Federal Court  Cour fédérale

**Date: 20180404**

**Docket: T-8-17**

**Citation: 2018 FC 365**

**Ottawa, Ontario, April 04, 2018**

**PRESENT: The Honourable Mr. Justice Ahmed**

**BETWEEN:**

**ARCTOS HOLDING INC. AND ARCTOS & BIRD MANAGEMENT LTD.**

**Applicants**

**and**

**ATTORNEY GENERAL OF CANADA AND FUJI STARLIGHT EXPRESS CO. LTD.**

**Respondents**

# JUDGMENT AND REASONS

## I. Overview

[1] This application for judicial review concerns Parks Canada's decision to consolidate leases (the "Lease Consolidation Decision") on several lots of land located in Banff National Park (the "Park"). Parks Canada consolidated the leases at the request of Fuji Starlight Express

Co. Ltd. (“Fuji”), which intends to develop the consolidated lots with businesses, including a hotel and restaurant.

[2] Arctos Holdings Inc. and Arctos & Bird Management Ltd. (interchangeably the “Applicants” or “Arctos”) own, develop and property-manage a retail, residential and restaurant space called “Bison Courtyard,” which is located adjacent to the consolidated lots. The Applicants oppose the Lease Consolidation Decision on the grounds that Parks Canada failed to adequately take “proactive” consideration of the impact that the consolidation and purported development would have on the Town of Banff’s permanent population, thereby failing to comply with the Banff Management Plan.

## II. Background

### A. *Facts*

[3] In a decision on the Respondent Attorney General’s motion to strike the Applicants’ application for judicial review, Justice Strickland set out the factual background of this case, as well as the complex regulatory regime governing land use and development in Banff National Park: *Arctos Holdings Inc. v. Canada (Attorney General)*, 2017 FC 553 at paras. 5-21 [*Arctos*]. For the sake of brevity, I will provide only a short summary.

[4] As mentioned above, the Applicants own, develop, and property-manage Bison Courtyard, a mix of retail, residential and restaurant spaces located in the Town of Banff.

[5] Lots 20-24 lie adjacent to Bison Courtyard. The leasehold interest in Lots 21-24 was originally shared between two co-owners, Homestead Inn and Melissa's Restaurant. Each co-owner held a certificate of title for an undivided share of the leasehold interest in Lots 21-24. In 2009, Fuji purchased Lot 20, as well as Homestead Inn's co-ownership interest in Lots 21-24. In 2016, Fuji purchased the remaining undivided leasehold interest held by Melissa's Restaurant in Lots 21-24, becoming the sole owner of not only Lot 20, but also Lots 21-24.

[6] By way of the Lease Consolidation Decision of November 25, 2016, Parks Canada issued Fuji a consolidated lease for Lots 20-24. The Lease Consolidation Decision forms the subject of the present application for judicial review.

[7] Since the Lease Consolidation Decision was rendered, a number of other developments have occurred. With consolidation having been approved, Fuji applied to the Town of Banff's Municipal Planning Commission (MCP) for a development permit. On December 14, 2016, the MCP issued the permit (the "MCP Decision"), subject to some conditions.

[8] Arctos appealed the MCP Decision to the Development Appeal Board (DAB). At that time, it argued that the consolidation of Lot 20 and Lots 21-24 constituted an unlawful subdivision, and that the development permit did not respect the obligations of the Banff Management Plan with respect to population requirements.

[9] In a decision dated May 11, 2017, the DAB issued a decision (the "DAB Decision"), allowing Arctos' appeal in part. However, it dismissed Arctos' appeal with respect to the

allegedly unlawful subdivision, and rejected Arctos' argument that there had been a failure to comply with the Banff Management Plan. Arctos sought leave to appeal the DAB Decision at the Alberta Court of Appeal. On September 15, 2017, the leave application was dismissed.

B. *The Banff Management Plan*

[10] At the core of this application for judicial review is a provision contained in the Banff Management Plan. The obligation to produce this plan is a statutory duty arising from s. 11 of the *Canada National Parks Act*, SC 2000, c 32, and requires that park plans be reviewed at least every 10 years. As with all national park plans, the Banff Management Plan sets out "a long-term ecological vision for the park, a set of ecological integrity objectives and indicators and provisions for resource protection and restoration, zoning, visitor use, public awareness and performance evaluation." A "Key Action" pertaining to the Town of Banff found in the current version of the Banff Management Plan reads as follows:

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| It is anticipated that the permanent population (Federal Census) will not exceed 8,000; all decisions of Parks Canada and the Town of Banff, including business licensing, shall proactively take into account this policy objective. | Pour plafonner la population permanente (recensement fédéral) à 8 000 habitants, agir proactivement en tenant compte de cet objectif stratégique dans toutes les décisions touchant à la ville, qu'elles soient prises avec ou sans la collaboration de la municipalité, y compris les décisions ayant trait aux permis d'exploitation. |

[11] As mentioned above, the Applicants contend that when rendering the Lease Consolidation Decision, Parks Canada did not "proactively" take into account the policy objective of maintaining a population that does not exceed 8,000 permanent residents.

## III. Issues

[12] On the merits, a single issue is before the Court: did Parks Canada commit a reviewable error in rendering the Lease Consolidation Decision by failing to "proactively" take into account the policy objective stated in the Banff Management Plan to maintain the Town of Banff's population under 8,000 permanent residents?

[13] However, as a preliminary matter, this Court must determine whether the Applicants have standing to bring this application for judicial review. While the Applicants initially took the position that they have direct standing, that argument was not pursued in oral submissions because it was already dismissed by Justice Strickland: *Arctos* at paras. 50-53. I concur with her analysis on the issue of direct standing and must now determine whether the Applicants meet the requirements to be granted public interest standing to bring their claim.

## IV. Preliminary Matter: Public Interest Standing

### A. *Position of the Parties*

#### (1) Applicants

[14] In their written submissions, the Applicants argue that they meet the tripartite test for public interest standing, when interpreted purposively and flexibly, as set out by the Supreme Court of Canada in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*] at para 37. They assert that the serious justiciable issue arising in this case is the unique, complex regulatory regime that applies to property and development in the Park, as well as the alleged failure of Parks Canada and the Town of Banff to proactively manage the Park's permanent population.

[15] The Applicants argue that the second factor – whether an applicant has a real stake or genuine interest in the dispute – is satisfied by the fact that the Applicants are business owners in the Town of Banff and are negatively impacted by "unconstrained intensification of development." On this factor, the Applicants further argue that Arctos has demonstrated ongoing concern in preserving the unique features of the Town of Banff, citing the careful architectural design it employed when developing Bison Courtyard, as well as its commitment to environmental preservation in its business practices.

[16] Finally, the Applicants submit that the proposed lawsuit is a reasonable and effective way to bring the issue before the courts because the only parties to the Lease Consolidation Decision

are Parks Canada and Fuji, neither of which has any interest in challenging the decision. As such, the Applicants state that a judicial review application might, in fact, be the only way to bring the issue before the courts.

(2) The Attorney General of Canada

[17] The Attorney General of Canada ("Attorney General") contends that the Applicants should not be granted public interest standing. The Attorney General first notes that the three factors in the tripartite test are to be weighed cumulatively, not individually, and in light of their purpose of raising an issue of public interest. The Attorney General does not contest that a serious justiciable issue has been raised in this case.

[18] The Attorney General nevertheless submits that Arctos does not have a real stake or genuine interest in the Lease Consolidation Decision. The Attorney General argues that the decision under review is an administrative lease consolidation, not development approval; while the Applicants enjoy participatory rights in the latter, they do not when it comes to the former. The Attorney General further argues that the administrative act of lease consolidation does not have an impact upon population and, even if it were somehow considered to confer development rights, the impact of the proposed development upon population is insignificant. The Attorney General finally notes that Justice Strickland, in considering whether the Applicants had a real stake or genuine interest in the dispute, found that there was no evidence to suggest that Arctos demonstrated a long standing or genuine concern with the permanent resident population of the Town of Banff.

[19] Finally, with respect to the third component of the tripartite test for public interest standing, the Attorney General submits that relief was available to the Applicants before the DAB and the Alberta Court of Appeal, and that therefore this matter need not be reviewed by this Court.

(3) Fuji

[20] Fuji takes no position with respect to the question of public interest standing.

B. *Analysis*

[21] The grant of public interest standing is an inherently discretionary exercise in which courts are called to balance "between ensuring access to the courts and preserving judicial resources": *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236**.** As it was stated by the Supreme Court of Canada in *Downtown Eastside* at para 37:

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

[22] This tripartite test guides the Court in determining whether it should grant public interest standing as a matter of judicial discretion. The test is to be applied purposively and flexibly, and the burden rests with the plaintiff to persuade the court that the factors, taken together, militate in favour of granting public interest standing. For the reasons that follow, I find that the Applicants in the case before me do not qualify for public interest standing to bring this application for judicial review.

(1) Serious Justiciable Issue

[23] As Justice Strickland was prepared to accept, and as the Respondent Attorney General does not contest, I find that the issue before the Court is a serious, justiciable one: namely, whether when making a discretionary leasing decision, the Minister must "proactively" consider the objectives of the Banff Management Plan, particularly with regard to population objectives.

[24] However, I equally concur with the observations of Justice Strickland that this case raises no constitutional issue, and that the consolidation of leases is not particularly serious – rather, it concerns an administrative housekeeping measure that has no independent impact on the Town of Banff's population. As stated above, the test for public interest standing is not one of meeting three individual thresholds. Consequently, the factors militating against the "serious justiciable issue" branch of the tripartite test are also relevant to the overall determination as to whether public interest standing ought to be granted, and shall be taken into account.

(2) Real Stake or Genuine Interest

[25] In my view, the Applicants have not demonstrated that they possess a "real stake" or "genuine interest" in the matter at hand which, it must be recalled, concerns the administrative consolidation of leases in the Park. As offered by the Applicants in oral argument, I accept that Arctos has an interest in environmental sustainability and preservation of the Park, and has conducted itself in a manner consistent with that vision. For this, Arctos ought to be commended. However, the Applicants' commitment to the Park's preservation is not the same thing as having a real stake or genuine interest in the decision under review – that is, the Lease Consolidation Decision itself. On the administrative act of consolidating the leases, which is the proper subject of this application for judicial review, the Applicants have no real stake or genuine interest. Arctos is only concerned with what follows consolidation (i.e. development and the putative population increase), not consolidation itself (which is, in any event, population neutral).

[26] Even if one assumes, for the sake of argument, that the issue before this Court could be framed as one that broadly concerns the proactive management of Town of Banff's population, Arctos is unable to demonstrate that it has a "real stake" or "genuine interest" sufficient to support a claim to public interest standing.

[27] First, the Applicants' evidence of a genuine public interest in compliance with the population targets of the Banff Management Plan appears to have arisen only after Arctos learned, in July 2016, of Fuji's plan to build a hotel. In his affidavit, Peter Poole, Owner and Chief Executive Officer of Arctos, indicates that in late October 2016 he learned from the mayor

that Town of Banff's population was around 10,000. He avers that this is what inspired him to look into the matter by obtaining the municipal census figures, and what cause him to "become concerned about intensified development on the Homestead Inn site." Mr. Poole's affidavit contains relatively recent and not particularly profound evidence upon which this Court has been asked to infer a genuine public interest.

[28] Second, Arctos' claim to a genuine public interest is undermined by the fact that it has mounted various challenges to the approval of Fuji's development permits, and many of those challenges have had nothing to do with the Town of Banff's population. Let me be very clear: those measures were well within the Applicants' legal rights and my comments here are not to be taken to detract from that fact. However, those prior challenges are relevant when determining whether Arctos' interest is genuinely motivated by a public interest in ensuring compliance with the Banff Management Plan's population targets. Arctos previously challenged Fuji's development permits on the grounds that it constituted an illegal subdivision, that it does not retain existing sight lines, and that it does not comply with the Land Use Bylaw in terms of height, garbage and recycling requirements, and poor design of the building. This logically leads to the conclusion that Arctos' interest in the matter at hand is both public and private in nature.

(3) Reasonable and Effective Way to Bring the Issue Before the Courts

[29] With regard to the third factor, I find that the Applicants have failed to demonstrate that granting public interest standing, in all the circumstances, is a reasonable and effective way to bring the issue before the courts. The Applicants claim that this judicial review "may be the *only* reasonable and effective way to bring the issue before the courts" [emphasis in original] is belied

by their own actions: the Applicants challenged the Lease Consolidation Decision before the DAB in 2017, and appealed that decision to the Alberta Court of Appeal. Those avenues were appropriate for challenging the Lease Consolidation Decision for conformity with the Banff Management Plan, and they have been exercised by Arctos. Thus, I find that this factor does not militate in favour of granting public interest standing to the Applicants.

C. *Conclusion*

[30] Taken together, the tripartite factors do not weigh in favour of granting the Applicants public interest standing. As the Applicants do not qualify for standing, it is unnecessary to proceed with an analysis on the merits of this case.

V. Costs

[31] At the hearing, the parties informed me that they had discussed the issue of costs but had not fully reached an agreement; while they agree on the line items for the procedural steps and disbursements, they disagree as to whether costs should be assessed under Column III or Column IV of Tariff B.

[32] The Applicants contend that costs should be granted in accordance with Column III of Tariff B. They note that the litigation was taken in the spirit of the public interest, an enumerated factor under Rule 400(3)(h) of the *Federal Courts Rules*, SOR/2004-238. The Applicants furthermore submit that, at the time the application was filed in January 2017, they could not know the outcome of several related proceedings (i.e. those before the DAB, Alberta Court of

Appeal, ruling of Justice Strickland on the motion to strike) and that as a result of those decisions, Arctos appropriately winnowed the issues to be litigated at trial.

[33] The Respondent Attorney General, on the other hand, argues that costs should be awarded in accordance with Column IV of Tariff B. The Respondent contends that several issues ought not to have been raised on this application for judicial review in the first place, citing for example the Applicants' argument in favour of direct standing. Fuji made no request as to costs in its written or oral submissions.

[34] I disagree with the Applicants' position that this litigation was taken in the public interest within the meaning of Rule 400(3)(h). In order to qualify as a public interest litigant, an applicant must demonstrate, among other things, that they have no personal, proprietary, or pecuniary interest in the outcome of the proceedings: *Mcewing v Canada (Attorney General)*, 2013 FC 953 at paras 13-17; . As I mention above, I find that the Applicants' in this case have a mix of both private and public interest in the matter at hand, and thus they cannot be considered true public interest litigants. While the presence of private interests are not dispositive of a party claiming to be a public interest litigant (see, for example, *Calwell Fishing Ltd. v. Canada*, 2016 FC 1140 at para 49), I find that in the case at bar, Arctos had substantial private interests in bringing forward this litigation. This is evidenced most clearly by Arctos' prior attempts to challenge Fuji's development activities.

[35] This having been said, I am persuaded by the Applicants' argument that it substantially winnowed the issues to be brought before this Court. The Applicants rightfully pointed out that

this application for judicial review was initiated in January 2017, and I am convinced that as the matter has unfolded in various related proceedings, the Applicants' have narrowed the issues to be litigated in these proceedings.

[36] When viewed holistically, I see no reason to depart the normal rule that costs follow the event. Accordingly, I shall order that costs be awarded to the Respondent Attorney General in accordance with Column III of Tariff B.

**JUDGMENT in T-8-17**

**THIS COURT'S JUDGMENT is that**:

1. This application for judicial review is dismissed.
2. Costs are awarded to the Respondent Attorney General in accordance with Column III of Tariff B.

"Shirzad A."

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-8-17 |
| **STYLE OF CAUSE:** | ARCTOS HOLDING INC. AND ARCTOS & BIRD MANAGEMENT LTD. v ATTORNEY GENERAL OF CANADA AND FUJI STARLIGHT EXPRESS CO. LTD. |
| **PLACE OF HEARING:** | CALGARY, ALBERTA |
| **DATE OF HEARING:** | FEBRUARY 22, 2018 |
| **JUDGMENT AND REASONS:** | AHMED J. |
| **DATED:** | APRIL 04, 2018 |

**APPEARANCES:**

| | |
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| Mr. William W. Shores<br>Mr. Scott Poitras | FOR THE APPLICANTS |
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| Mr. Blair C Yorke-Slader<br>Ms. Denise Brunsdon<br>Ms. Bonnie Anderson | FOR THE RESPONDENT<br>FUJI STARLIGHT EXPRESS CO. LTD. |

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