mr. Sethi did not, nor did anyone else, insist that any new corporation be set up in Mr. Tozer’s daughter’s name. Mr. Sethi has advised me that he did discuss with Mr. Tozer on a separate occasion that Mr. Tozer had already incorporated a corporation with his daughter being in control. It was not Mr. Sethi’s or the Bank’s plan but something Mr. Tozer had already done.
23. Mr. Tozer advised us of the importance of the Shell Contract and that if this contract was terminated there would be no go forward possibility for a new corporation. The Shell Contract was very important because it provided the bridge between the work

under the Albian Contract that would end in Spring 2010 and resume again in Fall 2010. Without the Shell Contract as a bridge between the seasons of the Albian Contract, the new corporation would not have any guaranteed revenue to fund all of the ongoing and significant lease payments to heavy equipment lessors and to otherwise fund overhead and administration costs.

24. Mr. Tozer did not advise of any concerns he had or any information he had with respect to the Shell Contract. Mr. Tozer also did not disclose any concerns he had or any information he had with respect to the Pennecon Contract.
25. The Bank did advise that it would consider supporting a new corporation provided it would be feasible and could take over the Contracts. This was based on the Bank's understanding and Mr. Tozer's representations regarding the Contracts. The Bank, despite the problems the Companies faced, did consider Mr. Tozer to be a person that could perform the Contracts if all of the other problems were taken care of.
26. At no point during the Telephone Call did I or anyone else on the Telephone Call state explicitly or impliedly that the CCAA Proceedings scheduled to be heard the following day included all of the Companies.

The Contracts

27. During the hearing of the CCAA application on the afternoon of March 1, 2010, at approximately 4:15 p.m. (Atlantic Time), I learned from George Kinsman of EYI that Mr. Tozer advised him that Shell had canceled the Shell Contract or what is referred to as the Sharkbite contract. The information provided was not clear as to what was occurring.

28. At 6:04 p.m. (Atlantic Time) I received an email from George Kinsman of EYI which stated:

“I spoke with Gord Burns. He advised that he took part in a conference call earlier today in which Shell provided verbal confirmation of their intention to cancel the Sharkbite contract. Burns has not seen written confirmation of this, but expects that it will be issued shortly.

There was no discussion re: Muskeg (the Shell representatives who are responsible for Sharkbite are separate and apart from the Shell representatives who are responsible for Muskeg). Burns advised that he spoke with the Shell Muskeg representatives last Friday who appeared to be willing to work with the Company under CCAA protection to complete the balance of this season's Muskeg contract. Until we speak directly with Shell their position re: Muskeg however remains an uncertainty.”

29. This was disappointing news and our counsel informed the Court of their understanding of events as they developed.

30. On March 2, 2010, the Bank learned that, prior to the Telephone Call, Mr. Tozer had in fact spoken by telephone to representatives of Shell late in the evening on February 26, 2010, and had received written notices from Shell terminating the Shell Contract (the “**Shell Termination Notice**”) on February 26, 2010.

31. The Bank considered Mr. Tozer’s lack of disclosure of the Shell Termination Notice to be a serious problem and that Mr. Tozer had failed to provide the Bank with critical information in a timely manner. Mr. Tozer did not advise the Bank of the Shell Termination Notice:

- a. on February 26, 2010 when he learned of it,
- b. on the Telephone Call when all parties discussed the importance of the Contracts and he emphasized that a restructuring involving a new corporation was not an alternative without the Shell Contract, or
- c. on March 1, 2010 prior to or during the hearing of the Atcon Proceedings.

32. The Bank would have quickly considered other alternatives to the CCAA Proceedings had Mr. Tozer advised of the Shell Termination Notice when he learned of them on February 26, 2010.
33. On March 2, 2010, the Bank learned that Mr. Tozer had advised the Monitor that Construction became aware in January 2010 that the Pennecon joint venture was incurring significant operating losses and that the Pennecon Contract was re-negotiated with the customer, Vale Inco.
34. On March 3, 2010 the Bank learned from the Monitor that the profit earned by the Pennecon joint venture had been entirely eroded and Construction's share of the joint venture profit would be nil.

March 4, 2010

35. As of March 4, 2010, the Bank had learned from the Monitor over the previous three days that Mr. Tozer was aware of essential information regarding the Pennecon Contract since January 2010 and regarding the Shell Contract since February 26, 2010. The Bank had been in regular contact with Mr. Tozer and was surprised that he did not share this critical information with the Bank. This information affected whether a going concern sale or a new corporation was feasible. In summary, the Bank had learned that the Shell Contract had been lost and the Pennecon joint venture had lost all of its value.
36. The Bank could not support Mr. Tozer's new corporation because it no longer had confidence that the Bank would receive full and complete disclosure of critical information in a timely manner. Further, the Shell Contract had been cancelled and it was essential to any type of plan to restructure via a new corporation. The Bank

had already expended considerable time and effort based on incomplete information which Mr. Tozer had provided. Mr. Tozer specifically recognized during the Telephone Call that without the Shell Contract a new corporation could not operate but he failed to disclose that he had received the Shell Termination Notice.

37. The Bank's unwillingness to proceed with providing any financing to Mr. Tozer was a result of Mr. Tozer's lack of disclosure and the Bank's loss of complete confidence in his ability to fix the Companies' problems or his ability to deal with the Bank in an open manner.

The Companies' Requested Relief

38. The Bank as a secured creditor and as the DIP Lender opposes the requested relief of the CCAA Companies. The DIP Lender will cease making advances should the relief requested be granted.
39. The Bank opposes the requested relief of the Receivership Companies. The Bank does not consider a stay of the Receivership Order to be reasonable in the circumstances. All of the Receivership Companies consented to the Bank enforcing its Security.
40. Mr. Tozer has been in complete control of the Companies and has attempted to address the Companies' problems for over ten months. Mr. Tozer has rejected most of the advice provided to him over the last ten months and failed to disclose critical information. The Shell Contract was terminated and all equity in the Pennecon joint venture has evaporated. As a result, the Bank does not have any confidence in Mr. Tozer's ability to resolve the Companies' problems now.
41. The Companies are hopelessly insolvent. Based on Exhibit "G" of the CCAA Affidavit and other exhibits thereto, the liabilities of the Companies exceed their

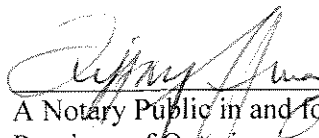
assets with no prospects of being able to pay their liabilities. It is expected that there will be substantial shortfalls to one or more of the secured creditors of the Companies.

42. I make this affidavit in good faith and in opposition to the motions by the CCAA Companies and the Receivership Companies.

SWORN TO at the City of)
Toronto, in the Province)
of Ontario, this 14th)
day of March 2010.)

BEFORE ME:)

) 
) _____
) Rocco Fabiano

) 
) _____
) A Notary Public in and for the)
Province of Ontario)
Being a Solicitor)