

S.H. No. 280604

**IN THE SUPREME COURT OF NOVA SCOTIA  
IN BANKRUPTCY AND INSOLVENCY**

**Citation: Classic Cheesecakes Delicious Delectable Delivered Inc. (Re)  
2007 NSSC 190**

**Date:** June 13, 2007  
**Docket:** S.H. 280604  
**Registry:** Halifax

**In the Matter of: Classic Cheesecakes Delicious Delectable Delivered  
Incorporated**

**In the Matter of: the Petition of Nova Scotia Business Incorporated (the  
“Petitioner”) for a Receiving Order**

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**DECISION**

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**Registrar:** Richard W. Cregan, Q.C.

**Heard:** May 25, 2007

**Counsel:** Pamela Clarke representing Nova Scotia Business  
Incorporated

Bradley Miller representing Classic Cheesecakes  
Delicious Delectable Delivered Incorporated

- [1] Nova Scotia Business Incorporated (“NSBI”) has petitioned the court for a receiving order against Classic Cheesecakes Delicious Delectable Delivered Incorporated (the “Company”). NSBI and the Company each gave consent for me as Registrar in Bankruptcy to hear the petition. The Company is represented by its President and principal share holder Bradley Miller.
- [2] The Company produces packaged cheesecakes and similar desserts which are sold to major grocery businesses, the food services industry and convenience stores. It was incorporated in 1997 and carries on its business in a building owned by it in the Sydport Industrial Park, Edwardsville, near Sydney. It had been a reasonably successful business. However, in 2004 Costco, which had been its major customer, made a decision to purchase these products elsewhere. The business has continued but with substantially reduced production and with financial difficulties.
- [3] In 1998 NSBI provided a loan to the Company. It was secured by a demand debenture charging both its real property and personal property. The principal advanced was \$270,000.

- [4] As the Company was in default on this loan, NSBI on October 20, 2006 made a demand for payment. The amount owing was \$322,253.23 principal, and \$29,520.02 interest, for a total of \$351,773.25.
- [5] NSBI had also made another loan to the Company on which there was as of October 20, 2006, owing for principal \$161,014.12 and interest \$15,192.78 for a total of \$176,206.90. Demands on both these loans were again made on March 1, 2007. Notice of Intention to Enforce Security was also given on that day, and a receiver was also appointed pursuant to the debenture. However, the Company refused the receiver access to the premises.
- [6] The amount claimed in the Petition for the Receiving Order, dated April 25, 2007, which is based on the first loan, is \$375,594.31 (including protective disbursement of \$11,551.93) as of March 20, 2007. NSBI values its security at \$245,000.00.
- [7] The security of NSBI is subject only to a priority agreement with the Royal Bank of Canada which gives the Bank priority over the Company's inventory and accounts receivable, the interest of G. N. Johnston Equipment

Co. Ltd. in two motor vehicles and outstanding real property taxes of \$38,916.79, \$33,225.28 of which are arrears from last year. The debt and security to the Bank was assigned to the Black Business Society Initiative early this year. This debt is \$7,474.81. However, in April 2007 its Board of Directors offered to settle for \$2,000.

[8] The Company opposes the petition. In the course of the hearing Mr. Miller gave evidence of his efforts to turn the Company around and strongly argued that it should be give a chance. The following is a brief review of his evidence.

[9] There has been a proposal that NSBI would accept \$150,000 in full settlement of the Company's obligations. Mr. Miller engaged a mortgage broker to obtain financing to enable the Company to accept this offer. A commitment letter has been provided. However, Mr. Miller received an e-mail on May 14, 2007 from the broker with additional conditions. I quote the following from it:

Upon review of the profit and loss statement through to March 2006 as provided by you, they indicated that there was a net operating loss from April/05 to March/06 in the amount of \$273,035.54. We would also require evidence that you have

turned your business around along with a detailed explanation as to why the existing first mortgage on the building will not continue the mortgage.

- [10] Although it is not specially mentioned in the commitment letter it is fair to assume that before funds can be advanced it will be necessary to pay outstanding real property taxes.
- [11] Mr. Miller presented promotional material for individual puddings and crumbles which had been developed with McCain Foods (Canada). He has a Custom Manufacturing Agreement with it, dated January 4, 2005 but it contains no specific commitments by McCain to ever actually place orders. He made an e-mail inquiry last November. McCain's reply was simply that it would let him know when it expected interest in the proposal to resume.
- [12] A company in Florida proposed last year that the Company contribute to a project where some of its products could be sold through small freezers placed in stores in the West Indies. It did not promise business, rather it asked for fees to place advertisements on the freezers.
- [13] He presented "New Product Presentation - (Article)" sheets describing

packaged cheese cakes to be sold at Sobey's Needs stores. Nothing in these papers shows any commitment for Sobey's to purchase anything.

- [14] A Smoked Arctic Charr Spread has been developed. However, there is no commitment from anyone to buy this product.
  
- [15] There are purchase orders from Liquidation World Inc. dated March 15, 2007 for \$16,920; \$40,608 and \$37,224. These orders have expired. Correspondence was found suggesting the expiry date is not critical. Yet no confirmation of this status has been provided.
  
- [16] There are other purchase orders mentioned, one for \$1,153.32 from Western Wholesale, another for \$540.00 from Co-op Atlantic and another for \$4,272.12 from Sobey's.
  
- [17] There is a recent communication from Farinex Distributors expressing interest in distributing cheesecakes to the food service market.
  
- [18] The Company has other term loans, extensive current loans and accounts

payable. The following is a brief review of the salient matters in its financial statement. There are three outstanding loans with the Enterprise Cape Breton Corporation. The first has a start date of April 1, 2000. It was for \$200,000. The outstanding balance is now \$183,500. The agency has proposed that repayments be rescheduled so that during the year beginning October 1, 2007, the Company make monthly payments of \$500, in the next year monthly payments of \$1,500, the next three years \$2,500 and the final two years \$3,000.

[19] The second loan has a balance of \$57,030. A similar proposal has been given respecting it as well as for the third loan which has a balance of \$6,570.

[20] On the balance sheet of the Company as of January 25, 2007 for the ten month period ending that date under Long Term Liabilities these loans are mentioned along with \$150,000 being the proposed settlement amount for the indebtedness to NSBI and other indebtedness. They total \$839,258.35. Mention is made of the other current liabilities totaling \$385,559.95 and credit card liabilities of \$57,512.15. However, there is suggestion that the

later liabilities do not properly relate to the Company.

- [21] The balance sheet show the total assets of \$918,979.91 and the total liabilities at \$1,472,341.50, a short fall of \$553,361.59. The income and expense statement shows a net ordinary income of negative \$52,998.85. The net income is stated to be \$634,793.52, but it results from the forgiveness of debt of \$687,792.37.
- [22] These financial statements are four months old. However, no evidence has been given to suggest that the situation has significantly improved.
- [23] Mr. Miller submitted a Projected Income Statement for the year ending March 31, 2008. It proposes sales for each month beginning with April at \$8,846 and May \$18,285, these presumably being based on actual results. Thereafter he assigns monthly amounts ranging from a high of \$269,354 in November to a low of \$68,900 in January 2008, for a total of approximately \$1,400,242. Against that one must compare the total sales of \$400,089.38 for the 10 months April 1, 2006 to January 25, 2007, an average of \$40,000 per month.



[24] Mr. Miller did not provide the reasoning for such optimistic projections.

Based on the experience of the past I think the likelihood of such a turn around is very small.

[25] The Petitioner alleges that the Company is indebted to the NSBI in the amount of more than \$1,000 and that the Company has committed an act of bankruptcy, namely under Section 42(1)(j) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (the “BIA”) having ceased to meet its liabilities generally as they become due, within the past six months.

[26] The burden is on NSBI to prove these allegations and, once proved, for the Court to grant the petition unless the Company can show, and the burden is on it, that it is able to pay its debts or that there is sufficient cause that the application be dismissed (Section 43(7) of the BIA).

[27] Sufficient cause may be among other things that there is a bona fide dispute as to the debt on which the petition is based, that there are proceedings already before the courts, that there is an existing agreement between the creditors and the debtor whereby the debts have been compromised and that

there has been compliance with all terms, that the debtor is carrying on business and there is a fair chance the debtor will be able to meet its obligation to the creditor, that it has the ability to raise necessary capital to stabilize finances, that nothing is to be gained by bankruptcy, that there are no assets, and that there has been improper conduct by the petitioning creditors. (See commentary in L. W. Houlden & G. B. Morawetz *Bankruptcy and Insolvency Law in Canada*, Third Edition D§14 and D§14.1 paragraphs (8) to (18))

[28] I am satisfied that NSBI has established that the Company owes it in excess of \$1,000, and that the Company has committed the alleged act of bankruptcy; and it has ceased to meet its liabilities generally as they become due. I am also satisfied that NSBI's valuation of its security as stated in the petition is reasonable. Its only obligation is to show to the court that it is reasonable (*Re Baker* (1937), 19 C.B.R. 73 (Ont. S.C.)). Another authority says the court will only look into the valuation of security if it is a mere sham or absurdly small (*Re Hugh M. Grant Ltd.* (1982), 41 C.B.R. (N.S.) 28 (Ont.S.C.)). There is compliance with Section 43(2).

[29] Let me review the details on which I base my conclusions. The Company has an outstanding balance with NSBI on the loan mentioned in the petition of \$375,594.31 as of March 20, 2007. It is in default. It has not been making the required payments both during the past six months and before and was in default of the covenant in the loan document to maintain insurance. In addition there are arrears in real property tax. The statement of accounts payable shows as of May 15, 2007 that nearly 80% of them are 90 or more days old.

[30] The three loans to Enterprise Cape Breton Corporation with outstanding balances total almost \$250,000. Payments of these balances have been rescheduled with minimal payments in October 2007, to be spread over seven years, the monthly payments increasing each year or two. The rescheduling of these loans results from their not being paid as they became due. Thus the rescheduling does not take these loans away as evidence of failure to meet liabilities generally as they become due.

[31] The current liabilities and long term liabilities are mentioned above. Details of the terms of payment are not provided but the fair inference is that they

are not being fully serviced.

[32] Taking these matters together I find that the Company during the past six months has ceased to meet its liabilities generally as they become due. I am then satisfied that the facts alleged are proved and that a bankruptcy order should be issued, unless I can be convinced that the Company is able to pay its debts or there is other sufficient cause that the order ought not to be made. (Section 43(7) of the BIA)

[33] Mr. Miller urged that he could settle with NSBI with the proposed new mortgage which would provide the funds for the offer of settlement made by NSBI of \$150,000. Elsewhere I have commented on this proposed loan. In the circumstances the Company finds itself, I think it is most unlikely that it will be able to meet the requirements of the proposed lender. Furthermore the new mortgage would only be a rescheduling of the NSBI loan. There are other rescheduled loans. It is hard to imagine that the Company would ever be able to meet those new schedules save a very significant turn around the likelihood of which I think is very small. There are the other term loans. There are the accounts payable. The firm commitments for future sales are

few, most likely not enough to support the cost of operating the business in the present, quite apart from servicing the outstanding debt, current and long term.

[34] As to the ability to pay in Section 43(7) of the BIA I quote the following from Houlden and Morawetz at page 2-48.1:

“Able to pay his debts” in s. 43(7) means “pay immediately in the sense of a reasonable time” .... If it is shown that the debtor has failed to pay the debt due to the petitioning creditor and to other creditors, the onus is on the debtor to prove that it is able to pay its debts .... It is not sufficient for the debtor to say that his creditors are not pressing him for payment .... **The debtor must prove by clear and independent evidence that it is able to meet its liabilities generally as they fall due.** (emphasis added)

Clearly the Company is not able to pay its debts.

[35] There is no present disputes regarding the debt owed to NSBI or any other creditor, other than that they are not being paid. Again there are no executed compromises of any debts.

[36] I think that the thrust of the accounting evidence is that even allowing some expectation that the business may turn around, it is most unlikely that the Company will ever be able to meet its outstanding obligations.

[37] Like most businesses it can only be successful with a good demand for its product, expenses under control and financing under control. It presently does not have any of these. No one is going to invest significant money in it just to be rid of substantial long term and current debt. The operation has only been operating at a 15% capacity. It is basically a family operation, because it cannot afford to pay staff.

[38] There is just not that which justifies the continued operation of the company with the burden of its debts. There is no evidence of carefully thought out restructuring plans on which to have a successful turnaround. That being the case, a bankruptcy order is the appropriate remedy. The creditors will then receive their respective shares in the assets of the Company as directed by the BIA. This will be in their best interest.

[39] I think the following from Houlden & Morawetz at page 2-66 is apt:

If, however, the debtor company is in serious financial difficulties and there is little likelihood of its successfully continuing in business, the court will refuse to exercise its discretion and will make the receiving order.

[40] Mr. Miller asked that I consider staying the petition under Section 43(11) of

the BIA. The authorities make it clear that a stay is normally only available in such situations as where an issue is being tried relating to disputed facts or where there is a concrete proposal that needs a little time to be effected. Such circumstances do not exist in the present situation.

[41] I am satisfied that NSBI is acting in good faith in bringing the petition.

Therefore, I grant the petition. A receiving order against the Company will be issued.

R.

Halifax, Nova Scotia  
June 13, 2007