

**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., ENVIREM
TECHNOLOGIES INC. all of which are carrying on business
in the Province of New Brunswick**

RESPONDENTS

SECOND SUPPLEMENT TO THE FIRST REPORT OF THE MONITOR

March 14, 2010

INTRODUCTION AND PURPOSE

1. Pursuant to the Initial Order of The Honourable Mr. Justice Riordon dated March 2, 2010 (the “**Initial Order**”), Ernst & Young Inc. (“**EYI**”) was appointed as monitor (the “**Monitor**”) of the Respondents (collectively referred to herein as “**Atcon**” or the “**Companies**”) with respect to these proceedings under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”).
2. The purpose of this second supplement (the “**Second Supplemental Report**”) to the First Report of the Monitor dated March 12, 2010 (the “**First Report**”) is to respond to certain statements contained in Atcon’s Notice of Motion dated March 12, 2010 (the “**Notice of Motion**”) and the Affidavit of Robert W. Tozer sworn March 12, 2010 (the “**Tozer Affidavit**”), copies of which were served on the Monitor at 1:27 PM EST on Friday March 12, 2010, following service and filing with the Court of the First Report.

OVERVIEW

3. During the duration of these proceedings, the Monitor has been focussed upon and committed to working cooperatively and effectively with Atcon management to stabilize the Companies’ operations to preserve all options available to the Companies. The Monitor has conducted itself as an independent and neutral Court officer with independent counsel, and has consulted, either directly or through its independent legal counsel, with many major stakeholders of Atcon, including the Applicant, equipment lessors, customers and others. The Monitor has been available since its appointment to meet with Mr. Tozer to assist him and the Companies to determine what options are possible or achievable to restructure the Atcon operations or preserve the going concern value of the Companies, for the benefit of all stakeholders, including customers, employees, etc.

MONITOR’S ACTIVITIES TO DATE

4. In paragraphs 126 to 136 of the First Report, the Monitor provided a summary to the Court of the activities it has engaged in to date. Such activities have included, among other things:

- (a) assisting the Companies with respect to the proposed sale transaction of Envirem, in an attempt to facilitate the completion of a going concern sale transaction for the benefit of all of the stakeholders of the Companies;
 - (b) assisting the Companies with respect to meetings with Shell and Pennecon regarding the status of the Shell Contract, the Albian Contract and the Pennecon Contract, in an attempt to permit the Companies to preserve value with respect to such contracts and maintain continued performance of the Albian Contract and the Pennecon Contract, for the benefit of all of the stakeholders of the Companies;
 - (c) assisting the Companies in dealing with various creditor, employee and customer issues in efforts to stabilize operations;
 - (d) assisting the Companies in considering potential additional sources of financing to continue the operations of Atcon Industrial throughout these proceedings; and
 - (e) assisting the Companies in considering and pursuing all possible opportunities to maintain the going concern value of the Companies.
5. Further to the First Report, since the date of the Initial Order, representatives of EYI in its capacity as the Monitor have attended at the Atcon offices to carry out and comply with its Court-ordered, statutory and ethical duties and obligations owing to the Court, the Companies and its stakeholders. An average of approximately 9 representatives of the Monitor have continually been in attendance at Atcon's and Envirem's offices, working between 12-14 hours a day, 7 days a week since its appointment, in an effort to assist, advise and monitor the Companies in connection with these proceedings. During this time, the Monitor has had numerous meetings and discussions with Atcon's middle management, employees and various other stakeholders. As noted in the First Report, dealings with Mr. Tozer, to the extent that he has made himself available to meet and discuss matters with the Monitor, have been difficult.
6. It is EYI's experience that, during the early days of an insolvency proceeding, executive management is typically actively involved with the Monitor. This has not been the case in these proceedings to date. During the duration of these CCAA proceedings, the Monitor has made repeated requests of Mr. Tozer to attend at the Atcon offices to take an active role in the management of the Companies' operations, the Envirem sales process, dealings with equipment lessors and customers and to meet with the Monitor to discuss any matters of interest or concern to him. The Monitor has also requested that, in

accordance with paragraph 26 of the Initial Order, Mr. Tozer make himself available to the Monitor to provide the Monitor with the assistance necessary to enable the Monitor to adequately carry out its duties and functions during a critical and important time in the CCAA proceedings. Mr. Tozer's compliance with these requests has been limited. Mr. Tozer's attendances at Atcon's offices have been sporadic, consisting of approximately a half-dozen occasions to date during these proceedings, for approximately 8-10 hours in total. The Monitor acknowledges that Mr. Tozer has informed the Monitor that he has been working from outside the Atcon offices at times dealing with staff and customer matters, but such work has been beyond the visibility of the Monitor except while Mr. Tozer accompanied the Monitor to Calgary, Alberta to attend the meeting with Shell on March 4, 2010.

ATCON'S MOTION

7. As set out in the Notice of Motion, Atcon seeks an Order amending or varying the Initial Order to provide, among other things, that EYI be replaced as the Monitor by BDO Canada Limited. The grounds listed in the Notice of Motion to be argued by the Companies are, among other things, that: (i) the Monitor has acted outside the scope of and has exceeded its Court-appointed authority; (ii) the Monitor has adopted an adversarial role against Atcon; (iii) EYI has breached a fiduciary duty owed as Monitor of the Companies; (iv) EYI has breached obligations of neutrality, independence and impartiality and has become an advocate for the Applicant; (v) EYI's actions as the Monitor have given rise to a reasonable perception of bias against the Companies; and (vi) EYI maintains interests, views and opinions directly opposed to Atcon that disqualify EYI from acting as the Monitor.
8. The Monitor has carefully reviewed the Tozer Affidavit and is of the view that certain of the information contained therein is incorrect and incomplete. While the Notice of Motion makes very broad and unfounded allegations against the Monitor, the Tozer Affidavit says very little about the actual conduct of the Monitor which the Companies rely upon to support those allegations. The Monitor responds to specific statements in the Tozer Affidavit below.

Atcon Restructuring Plan

9. In paragraph 5 of the Tozer Affidavit, Mr. Tozer states that “The Plan was developed by Ernst Young, on behalf of the Bank, and presented to the Companies.” This statement is incorrect. EYI did not develop the Atcon preliminary restructuring plan dated September 11, 2009 (the “**Restructuring Plan**”), as it was developed by the Companies. EYI, in its capacity as an advisor to The Bank of Nova Scotia (the “**Bank**”), did consult with the Companies at the time the Plan was prepared and developed by Atcon. The mandate of EYI as advisor to the Bank, which the Companies consented to, included EYI reviewing with the Companies and assessing the Companies’ business plan and the various options available to the Companies.

Atcon Bidding on Future Work

10. In paragraph 25 of the Tozer Affidavit, Mr. Tozer states that “E & Y have consistently told me not to bid any future work for the Companies...”. At no time did any representative of EYI make such a statement to Mr. Tozer or suggest to him that the Companies should not tender bids on future work. However, the Monitor did inform Mr. Tozer on March 11, 2010 that the Companies had severe working capital constraints, as its \$3 million debtor-in-possession (“**DIP**”) financing was projected to be fully utilized. As a result, the Monitor informed Mr. Tozer that there was no additional funding presently available for the Companies to complete the two contracts of Atcon Industrial Services Inc., commence additional work on new projects, and that the continued funding of the Companies’ operations and administrative costs were reliant upon Atcon receiving Shell accounts receivable and the proceeds of the Envirem sale transaction.

Cash Flow Statements

11. In paragraph 26 of the Tozer Affidavit, Mr. Tozer states that the Monitor advised him that “the income that will be generated [on a new project] will not be reflected on the projected cash flow statements to be provided to the Court.” The Monitor invited Mr. Tozer to meet on March 10, 2010 to review various matters, including discussing the recently completed cash flow model that Atcon management had prepared with the assistance of the Monitor. Mr. Tozer did not meet with the Monitor on or prior to March

10, 2010 to discuss the Companies bidding for new work notwithstanding the Monitor's availability to do so. Such timely discussions could have enabled inclusion of such new work in the Companies' projected cash flow statements.

12. The Monitor acknowledges that a conversation took place on March 11, 2010 between Mr. Tozer and Mr. Hickey and Mr. Kinsman of EYI, acting in their capacity as representatives of the Monitor. Prior to and during that meeting, Mr. Tozer was provided with copies of the projected cash flow statement that was prepared by Atcon management and reviewed by the Monitor. When asked by the Monitor whether he had any comments on the projected cash flow statement, Mr. Tozer responded that he did not have any comments. Mr. Tozer informed the Monitor for the first time that the Companies had bid on and apparently secured new contracts, notwithstanding the Monitor's frequent requests to meet with Mr. Tozer to discuss such operational and other matters since the commencement of these proceedings. Notwithstanding the Monitor spending a significant amount of time with Atcon management discussing the assumptions underlying the Companies' cash flow projections, with one exception, no new contracts were disclosed. A single member of middle management had advised the Monitor of the existence of only 1 new contract. That contract was for the summer of 2010, and therefore outside the period considered by the projected cash flow statements filed with the Court.
13. The Monitor informed Mr. Tozer that, if details for the new contracts were provided, the Monitor could assist the Companies in modelling updated projected cash flow statements to take the new contracts into account. The Monitor informed Mr. Tozer that there was insufficient time to complete amendments to the previously prepared projected cash flow statements that were to be filed with the Court, as the Monitor expected to file its report to the Court in the evening of March 11, 2010 or in the early morning of March 12, 2010. At no time did the Monitor state or suggest that any income from new committed projects could not be included in future projected cash flow statements prepared by the Companies and filed in these CCAA proceedings. The Monitor did indicate that there was a distinction between including contracts that had actually been awarded and contracts that had only been bid on but not yet awarded. Further, the Monitor advised

Mr. Tozer that the ability of the Companies to fund the completion of any new contracts would dictate whether such contracts could actually be undertaken by Atcon and therefore realistically included in any cash flow statements.

Meeting with Shell

14. In paragraphs 34 to 36 of the Tozer Affidavit, Mr. Tozer describes interactions he had with Mr. Harris of EYI with respect to matters relating to the Companies' relationship with Shell. The Monitor confirms that Mr. Harris attended the meetings with Mr. Tozer and representatives of Shell in his capacity as a representative of the Monitor. Mr. Harris has confirmed to the Monitor that he did not, at any time, make the statement attributed to him in paragraph 36 of the Tozer Affidavit.
15. The Shell meeting was initiated by Atcon and the Monitor jointly. The purpose of the Shell meeting was to discuss the unpaid amounts which were due to Atcon as well as to discuss the future of the Albian Contract. At the time of the meeting, Shell had not made payments pursuant to the Companies' Albian contract in the amount of approximately \$8.2 Million, which amount was otherwise due for payment. Prior to the meeting, Shell had advised the Companies that it required time to review the matter with its internal legal department and consider its position on unpaid supplier charges and a garnishment notice that had been served upon them with respect to Atcon.
16. Mr. Harris invited Mr. Tozer and Mr. Burns of Atcon to meet with him at his Calgary office prior to the Shell meeting to discuss an agenda and strategy for the meeting. Mr. Harris informed Mr. Tozer that he understood that the primary objective of the meeting was to request that Shell agree to release funds to the Companies as soon as possible, as such funds were essential to fund the continued operations of the Companies. Mr. Harris and Mr. Tozer were both aware that Atcon's DIP financing was almost exhausted, and that operations would likely be discontinued if funds were not forthcoming from Shell.
17. During the Shell meeting the Monitor provided the Shell representatives with a copy of the Initial Order, explained the DIP financing that the Companies had arranged, and explained how the Initial Order was effective in allowing the Companies to continue operating to complete the current season of the Albian Contract.

18. At the conclusion of the meeting, Shell confirmed to the Monitor and Atcon representatives the following:
- (a) That they understood that cash was required from Shell pursuant to the Albian Contract to facilitate a continuation of Atcon's operations'
 - (b) That they would meet with senior management and their internal legal department in order to determine the Shell position on the release of funds to the Companies and advise the Companies early the following week, and
 - (c) That they would like the Companies to continue to work pursuant to the Albian Contract until the end of the current Muskeg removal season, but that a decision on whether Atcon would be invited to continue the contract for the 2010/2011 season would be made at a later date.
19. The Monitor had two subsequent teleconference meetings with Shell representatives between March 4 and March 9 to assist Shell in concluding its position on the release of funds to the Company. As a result of the Shell meeting and subsequent teleconferences, Atcon and the Monitor were advised by Shell on March 10, 2010 that approximately \$4.5 million will be released to the Companies on March 15, 2010.

Envirem

20. As noted above, Mr. Tozer did not make himself reasonably available to have discussions with the Monitor up to March 8, 2010, notwithstanding the Monitor's repeated requests to have such discussions. Since the date of the Initial Order to March 5, 2010, the Monitor attempted to determine if the purchaser was still interested in consummating a transaction for the Envirem business, notwithstanding the commencement of these proceedings, and if so on what terms. Mr. Tozer was unavailable to the Monitor on March 6 and 7, 2010. On March 8, 2010, the Monitor informed Mr. Tozer that negotiations had progressed on the Envirem transaction and that a letter of intent was expected to be forthcoming shortly, which the Monitor would review with him once the purchaser had agreed to satisfactory terms. The Monitor provided a general outline of the asset transaction to Mr. Tozer at this meeting, including a discussion of the purchase price, the allocation of the purchase price to different asset categories, the terms, the assets contemplated to be included in the sale transaction and the amount of the non-refundable deposit, among other things.

21. The Monitor did not advise Mr. Tozer that Envirem would be placed into bankruptcy. However, the Monitor did indicate that, in the event the sale transaction was completed, Envirem would have limited assets remaining and that bankruptcy or receivership proceedings would not be unexpected in such circumstances.
22. During the meeting between Mr. Tozer and the Monitor held on March 11, 2010 mentioned above, the structure of the sale transaction for Envirem was discussed. During the meeting, Mr. Tozer noted that the current structure of the transaction did not provide for payment to Envirem's unsecured creditors and Canada Revenue Agency. The Monitor informed Mr. Tozer that persons that were legally entitled to the Envirem sale proceeds would receive payment as determined by the Court. The Monitor also informed Mr. Tozer that if the Envirem sale transaction was not finalized in a timely manner, additional funding would be required to permit Envirem to continue to operate and conduct a new sales process. The Monitor stated its belief that it was unlikely that the Applicant would provide additional funding to Envirem to permit it to continue to operate beyond the timeline established to complete the contemplated sale transaction.

RECEIVERSHIP PROCEEDING

23. As set out in the First Report, in addition to its role as Monitor in these proceedings, EYI was appointed as receiver and receiver manager (the "**Receiver**") of certain Atcon affiliates (the "**Receivership Entities**") pursuant to the Order of The Honourable Mr. Justice Riordon dated March 2, 2010 (the "**Receivership Order**"). The appointment of the Receiver was granted by this Court pursuant to, among other things, section 243 of the *Bankruptcy and Insolvency Act* (the "**BIA**") and Section 33 of the *Judicature Act*.
24. On Friday March 12, 2010 at 1:27 PM EST, the Receiver was served with the Receivership Entities' notice of appeal of the Receivership Order. The Receiver has been advised by its counsel that section 195 of the BIA provides that:

Except to the extent that an order of judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it

appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal of a judge thereof may deem proper.

25. The Receiver has also been advised by its counsel that the Receivership Entities served a notice of motion on Friday March 12, 2010 seeking, among other things an order staying the execution of the Receivership Order to be granted by the Court on March 15, 2010.
26. In response to the recent steps taken by the Receivership Entities, the Receiver intends to seek the advice and direction of this Honourable Court on March 15, 2010 with respect to the steps, if any, the Court directs its Court-officer to take in light of the steps taken by the Receivership Entities.

CONCLUSION

27. EYI has fulfilled and remains prepared to continue to fulfill its responsibilities as an officer of this Court as Monitor to supervise and assist Mr. Tozer and all other representatives of Atcon through the duration of these CCAA proceedings in accordance with its duties and obligations under the CCAA and the Initial Order. The Monitor has been and continues to be willing to work tirelessly with Mr. Tozer and the Companies to canvass all options to preserve the businesses and maximize value.

ALL OF WHICH is respectfully submitted this 14th day of March 2010.

ERNST & YOUNG INC.

In its capacity as the Court-appointed Monitor 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., and not in its personal or corporate capacity

Per:



Paul D. Hickey, CA•CIRP
Senior Vice President