CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

S U P E R I O R C O U R T
(Commercial Division)
(Sitting as a court designated pursuant to the *Bankruptcy and Insolvency Act* (the "*BIA*"), R.S.C. 1985, c. B-3)

No.: 500-11-047847-146

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF:

MEXX CANADA COMPANY

Debtor/Petitioner

- and -

RICHTER ADVISORY GROUP INC.

Trustee

FOURTH MOTION FOR AN EXTENSION OF TIME TO FILE A PROPOSAL
(Section 50.4(9) of the *Bankruptcy and Insolvency Act (the*)

TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT OR THE REGISTRAR, SITTING IN COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE DEBTOR RESPECTFULLY SUBMITS THE FOLLOWING:

I. INTRODUCTION

1. By the present motion, Mexx Canada Company (the "**Debtor**" or "**MCC**") seeks a fourth extension of time for filing a proposal until June 1, 2015, for the reasons more fully explained below.

II. FACTUAL & PROCEDURAL BACKGROUND

2. MCC has its domicile at 905 Hodge Street, in the City and District of Montréal, Province of Québec, H4N 2B3.

3. MCC was part of the Mexx Group. The Mexx Group was an international fashion group that designs clothes and accessories for men, women and children. All the entities forming part of the Mexx Group, including MCC, were owned, directly or indirectly, by a Netherlands holding company named Mexx Lifestyle B.V. ("**Lifestyle**"). Certain of these entities filed for bankruptcy in the Netherlands on December 3, 2014 and a trustee has been appointed pursuant to the laws of the Netherlands.

4. MCC used to operate 95 stores in eight different provinces, namely Nova Scotia, New Brunswick, Québec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia.

5. On November 1, 2011, MCC entered into a Credit Agreement with GE Canada Finance Holding Company ("**GE**") for a maximum amount of $30,000,000 (the "**GE Loan**").

6. On December 19, 2011, MCC entered into a Credit Agreement with Crystal Financial LLC ("**Crystal**") for a maximum amount of $13,000,000 (the "**Crystal Loan**").

7. The GE Loan and the Crystal Loan are secured by moveable hypothecs and general security on the universality of the movable assets of MCC.

8. On December 3, 2014, MCC was forced to file a *Notice of Intention to File a Proposal* (the "**Notice**") pursuant to section 50.4 of the *BIA* with the Official Receiver, and Richter Advisory Group Inc. (the "**Trustee**") was appointed trustee, the whole as appears from this Court's record.

9. On December 18, 2014, MCC obtained an order authorizing it to enter into a Consulting Agreement with Merchant Retail Solutions ULC and Gordon Brothers Canada ULC (collectively the "**Consultant**") whereby the Consultant would assist MCC in the liquidation of all inventory (located primarily in its retail locations) as well as in disposing of its furniture, fixtures and equipment, the whole to enable it to potentially generate sufficient funds to allow MCC to file a proposal to its creditors (the "**Consulting Order**").

10. On the same day, this Court issued a first order extending the time for filing the proposal to January 30, 2015 (the "**First Extension**").

11. Following the issuance of the First Extension and of the Consulting Order, MCC, *inter alia*:

    (i) executed the Consulting Agreement with the Consultant on December 19, 2014;

    (ii) commenced the liquidation of its inventory;

    (iii) repaid in full the GE Loan (approximately $4,000,000) on December 19, 2014;

    (iv) closed the majority of its stores in January and February 2015;

    (v) was served with a copy of a warrant of arrest issued by the Federal Court of Canada (the "**FCC**") on December 23, 2014 (the "**Arrest**") allowing LF Centennial PTE Ltd. ("**LF**") to arrest several containers containing a significant number of garments belonging to MCC (the "**Garments**")

    (vi) filed on January 5, 2015 a motion seeking either a declaration that the Arrest by LF is unenforceable or alternatively the issuance of a Safeguard Order allowing MCC to sell the Garments;

    (vii) obtained from this Court on January 6, 2015 a Safeguard Order allowing MCC to ship the Garments to its stores and sell them and forcing MCC to deposit into an

escrow account the proceeds of the sale of the Garments less certain amounts up to a maximum of $1,100,000 (the "**Escrow Arrangement**").

(viii) filed with the FCC on January 8, 2015 a *Notice of Motion* for an order, *inter alia*, quashing the Arrest;

(ix) repaid approximately $7,750,000 of the Crystal Loan which was at approximately $13,000,000 on the day of the First Extension;

(x) negotiated the early termination of the lease for its head office and distribution center which will result in the vacating of these premises by March 31, 2015, as well as allow for reduced rent for the premises for February, and March 2015 and the likely return of a security deposit held by the landlord.

12. On or about January 14, 2015, MCC was notified by Crystal that it had assigned the Crystal Loan to Gores Capital Partners (Alternative) III, L.P. and Gores Co-Invest Partnership (Alternative) L.P. (collectively "**Gores**") in exchange for a payment of approximately $5,250,000. Said assignment was in the best interest of MCC since Gores fully support the present proceedings.

13. On January 26, 2015, this Court issued a second order extending of time for the filing of the proposal to March 12, 2015 (the "**Second Extension**").

III. RESTRUCTURING INITIATIVES & DEVELOPMENTS SINCE THE SECOND EXTENSION

14. Following the issuance of the Second Extension, MCC, *inter alia*:

(i) obtained a judgment from Prothonotary Morneau of the FCC on February 3, 2015 quashing the Arrest and the Escrow Arrangement, as appears from a copy of said judgment communicated herewith as **Exhibit R-1** (the "**Prothonotary Judgment**");

(ii) successfully contested an appeal from the Prothonotary Judgment by LF, which was dismissed by Justice de Montigny of the FCC, as appears from a copy of said judgment communicated herewith as **Exhibit R-2**;

(iii) completed the liquidation sales;

(iv) closed all the remaining stores. No landlord has contested any of the lease disclaimers;

(v) repaid almost entirely the Crystal Loan.

IV. RESTRUCTURING INITIATIVES & DEVELOPMENTS SINCE THE THIRD EXTENSION

15. Following the issuance of the Third Extension, MCC, *inter alia*:

(i) completed the closure of its head office;

(ii) completed settlement discussions with LF;

(iii) reconcile, with the assistance of the Trustee and the Consultant, the proceeds stemming from the liquidation sales and the collapse of the Escrow Arrangement; and

(iv) collected certain receivables from the sale of its furniture, fixtures and equipment; and

(v) entertained discussions with third parties with respect to the proposal to be filed by MCC.

V. EXTENSION OF TIME

16. MCC might have been able to present its proposal to its creditors within the current delay which expires on April, 24, 2015. However, MCC has been advised by this Court that the Court would not be able to hear it during the week of April, 20, 2015, should an extension be required. Given the foregoing, MCC decided to seek immediately an extension in the event that such extension would be required.

17. Pursuant to the present extension, if same is granted, MCC will finalize the terms of the proposal to be presented to MCC's creditors.

18. MCC and the Trustee consider that an extension is in the very best interest of all stakeholders given that it may allow the filing of a proposal.

19. The Trustee is supportive of this motion and the extension sought. A copy of MCC's cash-flow statement and a copy of the Trustee's report on the state of MCC's business and financial affairs will be communicated S

20. The process undertaken is by far the best alternative for the benefit of all stakeholders. MCC and the Trustee are actively considering the parameters of a proposal.

VI. CONCLUSIONS

21. To MCC's and the Trustee's knowledge, the extension sought will not materially prejudice any creditors.

22. Gores is supporting the present motion.

23. MCC has acted and continues to act diligently and in good faith.

24. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present Fourth Motion for an extension of time to file a Proposal;

EXTEND until June 1, 2015 the delay granted to Mexx Canada Company to file its proposal with the Official Receiver.

THE WHOLE, with costs to follow.

MONTRÉAL, April 14, 2015

Davies Ward Phillips & Vineberg LLP

DAVIES WARD PHILLIPS & VINEBERG LLP
Attorneys for the Debtor
Mexx Canada Company

AFFIDAVIT

I, the undersigned, Robbie Reynders, President and director of Mexx Canada Company, having a place of business at 905 Hodge Street, in the City of Montréal, Québec, solemnly declare the following:

1. I am the President and Director of the Debtor/Petitioner herein and I am duly authorized for the purposes hereof;

2. I have taken cognizance of the attached *Fourth Motion for an Extension of Time to File a Proposal*;

3. All the facts alleged in the said motion are true.

AND I HAVE SIGNED

_____

ROBBIE REYNDERS

Solemnly affirmed before me in _____
on the _____th day of April, 2015

_____

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Commercial Division)
(Sitting as a court designated pursuant to the *Bankruptcy and Insolvency Act* (the "*BIA*"), R.S.C. 1985, c. B-3)

No.: 500-11-047847-146

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF:

MEXX CANADA COMPANY

Debtor/Petitioner

- and -

RICHTER ADVISORY GROUP INC.

Trustee

LIST OF EXHIBITS

EXHIBIT R-1 Judgment dated February 3, 2015;

EXHIBIT R-2 Judgment dated February 19, 2015;

MONTRÉAL, April 14, 2015

Davies Ward Phillips & Vineberg LLP

DAVIES WARD PHILLIPS & VINEBERG LLP
Attorneys for the Debtor
Mexx Canada Company

R-1

Cour fédérale Federal Court

Date : 20150203

Dossier : T-2602-14

Référence : 2015 CF 136

Montréal (Québec), le 3 février 2015

En présence de monsieur le protonotaire Richard Morneau

ACTION D'AMIRAUTÉ *IN REM*

ENTRE :

LF CENTENNIAL PTE. LTD.

demanderesse

et

THE CARGO OF GARMENTS STOWED IN OR FORMERLY STORED IN CONTAINERS TRLU7228664, OOLU9737594, CBHU6004670, MAGU4866981, TCNU4143181, HLBU1197840, KKFU9115230, HJCU1978380, GESU6244729, CBHU9118887, BMOU5252814, HJCU1327813, OOLU9655325, TCNU6627499, OOLU9686250, OOLU7748630, OOLU7535716, HLXU6327409, YMLU8505728, OOLU9742899, DRYU9110790, SEGU4579179, HLXU8254929, HLXU6085666, CLHU8811990, HLXU6575529, APZU4504729, BEAU2096763, HJCU1451779 and TCNU9721739

et

THE OWNERS AND ALL OTHERS INTERESTED IN THE CARGO OF GARMENTS STOWED IN CONTAINERS TRLU7228664, OOLU9737594, CBHU6004670, MAGU4866981, TCNU4143181, HLBU1197840, KKFU9115230, HJCU1978380, GESU6244729,

CBHU9118887, BMOU5252814, HJCU1327813, OOLU9655325, TCNU6627499, OOLU9686250, OOLU7748630, OOLU7535716, HLXU6327409, YMLU8505728, OOLU9742899, DRYU9110790, SEGU4579179, HLXU8254929, HLXU6085666, CLHU8811990, HLXU6575529, APZU4504729, BEAU2096763, HJCU1451779 and TCNU9721739

défendeurs

ORDONNANCE ET MOTIFS

[1] Il s'agit en l'espèce d'une requête de Mexx Canada Company [Mexx] et Richter Advisory Group Inc. [Richter] [et parfois collectivement Mexx] pour l'obtention de divers remèdes par suite de la saisie le 23 décembre 2014 d'une Cargaison de vêtements (plus de 155 000 morceaux) contenus ou qui étaient, jusqu'à peu de temps avant, contenus dans divers conteneurs [parfois la Cargaison].

[2] Les remèdes recherchés par Mexx se retrouvent décrits comme suit à son avis de requête :

> **ACCORDINGLY, MEXX AND RICHTER PRAY FOR JUDGMENT:**
>
> **[A]** **GRANTING** them leave to intervene;
>
> **[B]** **QUASHING** the arrest of the Garments;
>
> **[C]** **STRIKING** the present action;
>
> **[D]** **GRANTING** aid to the Superior Court by:
>
> (i) **ORDERING** Plaintiff to respect the Stay and the Extension and Liquidation Orders;

(ii) **ORDERING** a stay of the present action;

(iii) **DISCHARGING** the arrest;

(iv) **RELEASING** Mexx from its obligations under the Escrow Agreement and **DECLARING** the Escrow Agreement dissolved and without effect as of the date of the order to be rendered herein; and

(v) **DECLARING** that Mexx may remove from escrow any Net Proceeds deposited pursuant to the Escrow Agreement;

[E] **DECLARING** the commencement of these proceedings and the arrest of the Garments to be an abuse of process;

[F] **ORDERING** Plaintiff to pay damages to Mexx in an amount to be determined by way of a Reference pursuant to Rule 153;

[G] **ORDERING** Plaintiff to pay the costs of the present motion on a solicitor-client basis; and in the alternative, in the event the Court sees fit not to strike the present action.

[H] **ORDERING** Plaintiff to furnish security for costs in the amount of $69,450 by way of a payment into Court, said security to be furnished within no more than two business days of the date of the Order to be rendered herein.

[3] Les divers articles de loi ou autres règles appuyant ces remèdes sont listés plus avant au même avis de requête comme suit :

11. Section 188(3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**", sections 22(1), 22(2)(i) and 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, Rules 4, 109, 153, 208, 221, 415 and 488(1) of the *Federal Court Rules*, 1998, SOR/98-106 and article 54.1 of the Quebec *Code of Civil Procedure.*

I. Contexte

[4] La Cour comprend que jusqu'aux environs du 3 décembre 2014, Mexx était un détaillant de vêtements opérant plus de 95 magasins à la grandeur du Canada.

[5] Quant à la demanderesse, LF Centennial PTE. Ltd. [LF Centennial], dont les procédures sont attaquées par les remèdes ci-avant cités, son implication dans le présent dossier est révélée, entre autres, par son affidavit portant demande de mandat daté du 23 décembre 2014 [l'Affidavit de saisie]. Cet affidavit se lit :

> I, Dwijendranath Ramdin, carrying on business at 10 Raeburn Park, Block A, #03-08, Singapore 088702, affirm that:
>
> **Rule 481(2)(a)**
>
> 1. I am a Director of LF Centennial Pte. Ltd. ("**LF Centennial**"), a corporation created under the laws of Singapore having its registered office at 10 Raeburn Park, Block A, #03-08, Singapore 088702, which acts as a buying agent for garment retailors;
>
> **Rule 481(2)(b)**
>
> 2. LF Centennial was the buying agent of Mexx Canada Company ("**Mexx**");
>
> 3. Vendors located in various jurisdictions sold apparel and fashion accessories ("Merchandise") to Mexx pursuant to Placement Memoranda;
>
> 4. Mexx has failed to pay the Vendors for the Merchandise which is stowed or was formerly stowed in containers TRLU7228664, OOLU9737594, CBHU6004670, MAGU4866981, TCNU4143181, HLBU1197840, KKRFU9115230, HJCU1978380, GESU6244729, CBHU9118887, BMOU5252814, HJCU1327813, OOLU9655325, TCNU6627499, OOLU9686250, OOLU7748630, OOLU7535716, HLXU6327409, YMLU8505728, OOLU9742899, DRYU9110790,

SEGU4579179, HLXU8254929, HLXU6085666, CLHU8811990, HLXU6575529, APZU4504729, BEAU2096763, HJCU1451779 and TCNU9721739 (collectively "Containers");

5. LF Centennial has been assigned the rights of the Vendors in the Merchandise stowed in or formerly stowed in the Containers;

6. The nature of the Plaintiff's claim is in relation to the exercise of its right of stoppage in transit of the Merchandise;

7. The *in rem* jurisdiction of this Court is invoked pursuant to subsections 22(1), and 22(2)(i) of the *Federal Courts Act*;

Rule 481(2)(c)

8. The Plaintiff's claim has not been satisfied;

Rule 481(2)(d)

9. The nature of the property to be arrested is apparel and other fashion accessories currently stowed in the Containers or which were formerly stowed in the Containers;

10. the property to be arrested which was formerly stowed in containers TRLU7228664, OOLU9737594, CBHU6004670, MAGU4866981, TCNU4143181, HLBU1197840, KKFU9115230, HJCU1978380, GESU6244729, CBHU9118887, BMOU5252814, HJCU1327813, OOLU9655325, TCNU6627499, APZU4504729, BEAU2096763, HJCU1451779 and TCNU9721739 is, to the best of my knowledge, currently at the premises of Delmar International Inc;

11. The property to be arrested which is stowed in the five (5) containers numbered OOLU9686250, OOLU7748630, OOLU7535716, HLXU6327409 and YMLU8505728 is, to the best of my knowledge, currently in transit on trains destined for Canadian National Railway Company or Canadian Pacific Railway Company railway terminals in Montreal;

12. The property to be arrested which is stowed in the seven (7) containers numbered OOLU9742899, DRYU9110790, SEGU4579179, HLXU 8254929, HLXU6085666, CLHU8811990 and HLXU6575529 is, to be best of my

> knowledge, currently on various vessels in transit to Canada and scheduled to discharge at the port of Halifax, Montreal, or Prince Rupert.

[6] Suivant Mexx, LF Centennial ne pouvait prendre action *in rem* en cette Cour le 23 décembre 2014 et procéder à l'arrêt de la Cargaison en raison, entre autres, des faits en matière d'insolvabilité décrits ci-après.

[7] Tel qu'il ressort de l'extrait cité ci-dessous au paragraphe [8], le 3 décembre 2014, et c'est là un fait central, Mexx a déposé en vertu de l'article 50.4 de la *Loi sur la faillite et l'insolvabilité*, LRC 1985, c B-3, telle qu'amendée [la LFI] un avis d'intention de faire une proposition [la NOI du 3 décembre 2014].

[8] Il ressort de la preuve que cette NOI, dont le texte suit, fut envoyée à LF Centennial par Richter, le syndic à la proposition, le 10 décembre 2014 :

> **Notice to Creditors of Intention to Make a Proposal**
> **(Subsection 50.4(6))**
>
> **In the Matter of the Notice of Intention to Make a Proposal of**
> **Mexx Canada Company**
> **Of the City of Montréal, Borough Saint-Laurent**
> **In the Province of Quebec**
>
> Notice is hereby given that, on December 3, 2014, the above-mentioned Debtor filed a Notice of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act*, as per a copy attached hereto.
>
> Notice is further given that in accordance with Section 69 of the *Bankruptcy and Insolvency Act*, all proceedings against the Debtor are hereby stayed. Accordingly, no creditor has any remedy against the Debtor or its assets, nor shall it commence or continue any action, execution, or other proceedings for the recovery of a claim.

A list of the creditors with claims amounting to $250 or more and the amounts of their claims as known or shown by the Debtor's books is annexed hereto. The enclosure thereof does not constitute the acceptance of any claim or claims.

Upon the filing of the contemplated Proposal, a **further** notice shall be mailed to you providing you with the following:

a) A copy of the Proposal;

b) The date, time and place of a Meeting of Creditors to be held to consider the Proposal;

c) A condensed statement of the assets and liabilities of the Debtor;

d) The following prescribed forms, to be completed:
- Proof of Claim;
- Proxy;
- Voting Letter on the Proposal.

Should the Debtor fail to file a Proposal within the prescribed delays, an automatic bankruptcy will ensue and the Trustee will forthwith convene a meeting of creditors.

Dated at Montréal, Province of Québec, December 10, 2014.

[Je souligne.]

[9] La Cour comprend de la preuve qu'entre le 10 décembre 2014 et le 16 décembre 2014, LF Centennial a retenu pour les fins des débats en insolvabilité la même firme d'avocats qui la représente ici dans le présent dossier de la Cour fédérale.

[10] Suite à des requêtes déposées en ce sens le 16 décembre 2014, la Cour supérieure du Québec à Montréal a émis le 18 décembre 2014 deux ordonnances, soit essentiellement une ordonnance prorogeant au 30 janvier 2015 le délai de Mexx pour faire une proposition sous

la LFI et une ordonnance permettant à cette dernière de liquider ses inventaires [les Extension et Liquidation orders].

[11] La Cour comprend également que dernièrement le délai du 30 janvier 2015 fut prorogé par la Cour supérieure au 12 mars 2015.

[12] Il ressort par ailleurs de la preuve que le 17 décembre 2014, soit le jour avant l'émission des Extension et Liquidation orders, un représentant de Richter aurait discuté avec une des procureurs de LF Centennial du contenu de ses intentions de rechercher de telles ordonnances. Toutefois, aucun représentant ou procureur de LF Centennial n'était présent en Cour supérieure le 18 décembre 2014.

[13] Rien en preuve ne fut produit par LF Centennial pour contredire la croyance suivante de Mexx – croyance qui est partagée par la Cour à l'effet que :

> Plaintiff's [LF Centennial] counsel knew or ought to have known that Justice Gouin had granted the motions made by Mexx and had issued the Extension and Liquidation Orders.

[14] Tel que mentionné auparavant, le 23 décembre 2014, LF Centennial entreprenait en notre Cour son action et procédait à la saisie de la Cargaison en vertu de l'Affidavit de saisie. Il est à noter que l'Affidavit de saisie, qui est signé par un des directeurs de LF Centennial, ne fait point mention de la NOI du 3 décembre 2014, des Extension et Liquidation orders, ou de toute autre procédure en Cour supérieure de la part de Mexx.

[15] Face à ces procédures en Cour fédérale, le 30 décembre 2014, Richter faisait parvenir à LF Centennial, entre autres, un nouvel avis à l'effet que Mexx était depuis le 3 décembre 2014 sous la protection d'une NOI. Le texte de cet avis du 30 décembre 2014 se lit :

> Notice is hereby given that the above debtor filed a Notice of Intention to Make a Proposal on December 3, 2014 under subsection 50.4 of the *Bankruptcy and Insolvency Act*.
>
> On December 18th, 2014 Mexx Canada Company obtained an extension of time to file a proposal until January 30, 2015.
>
> Pursuant to subsection 69.(1) of the Act, all proceedings against the aforenamed insolvent person are stayed as of the date of filing of the Notice of Intention.
>
> No proceedings against the debtor or against the property of the debtor can be undertaken or continued by LF Centennial Pte. Ltd. (**Court No. T-2602-14**), unless the Superior Court, commercial division, in the matter 500-11-047847-146, rules otherwise.
>
> Dated at Montréal in the Province of Québec, this 30th day December 2014.

[16] Par après, tel que le relate Mexx à son avis de requête, les procédures suivantes se sont déroulées en Cour supérieure:

> 33. On January 5, 2015 Mexx filed a motion with the Superior Court seeking relief against the proceedings commenced by Plaintiff, including a declaration that the arrest of the Garments was not opposable to it (the "**Motion for Relief**").
>
> 34. On the event of the hearing before Justice Gouin, the parties came to an agreement that would allow Mexx to ship the Garments to its stores and sell them. In return for this, Mexx agreed to deposit into an escrow account the proceeds of the sale of the Garments less certain amounts (the "**Net Proceeds**") up to a maximum of $1,100,000 (the "**Escrow Agreement**").
>
> 35. The parties furthermore agreed that the Net Proceeds would stand as bail in the present proceedings.

> 36. Mexx agreed to this arrangement without admission that the Federal Court has jurisdiction over the matter or that LF was entitled to arrest the Garments.
>
> 37. Mr. Justice Gouin heard the Motion for Relief and issued a safeguard order giving effect to the Escrow Agreement.

II. Analyse

[17] LF Centennial ne s'oppose pas à l'intervention en cette Cour de Mexx et de Richter. La Cour conçoit également qu'il en soit ainsi. Le remède [A] recherché par Mexx à son avis de requête (voir paragraphe [2], *supra*) sera donc accordé dans l'ordonnance. En conséquence et dorénavant, l'intitulé de cause devra refléter cette nouvelle situation.

[18] Ceci dit, quant au mérite de la présente requête, Mexx soutient à l'appui des remèdes recherchés, que les présentes procédures en Cour fédérale n'auraient jamais dû être prises sans à tout le moins que LF Centennial ait obtenu au préalable l'autorisation en ce sens de la Cour supérieure.

[19] Je crois que Mexx a raison et c'est cet argument que la Cour propose de regarder en premier lieu puisqu'il lui apparaît être central en l'espèce.

[20] D'entrée de jeu, l'Affidavit de saisie établit essentiellement à l'égard de Mexx son caractère d'acheteur de la Cargaison. Je pense que cela se traduit aussi en caractère de propriétaire de ladite Cargaison d'autant plus que LF Centennial n'a pas véritablement contesté ce statut.

[21] Dans cette foulée, je tiens que les propositions suivantes de Mexx à ses représentations écrites au soutien de sa requête sont fondées :

> 25. [...] Plaintiff knew at the time it commenced the Federal Court Proceedings that Mexx was the owner of the Garments. In this regard, Plaintiff knew full well that Mexx had purchased the Garments on an Free On Board and Free Along Side basis and that Mexx had 90 days on which to pay the price. (See *Kingsway, compagnie d'assurances générales c. Bombardier*, 2010 QCCA 1518, [2010] R.J.Q. 1894, para 34-43 [**TAB 9**])
>
> 26. Given the provisions of section 69.4 of the BIA, Plaintiff had no right to institute the Federal Court Proceedings directed against Mexx' property without first obtaining permission of the Superior Court which it did not do. On this basis alone, the Federal Court Proceedings constitute an abuse of process.
>
> [...]
>
> 31. The arrest of the Garments was an action against or involving Mexx' property. As the Federal Court Proceedings were commenced without leave of the Superior Court, said proceedings violate section 69 of the BIA and encroach on the Superior Court's exclusive jurisdiction over Mexx' insolvency. The Federal Court Proceedings must, therefore, be dismissed or permanently stayed.

[22] Ainsi je ne puis suivre l'analyse préconisée par LF Centennial à l'effet que la situation à l'étude est semblable à celle qu'avait à analyser la Cour suprême du Canada dans l'arrêt *Holt Cargo Systems Inc v ABC Containerline N.V. (Trustees of)*, [2001] 3 RCS 907 [l'arrêt *Holt Cargo*].

[23] Dans cet arrêt, la Cour fédérale, puis la Cour suprême, avaient à évaluer si les procédures en Cour fédérale touchant l'arrêt au Canada du navire « Brussel » devaient être suspendues en raison du fait que subséquemment le propriétaire belge dudit navire a déclaré faillite en Belgique et que par suite de demandes des syndics belges, avec l'appui du tribunal de faillite belge, la

Cour supérieure du Québec siégeant en matière de faillite avait émis diverses ordonnances statuant sur le sort du navire ainsi que son produit de vente.

[24] On doit savoir que dès avant cette période, la Cour fédérale avait déjà accordé dans le mois précédent jugement par défaut au créancier garanti américain (Holt) et avait ordonné et mis en place le processus traditionnel pour la vente du navire « Brussel ».

[25] De plus, tel que le note la Cour suprême au paragraphe 21 de ses motifs, il n'y a eu en tout temps au Canada aucune instance en matière de faillite autres que les procédures engagées par les syndics belges dans le but de faire reconnaître les ordonnances délivrées par le tribunal de faillite belge.

[26] Ainsi dans l'arrêt *Holt Cargo*, les procédures *in rem* en Cour fédérale étaient passablement avancées (arrêt du navire, jugement par défaut, ordonnance de vente du navire, voire le statut certain de créancier garanti de Holt), au moment où le tribunal de faillite belge, via la Cour supérieure du Québec, a cherché à obtenir la suspension des procédures en Cour fédérale.

[27] C'est face à cette dynamique particulière – très différente de la nôtre – que la Cour suprême du Canada embrasse comme suit aux paragraphes 66 et 92 la position du juge MacKay de ne pas céder le pas, de ne pas reconnaître en premier l'autorité de la Cour supérieure du Québec sur le navire saisi :

66. La faillite n'était certainement pas dépourvue de pertinence dans le cadre	66. The bankruptcy was certainly not irrelevant to the Federal Court proceedings.

des procédures engagées devant la Cour fédérale. Les syndics ont à bon droit demandé (et obtenu) le droit de participer aux procédures afin de protéger les intérêts du propriétaire failli du navire. Après le 5 avril 1996, les procédures devant la Cour fédérale ont comporté un aspect « faillite » dont le juge MacKay a tenu compte dans ses diverses ordonnances. Néanmoins, après avoir décidé de reconnaître la garantie de Holt sur le plan du droit maritime et avoir tenu compte de la priorité accordée aux créanciers garantis dans l'ordonnance du tribunal de faillite canadien en date du 28 juin 1996, il a conclu à juste titre qu'aucune entrave juridictionnelle n'empêchait la Cour fédérale de continuer d'instruire l'action *in rem* de Holt contre le navire.

The Trustees rightly demanded (and were accorded) rights of participation in the proceedings to protect the interest of the bankrupt shipowner. There was a continuing bankruptcy aspect throughout the Federal Court proceedings after April 5, 1996 which MacKay J. acknowledged in his various orders. Nevertheless, having ruled that he would recognize Holt's security interest as a matter of maritime law, and having regard to the priority accorded to secured creditors in the order of the Canadian bankruptcy court dated June 28, 1996, he rightly concluded that there was no jurisdictional barrier to the Federal Court continuing to adjudicate Holt's *in rem* action against the Ship.

...

92. En examinant la question de la suspension, le juge MacKay a reconnu l'importance de la courtoisie et de la coordination internationale lorsqu'une affaire s'y prête. Il a ensuite insisté principalement sur le fait qu'il était saisi d'une action *in rem* intentée par des créanciers garantis contre un navire dont la Cour fédérale avait déjà ordonné la saisie au moment de la faillite, et dont il avait déjà ordonné l'évaluation et la vente au moment des interventions du

[...]

92. In addressing the issue of a stay, MacKay J. acknowledged the importance of comity and international coordination in a proper case. Having done so, he went on to place primary emphasis on the fact he was dealing with an *in rem* action by secured creditors against a ship which at the time of the bankruptcy the Federal Court had already arrested and at the time of the interventions of the Canadian bankruptcy court (June 11 and June 28, 1996) he had already ordered appraised

> tribunal de faillite canadien (11 juin et 28 juin 1996)... and sold. [...]
>
> [Je souligne.]

[28] C'est donc en ce sens que l'on peut comprendre que la Cour supérieure de l'Ontario dans l'arrêt *Roynat Inc v Phoenix Sun Shipping Inc*, 2013 ONSC 7308 ait appliqué l'arrêt *Holt Cargo* puisque là également les procédures en Cour fédérale avaient été instituées avant celles en faillite.

[29] Or, la dynamique qui nous occupe dans le présent dossier est toute autre.

[30] Tel qu'on l'a vue, la NOI date du 3 décembre 2014 et devait être à la connaissance de LF Centennial et de ses procureurs dès au moins le 10 décembre 2014.

[31] L'arrêt de la Cargaison n'est survenu par après que le 23 décembre 2014. À cette époque, de plus, tout droit et caractère de créancier garanti n'était point consacré en faveur de LF Centennial (contrairement à la situation dans l'arrêt *Holt Cargo*).

[32] De plus, il ressort qu'avant même l'arrêt de la Cargaison en cette Cour, les procureurs de LF Centennial étaient au courant que des débats et des ordonnances avaient été émises par la Cour supérieure du Québec.

[33] Ainsi je pense que LF Centennial n'a pas porté suffisamment attention (*pay due regard*) aux procédures en Cour supérieure et, en n'obtenant pas au préalable l'autorisation de cette Cour supérieure, elle a, tel que soutenu par Mexx, contrevenu aux articles 69 et 69.4 de la LFI.

[34] En conséquence, il m'apparaît que le remède à accorder ici est le remède [D] dans son ensemble tel que contenu à l'avis de requête de Mexx, soit, pour reprendre ce paragraphe :

> **[D]** **GRANTING** aid to the Superior Court by:
>
> (i) **ORDERING** Plaintiff to respect the Stay and the Extension and Liquidation Orders;
>
> (ii) **ORDERING** a stay of the present action;
>
> (vi) **DISCHARGING** the arrest;
>
> (vii) **RELEASING** Mexx from its obligations under the Escrow Agreement and **DECLARING** the Escrow Agreement dissolved and without effect as of the date of the order to be rendered herein; and
>
> (viii) **DECLARING** that Mexx may remove from escrow any Net Proceeds deposited pursuant to the Escrow Agreement;

[35] La Cour ajoute toutefois *en obiter* que si elle n'avait pas conclu dans le sens de ce remède [D], elle aurait néanmoins, pour les motifs suivants, évalué sérieusement la radiation de la déclaration d'action de LF Centennial et casser en conséquence le mandat de saisie.

[36] À cet égard, Mexx soutient que notre Cour n'a pas juridiction sur l'action entreprise en cette Cour par LF Centennial puisque les articles de la *Loi sur les Cours fédérales*, LRC 1985, c F-7 [la Loi] sur lesquels l'Affidavit de saisie s'en remet ne sont pas applicables en l'espèce.

[37] Ces articles, soit le paragraphe 22(1) et l'alinéa 22(2)*i*) de la Loi, se lisent :

22. (1) La Cour fédérale a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence.	**22.** (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.
22. (2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :	**22** (2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:
[...]	[...]
i) une demande fondée sur une convention relative au transport de marchandises à bord d'un navire, à l'usage ou au louage d'un navire, notamment par charte-partie;	(*i*) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;

[38] Bien que la requête en radiation de Mexx invoque la règle 208 des *Règles des Cours fédérales* [les règles], il appert de l'extrait suivant des auteurs Saunders et al, Federal Courts Practice 2015, Carswell, en page 581, que cette même requête doit être vue implicitement comme s'appuyant principalement sur l'alinéa 221(1)*a*) des règles :

> Notes
>
> Rule 208 provides that a party who moves to object to service of a statement of claim on preliminary grounds does not attorn to the jurisdiction of the Court.
>
> Rule 208 governs only the consequences of a preliminary objection. It does not provide a substantive basis for objection, which must be found in other provisions of the *Federal Courts Act* or Rules or the general law. Under the *Rules*, objections to jurisdiction may be brought under rule 221(1)(a). [...]
>
> [Je souligne.]

[39] Ainsi, l'extrait suivant de l'arrêt *Hodgson et al v Ermineskin Indian Band et al.* (2000), 180 FTR 285, page 289 (confirmé en appel : 267 NR 143; autorisation de pourvoi à la Cour suprême du Canada refusée : 276 NR 193) établit qu'une approche soulevant une question de juridiction ou d'absence de cause d'action sous cet alinéa se doit d'être claire et évidente pour que la Cour l'accueille. Cet extrait rappelle également que sous l'aspect de juridiction, des éléments de preuve sont admissibles :

> [9] I agree that a motion to strike under rule 221(1)(a) [previously rule 419(1)(a)] on the ground that the Court lacks jurisdiction is different from other motions to strike under that subrule. In the case of a motion to strike because of lack of jurisdiction, an applicant may adduce evidence to support the claimed lack of jurisdiction. In other cases, an applicant must accept everything that is pleaded as being true (see *MIL Davie Inc. v. Société d'exploitation et de développement d'Hibernie ltée* (1998), 226 N.R. 369 (F.C.A.), discussed in Sgayias, Kinnear, Rennie, Saunders, *Federal Court Practice 2000*, at pages 506-507).
>
> [10] [....] The "plain and obvious" test applies to the striking out of pleadings for lack of jurisdiction in the same manner as it applies to the striking out of any pleading on the ground that it evinces no reasonable cause of action. The lack of jurisdiction must be "plain and obvious" to justify a striking out of pleadings at this preliminary stage.

[40] Ici, même en application des paramètres de l'arrêt *Hodgson*, je pense qu'un poids certain doit être donné aux propositions suivantes que l'on retrouve aux représentations écrites de Mexx pour écarter la juridiction de notre Cour :

> 13. Plaintiff's claim does not arise of a contract for the carriage of goods or for the use or hire of a ship. In this instance, the only contract in existence between Plaintiff and Mexx is the Buying Agency Agreement. The only contracts in existence between Mexx and the suppliers of the Garments were strictly for the sale of those goods. None of these contracts had the slightest thing to do with the carriage of the Garments.
>
> 14. Moreover, Mexx was neither the owner, charterer or operator of any ship or conveyance involved in the carriage of the Garments.
>
> 15. Under section 5.2 of the Buying Agency Agreement, Mexx was responsible for arranging the carriage of the Garments to Canada. Mexx's freight forwarder made arrangements with common carriers for the carriage of the Garments from their FOB/FAS points to Montréal.
>
> 16. In view of the foregoing, section 22(l)(ii) *sic* [22(2)(*i*)] cannot be the basis for the Federal Court's jurisdiction over Plaintiff's claim.
>
> 17. As for section 22(1) FCA, it disposes that:
>
> > 22. (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.
>
> 18. Plaintiff cannot rely on this section as its claim is not made under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming with the ambit of navigation and shipping (see *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 SCR 752, page 766-769 **[TAB 1]**).
>
> [...]

> 20. In this instance, there is no Canadian maritime law or any other law of Canada relating to any matter coming within the class or subject of navigation and shipping essential to the disposition of the case. There is no contract for carriage of goods by sea and nothing relating to this dispute or involving the parties' respective rights occurred at sea or involves the carriage of the Garments.
>
> 21. The dispute between Plaintiff and Mexx is of purely a commercial nature only. It has no connection with carriage by sea or maritime law. The Superior Court is the only tribunal with jurisdiction on this matter. That jurisdiction is assigned by the BIA.
>
> [Je souligne.]

[41] Ainsi, sans même devoir se prononcer sur la question quant à savoir si LF Centennial peut se réclamer d'un droit d'arrêt en transit (*a right of stoppage in transit*), ce droit n'aurait rien de maritime ici au sens du paragraphe 22(1) ou de l'alinéa 22(2)*i*) de la Loi et ne pourrait donc être exercé en cette Cour.

[42] Vu toutefois le remède [D] accordé en ratio, la Cour considère qu'elle n'a pas, par ailleurs, à se prononcer autrement sur les remèdes [B], [C], [E], [F] et [H] contenus à l'avis de requête de Mexx.

[43] Quant au remède [G], soit les dépens sur la présente requête, la Cour considère qu'ils doivent être accordés à Mexx, mais suivant simplement le maximum de la colonne III du Tarif.

ORDONNANCE

LA COUR accorde à Mexx les remèdes [A] et [D] contenus à l'avis de requête de Mexx.

Quant au remède [G], soit les dépens sur la présente requête, la Cour considère qu'ils doivent être accordés à Mexx suivant le maximum de la colonne III du Tarif.

« **Richard Morneau** »
Protonotaire

COUR FÉDÉRALE

AVOCATS INSCRITS AU DOSSIER

DOSSIER :	T-2602-14
INTITULÉ :	LF CENTENNIAL PTE. LTD. c THE CARGO OF GARMENTS ET AL.
LIEU DE L'AUDIENCE :	MONTRÉAL (QUÉBEC)
DATE DE L'AUDIENCE :	LE 27 JANVIER 2015
ORDONNANCE ET MOTIFS :	LE PROTONOTAIRE MORNEAU
DATE DES MOTIFS :	LE 3 FÉVRIER 2015

COMPARUTIONS :

Jean-Marie Fontaine Daniel Grodinsky	POUR LA DEMANDERESSE
George Pollack Christian Lachance	POUR LES INTERVENANTES MEXX CANADA COMPANY ET RICHTER ADVISORY GROUP INC.

AVOCATS INSCRITS AU DOSSIER :

Borden Ladner Gervais LLP Montréal (Québec)	POUR LA DEMANDERESSE
Davies Ward Phillips & Vineberg LLP Montréal (Québec)	POUR LES INTERVENANTES MEXX CANADA COMPANY ET RICHTER ADVISORY GROUP INC.

R-2

Federal Court Cour fédérale

Date: 20150219

Docket: T-2602-14

Citation: 2015 FC 214

Ottawa, Ontario, February 19, 2015

PRESENT: The Honourable Mr. Justice de Montigny

ADMIRALTY ACTION *IN REM*

BETWEEN:

LF CENTENNIAL PTE. LTD.

Plaintiff

and

THE CARGO OF GARMENTS STOWED IN OR FORMERLY STORED IN CONTAINERS TRLU7228664, OOLU9737594, CBHU6004670, MAGU4866981, TCNU4143181, HLBU1197840, KKFU9115230, HJCU1978380, GESU6244729, CBHU9118887, BMOU5252814, HJCU1327813, OOLU9655325, TCNU6627499, OOLU9686250, OOLU7748630, OOLU7535716, HLXU6327409, YMLU8505728, OOLU9742899, DRYU9110790, SEGU4579179, HLXU8254929, HLXU6085666, CLHU8811990, HLXU6575529, APZU4504729, BEAU2096763, HJCU1451779 AND TCNU9721739
AND
THE OWNERS AND ALL OTHERS INTERESTED IN THE CARGO OF GARMENTS STOWED IN CONTAINERS TRLU7228664, OOLU9737594, CBHU6004670, MAGU4866981, TCNU4143181, HLBU1197840, KKFU9115230, HJCU1978380, GESU6244729,

CBHU9118887, BMOU5252814, HJCU1327813, OOLU9655325, TCNU6627499, OOLU9686250, OOLU7748630, OOLU7535716, HLXU6327409, YMLU8505728, OOLU9742899, DRYU9110790, SEGU4579179, HLXU8254929, HLXU6085666, CLHU8811990, HLXU6575529, APZU4504729, BEAU2096763, HJCU1451779 AND TCNU9721739

Defendants

and

MEXX CANADA COMPANY AND RICHTER ADVISORY GROUP INC.

Interveners

ORDER AND REASONS

[1] This is an appeal from an Order made by Prothonotary Morneau dated February 3, 2015, granting, in part, the Interveners' motion to stay the proceedings commenced by the Plaintiff before this Court on December 23, 2014. This appeal brings to the fore, complex issues relating to the interplay between the law of bankruptcy and maritime law, as well as the relationship between the jurisdiction of this Court in matters of admiralty and the jurisdiction of provincial superior courts in matters of bankruptcy and insolvency.

[2] Having carefully considered the written and oral arguments made by counsel on behalf of the Plaintiff and the Interveners, I have determined that the decision of the Prothonotary must be upheld.

I. Facts

[3] LF Centennial PTE Ltd. (LF Centennial) is a Singaporean company which acts as a buying agent for and on behalf of garment retailers. Mexx Canada Company (Mexx) is a clothing retailer who purchased a significant amount of its wares through LF Centennial. Richter Advisory Group Inc. (Richter) is the appointed trustee in the insolvency of Mexx.

[4] On December 3, 2014, Mexx filed a Notice of Intention to Make a Proposal (NOI) with the Official Receiver and commenced restructuring proceedings in furtherance of the NOI before the Québec Superior Court (Commercial Division), (the Superior Court), pursuant to section 50.4(6) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the Act). In so doing, it received the benefit of the stay of proceedings set out at section 69 of that Act.

[5] On December 16, 2014, Mexx filed a motion for an extension of the delay in which to file a proposal. In addition to requesting an extension of the delay for the filing of a proposal, Mexx also filed a motion with the Superior Court for authorization to enter into an agreement for the liquidation of its inventory, fixtures, furniture, and equipment. Both Mexx and Richter agreed that this was the best way of ensuring that proceeds would be available to fund a proposal that would provide some return to Mexx's unsecured creditors. On December 18, 2014, Justice Louis Gouin of the Superior Court granted the two motions.

[6] On December 23, 2014, the Plaintiff obtained the issuance of a warrant from this Court for the arrest of shipments consisting of over 155,000 garments that Mexx had purchased from

suppliers located in Europe, China, Bangladesh and India. It did so on the basis of its interest in the cargo as an unpaid seller, and in exercise of its alleged right to stop goods in transit. Whether the garments had been delivered to Mexx or were still in the hands of the carrier or of the carrier's agent when the warrant was issued is a matter of dispute between the parties. What is not in dispute is that the Plaintiff did not obtain leave from the Superior Court before instituting the proceedings before this Court.

[7] On January 5, 2015, Mexx and LF Centennial reached an agreement on bail for the arrested cargo (the Escrow Agreement). This agreement allowed Mexx to ship the garments to its stores and sell them, in return of which Mexx agreed to deposit into an escrow account the proceeds of the sale of the garments, less certain amounts, up to a maximum of $1,100,000. The parties furthermore agreed that the net proceeds would stand as bail in the Federal Court proceedings, the whole without prejudice to the parties' respective rights. Mexx agreed to this arrangement without admission that the Federal Court has jurisdiction over the matter or that LF Centennial was entitled to arrest the garments.

[8] On January 6, 2015, Mexx and LF Centennial appeared before the Québec Superior Court and informed that Court of the arrests and the agreement for the release of the containers. A Safeguard Order was issued as a result, on consent of the parties and LF Centennial released all the cargo from arrest on January 6, 2015.

[9] Mexx and Richter then sought to quash those arrests and to strike the claim by asserting the existence of the insolvency proceedings before the Québec Superior Court. The Interveners

furthermore contended that the Federal Court was without jurisdiction, and also sought the dismissal of the Plaintiff's action on the basis that it was an abuse of the process of the Court within the meaning of Rule 221(1)(f) of the *Federal Courts Rules*, SOR/98-106 (the Rules). By Order dated February 3, 2015, Prothonotary Morneau granted, in part, the relief sought by the Interveners.

II. The impugned decision

[10] The Prothonotary adopted Mexx's submissions that the Plaintiff knew at the time it commenced the Federal Court proceedings, that Mexx was the owner of the garments, and that given the provisions of section 69.4 of the Act, the Plaintiff had no right to institute these proceedings without first obtaining permission of the Superior Court, which it did not do. In coming to this conclusion, the Prothonotary found that the timing of the insolvency proceedings as compared to the arrests was a central fact to consider, and distinguished on that basis the decision of the Supreme Court in *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)*, [2001] 3 SCR 907 [*Holt*]. In that case, the ship against which an *in rem* action had been filed by secured creditors had already been arrested and sold at the time of the intervention of the Canadian bankruptcy court. Moreover, LF Centennial's right as a secured creditor had not yet crystallized at the time of the arrests, according to the Prothonotary, which further distinguished this case from *Holt*.

[11] The Prothonotary also found that the Plaintiff and its counsel knew or ought to have known of the NOI and failed to disclose the existence of the restructuring proceedings pending before the Québec Superior Court when it applied for the arrest of the garments.

[12] As a result, the Prothonotary granted aid to the Superior Court, as requested by the Interveners, by:

> (i) **ORDERING** Plaintiff to respect the Stay and the Extension and Liquidation Orders;
>
> (ii) **ORDERING** a stay of the present action;
>
> (iii) **DISCHARGING** the arrest;
>
> (iv) **RELEASING** Mexx from its obligations under the Escrow Agreement and **DECLARING** the Escrow Agreement dissolved and without effect as of the date of the order to be rendered herein; and
>
> (v) **DECLARING** that Mexx may remove from escrow any Net Proceeds deposited pursuant to the Escrow Agreement.

[13] In *obiter*, the Prothonotary went further and added that even if he had not granted the above mentioned remedy, he would have seriously considered striking and quashing the Statement of Claim filed in this Court by LF Centennial as a result the arrest of the garments. The Prothonotary found that "un poids certain" must be given to Mexx's submission that the Plaintiff's claim does not rise out of a contract for the carriage of goods or for the use or hire of a ship, since the only contracts between Mexx and the suppliers of the garments were strictly for the sale of those goods and had nothing to do with the carriage of the garments. Moreover, Mexx was neither the owner, charterer or operator of any ship or conveyance involved in the carriage of the garments. As a result, the dispute between the Plaintiff and Mexx is of a commercial nature only, and has no connection with carriage by sea or maritime law. This Court would therefore be without jurisdiction to deal with Plaintiff's alleged right of stoppage in transit, as such a remedy in the present context has no connection to maritime law pursuant to section 22 of the *Federal Courts Act*, RSC 1985, c F-7.

III. Issues

[14] The issues to be determined in this appeal are the following:

A. What is the standard of review of the decision of the Prothonotary?

B. Did the Prothonotary err in ordering that the Plaintiff's action be stayed and the security be dissolved because it did not apply for permission under section 69.4 of the Act to exercise a right of stoppage in transit?

C. Does the Federal Court have jurisdiction over this matter?

IV. Analysis

A. What is the standard of review of the decision of the Prothonotary?

[15] It is well established that discretionary orders of prothonotaries are not to be disturbed on appeal unless:

> a) the questions raised in the motion are vital to the final issue of the case; or
>
> b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.
>
> *Merck & Co v Apotex Inc*, 2003 FCA 488, at para 19; *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27, at para 18

[16] There is no dispute between the parties that the discretionary decision made by the Prothonotary is vital to the final issue of the case, to the extent that discharging the arrests and

dissolving the Escrow Agreement could in effect render the underlying action *in rem* moot or significantly reduce the possibility of realizing any possible judgment in such an action.

[17] On that ground alone, and quite apart from any error of fact or law that the Prothonotary may have made with respect to the test for a motion to strike a claim or to stay proceedings, this appeal must be heard on a *de novo* basis.

B. Did the Prothonotary err in ordering that the Plaintiff's action be stayed and the security be dissolved because it did not apply for permission under section 69.4 of the Act to exercise a right of stoppage in transit?

[18] Counsel for the Plaintiff submitted that the Prothonotary erred in ordering the discharge of the arrest and the dissolution of the Escrow Agreement without applying the test for a motion to strike a statement of claim. As Mexx is presently in the midst of insolvency proceedings, the Order of the Prothonotary will effectively render the Plaintiff's *in rem* action moot as the possibility of any eventual judgment on the right to arrest the goods in transit will be of no effect, according to counsel. Quite apart from this context, counsel further submits that a defendant must always apply to strike out the statement of claim in order to set aside the warrant of arrest, as the latter is the accessory of the former. That being the case, the Plaintiff's claim should only have been struck if it is plain and obvious that the pleading discloses no reasonable cause of action, assuming the facts pleaded to be true, pursuant to Rule 221(1)(a) of the *Federal Courts Rules*.

[19] With all due respect, this argument is without merit. The Notice of Motion filed by the Interveners requested a stay of the Federal Court proceedings on the basis of section 50 of the

Federal Courts Act and of section 188(2) of the Act. This relief is distinct and alternative to the Interveners' demand that the Plaintiff's action be struck for want of jurisdiction pursuant to Rules 208 and 221, because the action discloses no reasonable cause of action, pursuant to Rule 221(1)(a), or because the action is abusive within the meaning of Rule 221(1)(f). In applying for a stay of the Federal Court proceedings pursuant to section 188(2) of the Act, the Prothonotary was not bound to apply the test that would ordinarily apply to a motion to strike; the tests and rules applicable to one do not apply to the other.

[20] Section 188(2) of the Act is prescriptive and mandatory, and directs all courts and officers of all courts to act in aid of the Superior Court in ensuring that its process with respect to Mexx's insolvency proceedings is obeyed. It reads as follows:

All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.	Tous les tribunaux, ainsi que les fonctionnaires de ces tribunaux, doivent s'entraider et se faire les auxiliaires les uns des autres en toutes matières de faillite; une ordonnance d'un tribunal demandant de l'aide, accompagnée d'une requête à un autre tribunal, est censée suffisante pour permettre au dernier tribunal d'exercer, en ce qui concerne les affaires prescrites par l'ordonnance, la juridiction que le tribunal qui a présenté la requête ou le tribunal à qui la requête a été présentée, pourrait exercer relativement à des affaires semblables dans sa juridiction.

[21] The Prothonotary, therefore, had no discretion to exercise and was bound to come to the aid of the Superior Court and ensure that the stay was respected. I agree with the Interveners that the only way the Prothonotary could do so was by staying the Federal Court proceedings and vacating the security.

[22] Given the provisions of section 69 of the Act, the Plaintiff had no right to institute the Federal Court proceedings without first obtaining permission of the Superior Court pursuant to section 69.4. In the case at bar, not only has the Plaintiff not sought permission from the Superior Court, but it did not even disclose the existence of the restructuring proceedings pending before that Court. If leave is not obtained under section 69.4 of the Act, the proceedings are ineffective and do not confer any rights on a creditor: *Textiles Tri-Star Ltée c Dominion Novelty Inc* (1993), 22 CBR (3d) 213 (QCCS).

[23] Counsel for the Plaintiff argued that a stay pursuant to section 69 does not apply to *in rem* proceedings and does not strip this Court of its admiralty jurisdiction to hear the action. At most, this Court should have "due regard" for those proceedings, and the Prothonotary erred in distinguishing the decision of the Supreme Court in *Holt* on the basis that the bankruptcy procedures in that case were initiated after the ship had been arrested and ordered to be appraised and sold by this Court.

[24] The first and most obvious distinction between the facts underlying *Holt* and those at play in the case at bar is that stressed by the Prothonotary, to wit, the timing of the bankruptcy proceeding. As noted by the Prothonotary, the *in rem* proceedings before the Federal Court were

well under way in *Holt*; not only had the ship been arrested for six weeks when the trustees in bankruptcy sought the adjournment of the *in rem* proceedings, but it was ordered appraised and sold a week after the trustees' motion before the Québec Superior Court was granted, obtaining an order recognizing and declaring executory in Québec a Belgian bankruptcy order. Nowhere in that decision are sections 69 or 188(2) of the Act alluded to or discussed by the Court, for the obvious reason that the train had left the station before they could be implemented.

[25] There is, however, another, more fundamental reason why *Holt* ought to be distinguished from the facts that are before this Court. In *Holt*, this Court was faced with a bankruptcy proceeding, which is intended to facilitate the distribution of a debtor's property to its creditors in a manner that is fair to the debtor's stakeholders. To ensure that this process takes place in an orderly and equitable manner, section 69.3(1) of the Act imposes a stay of proceedings against the debtor and its property; that stay, however, does not affect secured creditors, and pursuant to section 69.3(2) "the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his or her security in the same manner as he or she would have been entitled to realize or deal with it if this section had not been passed".

[26] The situation is quite different in an insolvency proceeding, where the objective is to provide breathing space for the debtor company to restructure and refinance. Upon the filing of a notice of intention pursuant to section 50.4(1) of the Act, a stay of proceedings arises through the operation of subsections 69(1)(a) and (b), and such a stay binds all the creditors including the secured creditors. Indeed, it even binds Her Majesty in Right of Canada and Her Majesty in Right of a province, pursuant to subsections 69(1)(c) and (d). Any creditors, secured or not, who

wish to commence any action or assert any claim against an insolvent person or its property must obtain leave from the Court pursuant to section 69.4, which is granted only in extraordinary circumstances. Given the breadth of this provision and the mandatory nature of section 188(2) of the Act, I see no reason why it should not have been given effect by the Prothonotary. If the Plaintiff was allowed to proceed with its *in rem* action in this Court without leave from the Superior Court, it would be granted an unfair advantage over other ordinary creditors and even over the Crown, and there is nothing in the language of section 69 read as a whole to allow for that construction.

[27] Even if one were to accept that the Prothonotary had some discretion as to the way in which he could come to the aid of the Superior Court pursuant to section 188(2) of the Act, I agree with counsel for the Interveners that ordering a stay of the Federal Court proceedings was the appropriate course of action in the circumstances. As explained by Justice Hugessen in *Always Travel Inc v Air Canada*, 2003 FCT 707, the "proper attitude of respectful cooperation" which this Court has to judgments of a provincial superior court will require that, "as a matter of course", this Court gives aid "in virtually every case" to orders issued by such court that requests this Court's aid. While Justice Hugessen was dealing with an order made by the Superior Court of Ontario under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, the same is true of an order by the Superior Court of Québec under the Act. Indeed, his reasoning is even more compelling where the insolvency proceedings occur under the umbrella of the Act which, unlike the *Companies' Creditors Arrangement Act*, provides for a mandatory, statutory stay of proceedings binding upon all of the insolvent person's creditors, including secured creditors.

[28] Justice Hugessen did leave the door open for this Court to refuse the granting of a stay in aid of a provincial superior court order when, for some reason, it is established that such a stay should not be granted. The burden, however, will always be on the person seeking to avoid the consequences of this Court acting in furtherance of a provincial superior court order. In the case at bar, the Plaintiff introduced no meaningful evidence at the hearing before Prothonotary Morneau; indeed, the only evidence of substance was the affidavit filed by the Interveners of Mr. Andrew Adessky, a chartered accountant and trustee in bankruptcy employed by Richter. In the absence of any particular circumstances brought to the attention of the Prothonotary establishing why a stay was unwarranted, he was entirely justified to grant the stay, to discharge the arrest of the cargo and to dissolve the bail agreement, thereby ensuring the proper administration of the restructuring process initiated in the Québec Superior Court.

[29] These reasons, in and of themselves, would be sufficient to dispose of this matter. Yet the Prothonotary also made some comments in *obiter* on the jurisdiction of this Court, and I will now address them briefly.

C. Does the Federal Court have jurisdiction over this matter?

[30] LF Centennial submits that its cause of action for stoppage in transit of cargo being carried pursuant to multimodal bills of lading falls under the jurisdiction of the Federal Court pursuant to subsection 22(2)(i) of the *Federal Courts Act*. Relying on the allegedly broader language of that section as compared to subsection 22(2)(f), the Plaintiff submits that subsection 22(2)(i) does not require that it be a party to the contract of carriage, as long as its cause of action invokes the carriage of goods.

[31] While I accept that subsection 22(2)(i) must be read purposively, it cannot be stretched indefinitely. The Plaintiff's claim does not arise out of a contract for the carriage of goods or for the use or hire of a ship, but flows exclusively from contracts of sale. The only contract in existence between the Plaintiff and Mexx is the Buying Agency Agreement. The only contracts in existence between Mexx and the suppliers of the garments were strictly for the sale of those goods. I fail to understand how any of these contracts can be interpreted as having the slightest thing to do with the carriage of the garments. Indeed, section 5.2 of the Buying Agency Agreement carves out from that agreement the "insurance, shipping, forwarding, handling, and other incidental charges against shipments incurred" by Mexx or its affiliates.

[32] Mexx was neither the owner, charterer or operator of any ship or conveyance involved in the carriage of the garments. It is Mexx's freight forwarder that made arrangements with common carriers for the carriage of the garments from their FOB/FAS points to Montréal. In the absence of any further evidence, subsection 22(2)(i) is clearly insufficient to ground the jurisdiction of this Court over the Statement of Claim brought by Plaintiff. It would be an impermissible, unwarranted and unconstitutional extension of this Court's jurisdiction over maritime and admiralty law to deal with such a matter.

[33] I accept, of course, that the type of claims enumerated at section 22(2) are not exhaustive and that other actions in maritime law may be available pursuant to the general grant of jurisdiction over maritime matters at section 22(1). I also accept, of course, that as part of "the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act* ... or any other statute" (see the definition of "Canadian maritime law" in

section 2 of the *Federal Courts Act*), English admiralty law as it existed in 1934 is part of Canadian law: *ITO-Int'l Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 [*ITO-Int'l Terminal Operators*]. That being said, this is far from sufficient to demonstrate that the Plaintiff's claim pertains to maritime law. Once again, the dispute between LF Centennial and Mexx arises out of purely commercial contracts of sale, with no maritime component. The mere fact that the garments had been carried on a ship at some point in their voyage to Canada does not establish a sufficient connection between the dispute and maritime transport. The concept of maritime law must not be expanded to such an extent as to encroach upon provincial legislative competence: *ITO-Int'l Terminal Operators*, at 774-776; *9171-7702 Québec Inc v Canada*, 2013 FC 832, at paras 24 ff.

[34] Counsel for the Plaintiff tried to substantiate an integral connection between its claim and maritime law with a number of factors, many of which are not supported by the evidence. In particular, the Plaintiff relies on the fact that every single arrest was carried out on cargo that was shipped by sea. As previously mentioned, this is insufficient to connect the claim to maritime law, especially since most of the garments were already in storage in warehouses far removed from any port and had already been delivered to Mexx when the arrest took place. The evidence is clear that most of the garments were no longer in the hands of any ocean carriers (or other carriers in the multimodal chain) or in the course of transit when the arrest was carried out.

[35] Finally, counsel for the Plaintiff submitted that stoppage of goods in transit is a remedy recognized by maritime law. This is no doubt true, but it is immaterial in the context of the case at bar. First of all, there were no such rights for the Plaintiff to exercise, as it appears that the

carriage of the garments had ended. As mentioned above, the evidence is to the effect that most of the garments had already been delivered to Mexx in Montréal either at its distribution center or at other warehouses when the warrant was issued. Furthermore, if the Plaintiff is the assignee of any agreement which could give rise to a right of stoppage in transit, as it purports to be, such assignment was not made known to Mexx prior to the time that it learned on December 24, 2014 of the arrest of the garments, contrary to article 1641 of the *Civil Code of Québec*.

[36] More importantly, for this Court to have jurisdiction, the underlying claims to which the Plaintiff's demand for *in rem* relates, must be connected to shipping and navigation. In other words, the mere existence of a remedy does not determine whether a court has jurisdiction. The remedy is the accessory, not the principal. In the absence of any evidence to the contrary, any rights that the Plaintiff may have had as an unpaid vendor falls within the rubric of "property and civil rights" and should have been exercised before the Superior Court. The Plaintiff, not having seen fit to lead any evidence that linked its claim to a contract of carriage or that disclosed any other meaningful factor that would have given that claim a maritime flavour, I am unable to find that its claim is integrally connected with maritime matters.

[37] I come to the conclusion, therefore, that the Prothonotary was correct in determining that this Court would not have jurisdiction over this matter. I need not strike the action, however, as it has been stayed by Order of the Prothonotary.

V. Conclusion

[38] The appeal is therefore dismissed, with costs in favour of the Interveners. Because the Plaintiff failed to make full and frank disclosure of all relevant facts when seeking the warrant for the arrest of the garments, the costs shall be assessed under Column IV of Tariff B. While the affidavit to lead warrant sworn by a director of the Plaintiff may have complied with the minimum technical requirements of the Rules, it did not relieve him of disclosing the existence of the NOI, of the Stay or of the Extension and Liquidation Orders. The Plaintiff and its counsel knew or ought to have known of the insolvency proceedings before the Québec Superior Court, and they had an obligation to be transparent. They were not entitled as of right to the issuance of a warrant, and they had an obligation to make full disclosure to enable the designated officer to exercise his discretion.

ORDER

THIS COURT ORDERS that this appeal be dismissed, with costs to the Interveners to be assessed in accordance with Column IV of Tariff B.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	LF CENTENNIAL PTE. LTD. v THE CARGO OF GARMENTS STOWED IN OR FORMERLY STORED IN CONTAINERS TRLU7228664 ET AL
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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