Federal Court  Cour fédérale

Date: 20170606

Docket: T-8-17

Citation: 2017 FC 553

Ottawa, Ontario, June 6, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

ARCTOS HOLDINGS INC AND ARCTOS & BIRD MANAGEMENT LTD

Applicants

and

ATTORNEY GENERAL OF CANADA AND FUJI STARLIGHT EXPRESS CO LTD

Respondents

ORDER AND REASONS

[1] This is a motion in writing, pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 ("Rules"), by which the Respondent, the Attorney General of Canada ("Attorney General"), seeks an Order striking the application for judicial review brought by the Applicants, Arctos Holdings Inc. and Arctos & Bird Management Ltd. (collectively "Arctos").

[2] Arctos Holdings Inc. owns the Bison Courtyard, described as a retail, residential and restaurant space located at 211 Bear Street in the Town of Banff (or the "Town"). Arctos & Bird Management Ltd. is a developer and property manager, one of its projects is Bison Courtyard. By their Notice of Application, Arctos seeks judicial review of a decision of the federal Minister of Environment, or her delegate, made on November 25, 2016, to consolidate two leases for property in Banff, being the lease for Lot 20 and the lease for Lots 21-24 ("Lease Consolidation Decision"), both were held by the Co-Respondent, Fuji Starlight Express Co. Inc. ("Fuji") and are located across the street from the Bison Courtyard.

[3] The Notice of Motion filed by the Attorney General asserts three grounds upon which the subject Application for Judicial Review should be struck out. These are that: the Court should exercise its discretion to strike the application as Arctos lacks standing pursuant to s 18.1(1) of the *Federal Courts Act*, RSC, 1985, c F-7 ("FC Act"); the Court cannot grant the relief requested by Arctos pursuant to s 18.5 of the FC Act; and, allowing Arctos access to the Court at this stage would circumvent an exclusive statutory scheme for the resolution of Town planning disputes and constitutes an abuse of the processes of this Court.

[4] Some background to both the lease consolidation and its procedural history, as well as the legislative regime, is necessary. For clarity, it is perhaps useful to begin with the legislative background.

Relevant Legislative and Related Background

i. *The Canada National Parks Act*

[5] The *Canada National Parks Act*, SC 2000, c 32 ("National Parks Act") describes the management and operation of Canada's national parks. Section 4(1) states that the parks are dedicated to the people of Canada for their benefit, education and enjoyment, subject to the Act and regulations, and that the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

[6] The Minister is responsible for the administration, management and control of parks, including the administration of public lands in parks (s 8(1)), and the maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks (s 8(2)). Powers in relation to land use planning and development in park communities may not be exercised by a local government body, except as provided in the agreement referred to in s 35 (s 9). The Minister is also required to prepare a management plan for the park containing a long-term ecological vision and other matters, which plan is to be reviewed every ten years (s 11). In this matter, this was the Banff National Park Management Plan ("Banff Management Plan"). The Governor in Council may make regulations respecting a number of matters, including the issuance, amendment and termination of leases, licences of occupation over public lands in park communities for the purposes of residence, schools, churches, hospitals, trade, tourism and places of recreation or entertainment (s 16(1)(g)(i)) as well as the control of businesses, trades, occupations and other activities or undertakings (s 16(1)(n)). Such regulations may also authorize the superintendent of a park, in the circumstances and subject to the limits that may be specified in the regulations, to issue, amend, suspend or revoke permits, licences and other

authorizations in relation to any matter that is the subject of regulations and to set their terms and conditions (s 16(3)(b)).

[7] Additionally, a community plan for each park community must be approved by Parliament and, in the case of the town of Banff, accompanied by any zoning by-laws made under the agreement referred to in s 35 (s 33(1)). The National Parks Act also contains provisions for particular parks. In the case of Banff, this includes s 35:

> **35** The Governor in Council, having authorized the Minister to enter into the Town of Banff Incorporation Agreement dated December 12, 1989, being an agreement for the establishment of a local government body for the town of Banff in Banff National Park of Canada, and to entrust to that body the local government functions specified in the Agreement, may authorize the Minister to further amend the Agreement.

ii. *Parks Canada Agency Act*

[8] The *Parks Canada Agency Act*, SC 1998, c 31 ("PCAA") establishes the Parks Canada Agency ("Agency"). The Minister is responsible for and has the overall direction over the Agency (s 4(1) and (2)). The Agency may exercise the powers and shall perform the duties and functions that relate to national parks that are conferred on, or delegated, assigned or transferred to the Minister under any Act or regulation (s 5(1)) and is responsible for the implementation of policies of the Government of Canada that relate to national parks (s 6(1)) and for the administration and enforcement of specified Acts, including the National Parks Act and regulations made thereunder (s 6(4)). The Agency has ancillary powers that permit it to do anything necessary or incidental to its purposes (s 8).

iii. *National Parks of Canada Lease and License of Occupation Regulations*

[9] The *National Parks of Canada Lease and License of Occupation Regulations*, SOR/92-25 ("Lease Regulations") were made pursuant to the National Parks Act. The Minister may, for any term not exceeding 42 years and on such terms and conditions as she sees fit, grant leases of public lands, including in the Town of Banff, where they are to be used for the purpose of residence, trade, tourism, schools, churches, hospitals and places of recreation or entertainment (s 3(1)(c) and (d), s 18(1)(c) and (d)), and otherwise deal with leasing in the national parks.

iv. *Banff Management Plan*

[10] The Banff Management Plan is created pursuant to s 11 of the National Parks Act. It states that it will guide the overall direction of Banff National Park for the next 10-15 years and will serve as a framework for all planning and decisions within the park. The plan reflects the policies and legislation of the Government of Canada. Section 6.2.2.1 describes the current situation in Banff, listing eleven items. These include that the Town of Banff Incorporation Agreement sets out the purposes and objectives for the Town, and, to manage the Town's impact on surrounding parklands, the municipal boundary has been defined in the National Parks Act, the Town's permanent population is intended not to exceed 8,000 (Federal Census estimated the 2006 permanent population at 6700). Section 6.2.2.3 entitled "Key Actions", includes that the Town's permanent population (Federal Census) will not exceed 8,000 and that all decisions of Parks Canada and the Town of Banff, including business licencing, shall proactively take into account this policy objective.

v. Town of Banff Incorporation Agreement

[11] The Town of Banff Incorporation Agreement ("Incorporation Agreement") is made pursuant to s 35 of the National Parks Act, as between the Government of Canada and the Government of the Province of Alberta, and establishes a municipal corporation, the Town of Banff, to provide local government for the Town in accordance with its terms, effective January 1, 1990. As of that date, the Town had all of the rights, obligations, duties, powers and functions, and was subject to the same limitations and restraints, as provided for by the laws of Alberta to towns incorporated pursuant to the laws of Alberta. Article 5 deals with the planning functions of the Town. The Town was required to adopt a general municipal plan and a land use by-law as well as to establish a municipal planning commission (subdivision approving authority) and a development appeal board. Subdivision of a parcel of land requires approval of the subdivision approving authority (5.8) and such approval cannot be implemented until the Federal Minister approves any new or amended lease required to effect the subdivision (5.14). Statutory plans adopted and land use by-laws passed under the Incorporation Agreement and the Planning Act, and every action taken or decision made pursuant to such plan or by-law, is required to conform to the Banff Management Plan (5.15).

vi. *Land Use Bylaw*

[12] The purpose of the Land Use Bylaw (or "Bylaw") is to provide for the orderly, beneficial and environmentally sensitive development of the Town, having regard to stated objectives, and was passed in accordance with the Incorporation Agreement. Pursuant to s 3.3, the Development Appeal Board ("DAB") is established and is to hear all appeals with respect to development

permit and subdivision applications. Section 5 deals with the subdivision of land, including that the Municipal Planning Commission ("MPC") shall not approve an application for subdivision unless, except when conditions are imposed pursuant to 5.4.2, the proposed subdivision conforms to the provisions of the Alberta Municipal Government Act, the Incorporation Agreement, the Banff Management Plan, any applicable statutory plan and the Bylaw (s 5.5.5(c)). Further, a subdivision approval by the MPC shall not be implemented until the Minister has approved any new or amended lease required to effect the subdivision (s 5.3.7).

vii. *Banff Community Plan*

[13] The Banff Community Plan arises pursuant to s 33 of the National Parks Act and sets out the vision, goals, objectives and indicators for the Town of Banff. Appendix A sets out the context for the plan. This notes that, historically, the administration of the town was the responsibility of Parks Canada but that this changed in 1990 when the Government of Canada and the Province of Alberta transferred most municipal government powers to an elected Town Council under the Incorporation Agreement. Following incorporation, the Town was required to adopt a municipal plan, as legislated by the province, to guide current and future land use. Reference is made to the regional context of the Banff Community Plan, including s 4 of the National Park Act, as well as to Banff population growth. In that regard, the 1998 Banff Community Plan utilized an employment-based model to provide an estimate of future population growth based on 350,000 ft^2 of new commercial development. The 2007 Banff Community Plan accommodates a permanent population of less than 10,000 permanent residents. As to the interpretation of the 2007 Community Plan, this identifies a vision for Banff and recognizes that the vision will evolve over time. Appendix B describes the legal framework

for the Banff Community Plan, referencing the requirement of the Municipal Government Act of Alberta to adopt a municipal development plan (the Banff Community Plan), and that the Town operates under its own distinctive legislation, the Incorporation Agreement. The Appendix states that the Banff Community Plan and related bylaws govern administration, management and land use within the town boundaries. The Minister responsible for Parks Canada has the authority to approve the plan and all amendments. The Incorporation Agreement specifies (s 5.15) that all plans and bylaws must conform with the Banff Management Plan approved by the Minister. Parks Canada is represented on the MPC and the DAB and also retains final approval for subdivision development and Land Use Bylaw amendments.

Lease Consolidation Background

[14] Lot 20 was originally part of a lease that included Lots 18-20. The owners of Lots 18-20 entered into an agreement to sell Lot 20 to one of the owners of Lots 21-24 and a separate lease for Lot 20 was issued by Parks Canada on August 16, 2000. Shortly thereafter it was determined that severing Lot 20 constituted a subdivision and, therefore, a subdivision approval would be required. An application was made and was granted by the MPC, Banff's subdivision approving authority, on February 14, 2001 ("2001 Subdivision Approval"). It is not disputed that notice of the 2001 Subdivision Approval was advertised and sent to adjacent property owners providing details of the right of appeal. It also appears that no appeals were received at that time.

[15] Significantly, the MPC required, as a condition of the 2001 Subdivision Approval, that Lot 20 be consolidated with the lease for Lots 21-24. However, the consolidation did not occur at that time. In 2009, Fuji purchased Lot 20.

[16] The leasehold interest in Lots 21-24 was shared between two owners by private agreement, Homestead Inn ("Homestead") and Melissa's Restaurant ("Melissa's"). Each co-owner held a certificate of title for its undivided share of the leasehold interest. In 2009, Fuji purchased the co-ownership interest of Homestead. In 2015, Fuji applied to redevelop Homestead at which time an issue arose as to whether the prior agreement of the co-owners amounted to an unauthorized subdivision of Lot 24. The MPC approved the development application but this was overturned on appeal to the DAB, one of the appellants was Arctos. In its June 24, 2015 decision ("2015 DAB Decision"), the DAB also ordered that the consolidation of the leases for Lot 20 and Lots 21-24 be completed and, to rectify the unauthorized subdivision, an application was to be made by Fuji to subdivide Lot 24, both of which were conditions of any future development.

[17] On August 27, 2015, Parks Canada wrote to Fuji and advised that clause 7(a) of its March 10, 1978 lease required Fuji to obtain Parks Canada's consent prior to subdivision of lands under lease and that this had not been requested or granted, referencing the 2015 DAB Decision. On January 26, 2016, the Department of Justice wrote to Fuji in this regard. Parks Canada subsequently advised Fuji, by email of August 29, 2016, that it required that the separation of interests in the Lease for Lots 21-24, and, the outstanding development condition concerning the consolidation of Lot 20 and Lots 21-24 under a single lease, be remedied before the application for any development permit was filed. This would entail the transfer of ownership of interest, consolidation of Lot 20 with Lots 21-24 in one leasehold and the issuance of a new lease.

[18] In 2016, Fuji purchased the remaining co-owner's (Melissa's) undivided leasehold interest in Lots 21-24, a new land title certificate for the transfer of the leasehold interest in those lots was issued by the Province of Alberta on November 4, 2016. In the result, Fuji was now the sole owner of Lots 21-24. The Consolidated Lease for Lots 20-24 was issued to Fuji by the Minister on November 25, 2016. A new land title certificate for the park lease was issued to Fuji, for Lots 20-24, on January 10, 2017.

[19] Fuji then applied again to the MPC for a development permit. The new proposal sought to develop both the Homestead and Melissa's properties. This was opposed by Arctos. However, on December 14, 2016, the MPC granted the development permits on the conditions set out, including that prior to the release of the development permits Fuji consolidate Lots 20-24. Arctos then filed three appeals with the DAB.

[20] Appeal #06-16, filed on December 8, 2016 concerned consolidation of the leases for Lot 20 and Lots 21-24. Arctos asserted that the consolidation of Lot 20 and Lots 21-24 was a subdivision, on the basis that it constitutes a boundary change to two or more adjoining parcels of land (relying on s 5.1(1)(i)(ii) of the Incorporation Agreement and therefore required subdivision approval before consolidation could proceed (relying on s 5.14 of the Incorporation Agreement). Arctos asserted that the lease consolidation by the Minister was not sufficient; there must also be a subdivision approval. Further, that the MPC or an employee of the Parks Canada Agency (if exercising powers conferred on the subdivision authority) acted outside its jurisdiction, erred or acted unreasonably by failing to consider or properly considering: whether the land being consolidated was suitable for the purpose, including compatibly with the National

Parks Act, the Incorporation Agreement and the Banff Management Plan; the obligation to proactively take into account the Banff Management Plan policy objective of ensuring that the population of Banff will not exceed 8,000; traffic congestion, and; failing to provide Arctos with meaningful consultation with respect to the consolidation. Appeals #12-16 and #13-16 were filed on December 23, 2013 and are concerned with the approval of the development permits, the basis for those appeals included an alleged lack of subdivision approval, that the proposed development did not comply with the Banff Management Plan requirement that all development be proactively managed to ensure that the permanent population of the Town does not exceed 8,000 and, alternatively, that the MPC failed to exercise its authority to impose appropriate conditions on the development permits. The appeals were heard in January 2017 and were adjourned *sine die* pending receipt of further information.

[21] The Notice of Application for judicial review of the Lease Consolidation Decision was filed on January 3, 2017. The grounds for the application include that Arctos owns land contiguous to the consolidated lease property and is directly and adversely affected by the Lease Consolidation Decision which will enable Fuji to circumvent the subdivision process mandated by the Incorporation Agreement, and/or facilitates increased development thereby exacerbating population growth pressures in the Town. Further, if the Lease Consolidation Decision was made by an official of the Parks Canada Agency, then it was made without delegated authority or outside the scope of that authority as the consolidated lease was made without the approval of the subdivision authority and/or the Lease Consolidation Decision failed to proactively take into account the population policy objective. Alternatively, and for the same reasons, if the Minister made the Lease Consolidation Decision then the Minister acted without or beyond her

jurisdiction. And either decision-maker acted unreasonably by failing to require the leaseholder to comply with the obligation to obtain approval of the subdivision approving authority, failing to take into account the obligation to take proactive steps to keep the Banff population at or below 8,000 permanent residents and by failing to consider its responsibility under the National Parks Act to maintain and make use of Banff National Park so as to leave it unimpaired for future generations. The decision-maker also breached the principles of procedural fairness and/or acted for improper purposes in making the Lease Consolidation Decision without first requiring subdivision approval as by doing so they denied Arctos the rights of appeal afforded by the Incorporation Agreement and the Land Use Bylaw, which appeal process also serves the public interest by ensuring compliance with population growth and commercial development limitations of the Incorporation Agreement and the Banff Management Plan.

Issue

[22] The sole issue on this motion is whether Arctos' application for judicial review should be struck out.

Positions of the Parties

A. *Attorney General*

[23] The AG asserts that while it is well established that dismissal of an application for judicial review on a preliminary motion should only be exercised where the application is so clearly improper as to be bereft of any possibility of success (*Pharmacia v Canada (Minister of National Health and Welfare*), [1994] FCJ No 1629 (FCA) at para 10 ("*Pharmacia*")), there is an

exception to that general rule where the applicant lacks standing (*Apotex v Canada (Governor in Council)*, 2007 FCA 374 at paras 13-14 ("*Apotex*"); *Canwest MediaWorks Inc v Canada (Minister of Health)*, 2007 FC 752 at para 10, affirmed in 2008 FCA 207 ("*Canwest*"); *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at para 20 ("*Finlay*") which is the circumstance in this matter.

[24] Section 18.1 of the FC Act states that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. An applicant will be directly affected where the decision under review affects the applicant's legal rights or obligations or directly prejudices them (*Rothmans of Pall Mall Canada Ltd v Minister of National Revenue*, [1976] 2 FC 500 (FCA) at para 13 ("*Rothmans*"); *Canwest* at para 13). "Officious inter-meddlers" or "mere busy bodies" do not have standing (*Morsebey Explorers Ltd v Canada (Attorney General)*, 2006 FCA 144 at para 17) and even if an applicant has a commercial interest affected by a decision, but was not a party to it, they will not have standing to seek judicial review (*Canwest* at para 16; also see *Rothmans* at para 13). Given the statutory leasing regime applicable to this matter and the ongoing DAB appeal process, Arctos has no standing to obtain relief from this Court.

[25] In this matter, Arctos is not a party to the Lease Consolidation Decision and only Fuji is directly affected by it. The Lease Consolidation Decision has no actual impact on any legal right or obligation of Arctos, nor does Arctos demonstrate a direct prejudice. Arctos has failed to show how the Lease Consolidation Decision is a "matter of importance to their business" or the "maintenance of Banff" as they assert. Further, the suggestion of an alleged subdivision, created

by the uniting of two leases, and its potential negative impact to the population of Banff is speculative, overly general and these are concerns that fit within the realm of municipal planning. They have nothing to do with the administration and commercial issues surrounding the decision to consolidate a lease. In any event, Arctos has not been denied its right of appeal to the proper jurisdiction, as these matters are presently before the DAB.

[26] The Lease Consolidation Decision was an administrative commercial transaction curing a condition from a prior subdivision and is a land administration and management matter entirely within the discretionary ambit of Parks Canada arising from the legislative regime. Lease consolidation by the Minister neither constitutes nor triggers development or subdivision approval by the Town. The Incorporation Agreement serves to incorporate by reference most general municipal statutory laws of the Province of Alberta but ensures the continuing jurisdiction of Canada. In the result, most Alberta planning legislation applies to the Town by way of federal instruments of entrustment, but remains subject to substantial federal supervision and control. Conversely, discretionary powers of leasing remain in the hands of the Minister. These are separate processes and Arctos is actively participating in the development review of a proposal concerning the lands in question. In any event, the municipal process creating the condition of the lease consolidation occurred in 2001. There are no new rights arising. Further, procedural rights do not occur in the abstract; Arctos does not have procedural rights in one forum triggered by another.

[27] Nor is there a free-standing obligation to the general public of a duty of fairness in administrative law decisions in which the public is not directly affected. Moreover, the

consolidated lease is a contract made pursuant to a statutory power and it is inappropriate to import a public law duty into what is predominantly a commercial relationship.

[28] The Attorney General also submits that the 2010 Banff Management Plan is a guideline which offers strategic direction (s 2.4) and is not law (*Brewster Mountain Pack Trains Ltd v Canada (Minister of the Environment)*, 41 ACWS (3d) 761 (FCTD) at para 27; *Canadian Parks and Wilderness Society v Maligne Tours Ltd*, 2016 FC 148 at para 91). Using a so called population cap as a specific prescriptive measure to prevent the Superintendent from considering lease consolidations does not accord with the guidance provided by the Banff Management Plan or with any jurisprudence. And, had Parliament intended to impose a limit or population cap in the Town, it would have done so by regulation in which event this would not be referred to in the Banff Management Plan as a "policy objective", "anticipated", or "intended". Nor is the Incorporation Agreement a law.

[29] In respect of public interest standing, the Attorney General states that it would be an exceptional and unusual case if an operational lease consolidation was a matter of public interest and that public interest standing is not met by the mere assertion that no one else will bring the matter before the Court. The three factors for public interest standing set out in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 at para 37 ("*Canadian Council of Churches*") are to be applied in a liberal and generous manner and these are interrelated considerations to be weighed cumulatively, not individually (*Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45 at paras 2 and 53 ("*Downtown Eastside Sex Workers*")). Arctos does not address

how it meets the test and, on the Attorney General's application of the test in this case, a finding in favour of public interest standing is not warranted.

[30] The Attorney General's written submissions address only the issue of standing and do not address the other two grounds set out in its motion to strike, being that the Court cannot grant the relief sought, and that allowing Arctos access to the Court at this stage would circumvent the statutory Town planning dispute resolution regime, thereby constituting an abuse of process.

B. *Fuji's Position*

[31] Fuji endorses the Attorney General's submissions concerning Arctos' lack of standing and addresses the Attorney General's third ground for its motion to strike, asserting that Arctos' attempt to apply for judicial review is an improper collateral attack on the Town's municipal planning process and on a final unappealed decision of the MPC.

[32] Fuji submits that the MPC approved the subdivision affecting Lot 20, conditional upon the consolidation of leases for Lot 20 and Lots 21-24. The correct forum to appeal the 2001 Subdivision Approval, and to oppose the resultant lease consolidation, was the municipal planning process. The 2001 Subdivision Approval was not appealed. Arctos purports to appeal to the MPC the "concurrence of the Town" in Parks Canada's issuance of the consolidated lease and has appealed the decisions of the MPC to the DAB. The DAB heard submissions on the appeals over two days and then adjourned *sine die* for additional environmental information and federal census data. Those appeals remain in progress.

[33] And, although Arctos argues that Parks Canada failed to take "into account….the obligation to take proactive steps to keep the population of Banff at or below 8,000 permanent residents", there is no magic cap of 8,000 and, in any event, the very recent federal census data – on which Arctos expressly relies – shows a population of fewer than 8,000. The real foundation of Arctos' judicial review application is the notion that the lease consolidation by Parks Canada circumvented the subdivision approving authority, the MPC, by failing to obtain the MPC's prior approval. However, this ignores that the 2001 Subdivision Approval not only approved the lease consolidation but expressly required it. Now, years later, Arctos has returned a second time to the MPC, and on appeal to the DAB, apparently seeking some sort of reconsideration or reversal of the 2001 MPC decision. This impliedly concedes that the municipal planning process is the proper forum. Yet, Arctos now also attempts a collateral attack on that forum by applying in this Court for a review of Parks Canada's discretionary administrative act, making the very same arguments it made before the DAB.

C. *Arctos' Position*

[34] Arctos submits that when considering a motion to strike based on a lack of direct or public interest standing the Court must consider standing in the context of the ground of review on which the application is based (*Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116 at para 28 (leave to appeal to the Supreme Court of Canada dismissed in 2009 CarswellNat 3243 (WL)) ("*Irving Shipbuilding*")).

[35] Arctos provides its interpretation of the applicable legislative and related regime, referencing in particular s 6.2.2.3 of the Banff Management Plan and s 4.3 of the Incorporation

Agreement and, based on this, submits that there is a legal obligation to consider and respect Banff population limits which falls independently on both the Minister and on the Town when making lease consolidation decisions or subdivision approvals. Further, that the legal sequence of decision making requires the Town to first exercise it authority, which may include making its approvals subject to conditions subsequent, and the Minister then approving the new or amended lease to effect the subdivision or development permit. Arctos submits that the Minister is legally obliged to proactively consider limits to population growth in the Town of Banff where its population approaches or exceeds the policy objective stated in the Banff Management Plan and there is no evidence that the Minister considered whether the Lease Consolidation Decision would affect Banff's population.

[36] Arctos submits that because it operates its business in Banff from a leasehold property it has an independent right to challenge the Lease Consolidation Decision flowing from its interest in ensuring that the Town remains the special place it is required to be by the Incorporation Agreement and the Banff Management Plan. And, as a business in Banff, Arctos has special rights and obligations which distinguish it from the interests of other citizens of Canada.

[37] It submits that it is directly affected by the Lease Consolidation Decision because, as a business in Banff, it is prejudicially affected by the decision which failed to consider, or to reasonably consider, Town population limits. Further, that procedural fairness rights enjoyed by Arctos in relation to the Town of Banff planning regime were adversely affected because the Lease Consolidation Decision preceded the Town planning decisions, prejudicing Arctos' ability to raise its concerns about population limits.

[38] And, even if it was not directly affected by the Lease Consolidation Decision, Arctos submits that it meets the test for public interest standing as there is a serious justiciable issue raised, Arctos has a real stake or genuine interest in it and the judicial review application is a reasonable and effective way to bring the issue before the courts. While the Attorney General's position is that no one other than Fuji has standing to challenge the Lease Consolidation Decision, a developer is unlikely to seek judicial review challenging its own development interests. If Arctos cannot bring this judicial review, then no one would challenge the Lease Consolidation Decision.

[39] Further, the Attorney General is also asking this Court on a motion to strike to delve into complicated facts contained in hundreds of pages of motion materials and to resolve conflicting statutory interpretations of a unique planning regime in order to determine whether it is plain and obvious that Arctos is without standing. The Attorney General does this while not making reference to whether the Lease Consolidation Decision considered population growth in Banff.

[40] In summary, Arctos submits that the Minister could not disregard her duty to consider population limits in the Town when making the Lease Consolidation Decision. The Minister's Lease Consolidation Decision and the Town's subdivision and development approval authorities are integrated with one another in the unique legislative regime applicable to Banff. In that context, the Minister must proactively consider how the Lease Consolidation Decision relates to the Town development decisions and the population limit defined in the Banff Management Plan. Arctos disputes the submission of the Attorney General that the limits to growth in the Town are a matter of discretion which may, or may not, be taken into account by the Minister or

her delegates. Given the unique obligation of the Minister to ensure that the Town adheres to this limit in municipal planning and development functions, and given that the Town is very near, or may actually exceed, that limit (depending on the survey taken), this is a matter of legal obligation falling on the Minister.

[41] Arctos also submits that the relief being sought is within the powers expressly conferred upon the Federal Court by s 18.1(3) of the FC Act. Therefore, there is no merit to the second ground of attack in the motion to strike, nor has the Attorney General advanced argument on this ground.

[42] As to the third ground, being the alleged abuse of process, Arctos submits that this ground is not fully developed in the submissions by the Attorney General, which is fatal to the discharge of its onus of proof, and is without merit. The Town and the Minister exercise independent responsibilities to ensure compliance with the population limits in the Town and Arctos is entitled to challenge both, independently of one another, especially as the Minister's decision precedes the municipal planning decisions. The Lease Consolidation Decision is assurance of compliance with the Banff Management Plan for purposes of future municipal decisions and is binding on the Town because of the Minister's final authority over planning matters. In this context, there is no abuse of process by bringing the judicial review application while also raising Arctos' concerns before municipal institutions.

D. *Supplementary Submissions on P&S Holdings Ltd*

[43] On April 5, 2017, the parties were directed by the Court to make supplementary written submissions to address the relevance, if any, of the recent decision of the Federal Court of Appeal in *P&S Holdings Ltd v Canada* ("*P&S Holdings*"), 2017 FCA 41 to the issue of standing in the motion to strike. The parties each filed their submissions, including a reply submission by the Attorney General. I have considered these submissions in rendering this decision.

Analysis

[44] In this matter, the ground primarily relied upon by the Attorney General in its motion to strike is that Arctos lacks either direct or public interest standing pursuant to s 18.1(1) of the FC Act.

[45] The jurisprudence is clear that a motion to strike an application for judicial review will only be granted in exceptional cases (*Pharmacia* at para 15; *Rahman v Canada (Public Service Labour Relations Board)*, 2013 FCA 117 at para 7; *Apotex* at para 16; As stated by the Federal Court of Appeal in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 ("*JP Morgan*"):

> [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, at paragraph 6; *cf. Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

> [48] There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, *supra* at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, *supra*, subsection 18.1(2) and section 18.4. An unmeritorious motion – one that raises matters that should be advanced at the hearing on the merits – frustrates that objective.

[46] As to motions to strike based on a lack of standing, the Federal Court of Appeal in *Apotex* stated that there was really only one question: was it plain and obvious that the application for judicial review was bereft of success. It also held such motions should only be allowed sparingly and in very clear cases:

> [13] It is not always appropriate for motions to strike to be the context to make a binding decision on a question of standing, especially when the motion is to strike out an application for judicial review. Rather, a judge should exercise her discretion as to whether it would be appropriate in the circumstances to render a decision on standing, or whether a final disposition of the question should be heard with the merits of the case. Evans J. (as he then was) briefly discussed the considerations a judge should take in exercising her discretion in *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211 (T.D.) ("*Sierra Club*") at paragraph 25 (emphasis added):
>
> > In my view, a court should be prepared to terminate an application for judicial review on a preliminary motion to strike for lack of standing only in very clear cases. <u>At this stage of the proceeding, the court may not have all the relevant facts before it, or the benefit of full legal argument on the statutory framework within which the administrative action in question was taken.</u> To the extent that the strength of the applicant's case, and other factors, are relevant to the ground of discretionary standing, the Court may not be in a position to make a fully informed decision that would justify a denial of standing.

> I agree with Evans J. that this discretion should be exercised sparingly. This is affirmed by the principle that applications for judicial review are supposed to be decided summarily, and that interlocutory motions are to be avoided. This, indeed, as will be discussed below, explains why the test for the motion to strike on an application for judicial review is that the Application would be "bereft of success."

[47] Further, the question of standing should not be addressed in the abstract but in the context of the ground of review on which an applicant relies. This was noted by Justice Evans in *Irving Shipbuilding* at para 28:

> 28 In my view, the question of the appellants' standing should be answered, not in the abstract, but in the context of the ground of review on which they rely, namely, breach of the duty of procedural fairness. Thus, if the appellants have a right to procedural fairness, they must also have the right to bring the matter to the Court in order to attempt to establish that the process by which the submarine contract was awarded to CSMG violated their procedural rights. If PWGSC owed the appellants a duty of fairness and awarded the contract to CSMG in breach of that duty, they would be "directly affected" by the impugned decision. If they do not have a right to procedural fairness, that should normally conclude the matter. While I do not find it necessary to conduct an independent standing analysis, I shall briefly address two issues that arose from the parties' submissions.

(also see: *P&S Holdings Ltd v Canada*, 2015 FC 1331 at para 35 (aff'd in *P&S Holdings*))

[48] As to those who are directly affected by the decision under review, the Federal Court of Appeal in *Forest Ethics Advocacy Assn v National Energy Board,* 2014 FCA 245 described this as follows:

> 29 Under subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, only those who are "directly affected" can ask this Court to review a decision.

> 30 Forest Ethics is not "directly affected" by the Board's decisions. The Board's decisions do not affect its legal rights, impose legal obligations upon it, or prejudicially affect it in any way: *League for Human Rights of B'Nai Brith Canada v. R.* (F.C.A.); *Rothmans of Pall Mall Canada Ltd. v. Minister of National Revenue* (Fed. C.A.); *Irving Shipbuilding Inc. v. Canada (Attorney General)* (F.C.A.). Therefore, Forest Ethics does not have direct standing to bring an application for judicial review and invoke the Charter against the Board's decisions.

[49] In this matter, the grounds of review set out in Arctos' Notice of Application are, essentially, that Arctos was directly and adversely affected by the Lease Consolidation Decision because the Minister, or her delegate, acted outside her jurisdiction or unreasonably by failing to consider or failing to proactively take into account the policy objective of ensuring that Banff's population does not exceed 8,000 permanent residents and to ensure that Banff National Park is left unimpaired for the enjoyment of future generations; because the Lease Consolidation Decision was made without the prior approval of the subdivision approving authority; and because the Minister or her delegate breached the principles of procedural fairness and/or acted for improper purpose by making the Lease Consolidation Decision without first requiring subdivision approval as they thereby denied Arctos rights of appeal afforded to it by the Incorporation Agreement and the Land Use Bylaw, which would protect Arctos' individual interests as adjacent land lease holders and the public interest in ensuring compliance with population growth and commercial development limits.

(i) Population of Town of Banff

[50] As to Arctos' submission that it was directly and adversely affected by the Lease Consolidation Decision because the Minister or her delegate failed to consider or to proactively

take into account the policy objective of ensuring that Banff's population does not exceed 8,000 permanent residents and, relatedly, to ensure that Banff National Park is left unimpaired for the enjoyment of future generations, I do not reach that conclusion.

[51] Arctos is not a party to the lease which was consolidated. There is nothing in the legislative leasing regime that suggests that a non-party to a lease has any rights, participatory or otherwise, arising with respect to the making of leasing decisions. Indeed, unlike *P&S Holdings*, Arctos does not assert that they are owed a duty of procedural fairness such that they would be entitled to participate in consolidation of leasing decisions giving rise to standing. Nor is there any evidence that the Lease Consolidation Decision affects Arctos' legal rights or imposes legal obligations upon it or directly prejudicially affects it in any way. In that regard, Arctos submits only that the Lease Consolidation Decision is a matter of importance to its business in Banff and to the maintenance of Banff National Park more generally. It makes only the general assertion that the treasure that is Banff National Park will be denigrated for it, its business and the community if development occurs without proper regard for the regulatory and policy framework.

[52] And, to the extent that Arctos is alleging standing on a commercial basis, in *Canwest* this Court held that a commercial interest in the issues in a judicial review application, in and of itself, is not a sufficient basis for standing (*Canwest* at para 17; also see *Rothmans*; *Aventis Pharma Inc v Canada (Minister of Health)*, 2005 FC 1396 at para 19).

[53] Accordingly, I am not convinced that Arctos has a sufficient personal interest in the Lease Consolidation Decision to warrant standing.

[54] This leaves the question of whether Arctos should, as a matter of judicial discretion, be granted public interest standing in these circumstances. In *Downtown Eastside Sex Workers*, the Supreme Court of Canada addressed the law of standing noting the rationale behind limiting standing and that the traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. However, that in public law cases, such as the one before it, the Courts have relaxed these limitations and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations. There, the Downtown Eastside Sex Workers United Against Violence Society ("Society"), whose objects included improving working conditions for female sex workers, and Ms. Kiselbach, a former sex worker working as a violence prevention coordinator, launched a broad constitutional challenge to the prostitution provisions of the Criminal Code.

[55] The Supreme Court of Canada stated that, in determining whether to grant public interest standing, the Courts must consider three factors:

> 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: , at p. 598; , at p. 626; , at p. 253; *Hy and Zel's*, at p. 690; , 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.

[56] The Supreme Court of Canada also stated that the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.

[57] To constitute a serious issue, the question raised must be a substantial constitutional issue or an important one and the claim must be far from frivolous, although the Court should not examine the merits of the case other than in a preliminary manner. In the matter before me, there is no constitutional issue and, viewed in isolation, the decision to consolidate Lot 20 and Lots 21-24 is not an important matter.

[58] However, there is a fundamental dispute between the parties as to whether the Minister is required, when making a discretionary leasing decision, to proactively consider the policy objective that the population of the Town of Banff will not exceed 8,000 permanent residents. Put otherwise, whether the Minister's discretion is not fettered by the policy or, as Arctos submits, whether a legal obligation arises to take the policy into consideration. And, if Arctos is correct, then whether the Minister reasonably considered the population limits in making the Lease Consolidation Decision.

[59] Given the relative complexity of the legislative regime as interrelated with the municipal planning and development approval process; the fact that the broader issue raised by Arctos, the impact on a national park of the population of the Town of Banff, is one of public interest; and, that there are no participatory rights of third parties when leasing decisions are made, I am satisfied that a serious justiciable issue exists.

[60] As to the nature of the interest, this factor is concerned with whether Arctos has a real stake in the proceeding or is engaged with the issues they raise. In my view, this is not a situation such as *Canadian Council of Churches* where the Court held that the applicant had a genuine interest as it enjoyed the highest possible reputation and had demonstrated a real and continuing interest in the problems of refugees and immigrants (at para 39). Nor is it similar to *Downtown Eastside Sex Workers* where the Society had considerable experience with sex workers, was familiar with their interests and was a registered non-profit organization run by and for current and former sex workers, whose mandate and objects promoted the improved lives and working conditions for those persons. And there Ms. Kiselbach's affidavit evidence made it clear that she was directly and significantly affected by the prostitution laws for 30 years and she was also now employed as a violence prevention coordinator.

[61] Here, although Arctos states its concern as being the population of the Town, and related impacts on the national park, viewed in context, this is but one of many objections it has brought to Fuji's development applications. Further, there is no evidence that, outside of Arctos' objections to Fuji's development, which is similar to and would compete with its own, that Arctos has had a longstanding and genuine concern with the permanent resident population of the Town. Nor does the evidence indicate that Arctos has a distinctive or important interest in the population issue different from that of others. In sum, this factor does not weigh in Arctos' favour.

[62] As to the third factor, other reasonable and effective manners in which the matter can be brought before the Court, the Supreme Court of Canada held that this requires consideration of

whether the proposed suit is, in all of the circumstances and in light of various considerations, a reasonable and effective means to bring the challenge to Court. Here, Arctos has launched three appeals before the DAB, all of which raise the issue of the Banff population policy statement. Thus, to the extent that the MPC was required but failed to duly consider that matter, it will be addressed by the DAB's decisions. And, because the DAB will render those decisions in the context of its experience with and knowledge of the Town's prior municipal planning and development, it will be well placed to assess the population concern raised by Arctos and, as pointed out by the Attorney General, if Arctos disagrees with those decisions, it has a right of appeal to the Alberta Court of Appeal. Given that the DAB appeals have been heard and its decisions are outstanding, this may also be a situation where the application for judicial review is premature.

[63] The Attorney General is of the view that the discretionary leasing decision of the Minister is a separate process and distinct from the municipal planning and development decisions of the Town by way of the MPC and DAB. Thus, the Lease Consolidation Decision does not require consideration of the population policy statement. If this is so, then the application for judicial review is not an effective means of bringing the population concern before the Court. Conversely, if it was a relevant consideration, then the appeals to the DAB will not remedy any failure of the Minister to reasonably consider that issue when rendering the Lease Consolidation Decision. That said, on a practical level, approval for the development applications will not be granted if the DAB determines that the population concern is warranted and precludes approval of the proposed development.

[64] Viewed in whole, these factors could potentially support granting of public interest standing to Arctos and therefore, preclude the motion to strike. However, as discussed below in the context of the subdivision issue, the more persuasive basis for denying the motion to strike is that it is not plain and obvious that the application for judicial review will not succeed.

(ii) Subdivision

[65] In my view, Arctos' assertion that the Lease Consolidation Decision was made without prior subdivision approval, as it concerns Lot 20, is without merit and it is plain and obvious that it cannot succeed. The 2001 Subdivision Approval of the MPC authorized the subdivision of Lot 20 from Lots 18-20, with the explicit condition that the leases for Lot 20 and Lots 21-24 be consolidated. It is clear from the record that the Lease Consolidation Decision was made in the context of the 2001 Subdivision Decision. In that regard, in the 2015 DAB Decision made in respect of Fuji's first application for a development permit, the DAB stated that counsel for Arctos "acknowledged the fact that it had been conceded that consolidation of lots 20 and lots 21-24 is required as a condition of development and that no further arguments need to be made in this regard". The DAB stated that both the appellant, Arctos, and the respondent, Fuji, had agreed that the leases comprising of Lot 20 and Lots 21-24 must be consolidated *prior to* development and ordered the consolidation as a condition of any future development.

[66] In sum, the Lot 20 subdivision was approved by the 2001 Subdivision Decision, with the condition of lease consolidation. On June 24, 2015 that condition was restated by the 2015 DAB Decision as a condition of any future development. The Lease Consolidation Decision is dated

November 2016. Accordingly, Arctos' assertion that the Lease Consolidation Decision was made without prior subdivision approval cannot succeed.

[67] However, the DAB also found that an unapproved subdivision had occurred which must be rectified prior to development and ordered that Fuji submit an application for subdivision, and successfully subdivide Lot 24, prior to any future development.

[68] By email of August 29, 2016, Parks Canada referenced the 2015 DAB Decision. Therein Parks Canada addressed the two measures that were required by Fuji to address two lease default issues. First, the separation of interests in the lease for Lots 21-24 (i.e. the unauthorized subdivision). Second, the outstanding development condition for consolidation of Lot 20 with Lots 21-24. The email states that that "pursuant to section 13 of the Lease of Lots 21-24, Parks Canada requires that the separation of interests in that lease, and the outstanding development condition for consolidation of Lot 20 with Lots 21-24 under a single lease, be remedied before the application for any development permit is filed. This will entail the transfer of interest, consolidation of Lot 20 with Lots 21-24 in one leasehold, and the issuance of a new lease with common terms governing use as Commercial Accommodation."

[69] Parks Canada noted that, as found by the DAB, rectifying those matters was necessary to avoid violation of Article 5.8 of the Incorporation Agreement, which states that no person shall subdivide a parcel within the town site without the approval of the subdivision approving authority, and also referenced s 5.1.1 of the Land Use Bylaw, which states that no person, corporation, or agency shall subdivide a parcel of land or do any act on land that may have the

effect of subdivision, without the approval of the MPC or, on appeal, of the DAB, and to avoid violation of the DAB's order concerning successful subdivision of Lot 24 prior to any future development. Parks Canada stated that the approach discussed in the email would also facilitate development as s 5.2(4) of the Incorporation Agreement requires that when a development involves construction of a structure over the boundaries of adjoining lots, any development permit issued shall be subject to the condition that prior to release of a development permit, the owner shall consolidate the leases for the lots involved. In the result, Parks Canada was of the view that the Town would not be in a lawful position to release a development permit until the matters were resolved.

[70] As noted above, the separation of interests concerning Lot 24 arose from the unauthorized subdivision by the prior owners, Homestead and Melissa's. The Attorney General submits that the issuance of the consolidated lease addressed the second development condition imposed by the DAB, and, that the purchase by Fuji in 2016 of the remaining undivided leasehold interest in Lots 21-24 remedied the issue of the unauthorized subdivision arising from the prior co-ownership agreement as Fuji was then the sole owner. Thus, there was no longer an unauthorized subdivision and, therefore, no requirement for subdivision approval. It appears that the MPC was of the same view as, when Fuji again applied for a development permit after it acquired sole ownership on the undivided leasehold interest in Lots 21-24, it was granted, however, the record does not indicate that an application for subdivision was made. Conversely, Arctos takes the position that the consolidation is in fact a subdivision and, therefore, an application was required. The Attorney General asserts that this position is speculative. On a preliminary review, I find little to support Arctos' interpretation. However, without delving into

the merits, the disposition of this question is not plain and obvious based on the record and submissions to date.

[71] Arctos also submits, as regard to subdivision, that the "legal sequence" of decision making required the Town to first exercise it authority and that the Minister is to then approve the new or consolidated lease to effect the subdivision or development approval. Again, while on a motion to strike the Court is not to delve into the merits of the matter, I note that nothing in the legislative regime supports this proposition. In this regard, Arctos relies on s 5.2(4) of the Incorporation Agreement which states that the Land Use Bylaw shall provide that when a development involves construction of a structure over the boundaries of adjoining lots, any development permit issued shall be subject to the condition that *prior to release of a development permit*, the owner shall consolidate the leases of the lots involved. Arctos also references s 5.14 which states that a subdivision approved by the subdivision approving authority or by the DAB *shall not be implemented* until the Federal Minister has approved any new or amended lease required to effect the subdivision.

[72] In my view, on their face, these provisions do not comprise a requirement at law of the sequence of decision making that Arctos proposes. Those sections are consistent with section 5.8 of the Incorporation Agreement which states that subdivision requires approval of the subdivision approving authority which approval *cannot be implemented* until the Minister approves any new or amended lease required to effect the subdivision and s 5.3.7 of the Land Use Bylaw states the same. These provisions simply require that any subdivision approval permits will not be released or implemented until any necessary lease issuance or amendment is

in place. This could occur prior to the subdivision approval or after. However, the question of whether subdivision approval was actually required in this matter remains.

[73] And, in any event, Arctos' submission on this point is that the alleged legal sequence ensures that the Minister has the capacity to exercise effective oversight of decisions of the Town which Arctos then relates to the independent obligation of the Town and the Minister to consider Town population restrictions.

[74] As to Arctos' submission that the Lease Consolidation Decision enables Fuji to circumvent the subdivision process, as it preceded subdivision approval and thereby denies Arctos the right of appeal afforded by the Incorporation Agreement and the Land Use Bylaw, and denies it the procedural fairness rights it was owed, this is predicated on Arctos' interpretation of the "legal sequence" of decision making and the question of whether subdivision approval was required with respect to Lot 24, given Fuji's purchase of the whole of the interest in Lots 21-24. The right to appeal a subdivision approval is available to an applicant for subdivision approval, the Banff town council, a school authority, Her Majesty the Queen in Right of Canada and any adjacent lessee or licence holder, such as Arctos (Incorporation Agreement s 5.11(1); Land Use Bylaw s 5.1.1). Thus, if the DAB determines that there was a subdivision and approval was required, Arctos will not be denied its right of appeal, indeed, it has already asserted this issue in the appeals it has filed. However, while it is difficult to reconcile this municipal right of appeal with Arctos' assertion that the prior making of the Lease Consolidation Decision denies it the municipal right of appeal, the fact remains that the

municipal process does not permit scrutiny of the making of the Lease Consolidation Decision – if it is subject to such scrutiny.

[75] In conclusion, in these circumstances, particularly given the questions of whether the Minister was required to consider the population policy objective when making the Lease Consolidation Decision and whether the consolidation was a subdivision of Lot 24 requiring subdivision approval, I cannot conclude that it is plain and obvious that Arctos' application for judicial review cannot succeed, although it will certainly have its challenges (see for example the Federal Court of Appeal's decision in *P&S Holdings* and *Irving Shipbuilding*). Accordingly, in my view, it would not be appropriate to reach a decision on standing, with final effect, as a preliminary matter. Rather, the final disposition of the question should be heard with the merits of the case (*Finlay* at para 20; *Apotex* at para 13; *JP Morgan* at para 91).

[76] Nor am I satisfied that the relief sought by Arctos, the quashing of the Lease Consolidation Decision, is unavailable pursuant to the FC Act (see ss 18(1)(a) and 18.1(3)).

[77] As to the allegation of abuse of process, I am similarly not satisfied that this has been established at this stage by the Attorney General or Fuji. However, as discussed above, many of the grounds on which Arctos challenges the Lease Consolidation Decision also underlie its appeals to the DAB. It may be, therefore, that the application for judicial review is premature. For example, if the DAB finds that the prior subdivision of Lot 24 was cured by Fuji's purchase of both interests therein, and, therefore, that no subdivision approval was required, Arctos will not have been denied any appeal rights available to it under the municipal development process.

Similarly, if the DAB finds that the impact on the population of the Town is not a concern then, even if the Minister was required to consider the population policy objective in reaching the Lease Consolidation Decision, the final outcome would be unlikely to differ.

[78] Given the totality of the arguments and the extent of the record, and having regard to the high test that must be met when striking an application on a preliminary motion, I am not persuaded that this is a clear case in which standing should be determined on a preliminary motion.

[79] I have, however, reached the conclusion that this is a matter which would benefit from case management and have ordered accordingly.

ORDER

THIS COURT ORDERS that:

1. The motion is dismissed.

2. Costs shall be in the cause.

3. This matter shall, pursuant to Rule 384, continue as a specially managed proceeding.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-8-17
STYLE OF CAUSE:	ARCTOS HOLDINGS INC AND ARCTOS & BIRD MANAGEMENT LTD v ATTORNEY GENERAL OF CANADA AND FUJI STARLIGHT EXPRESS CO LTD
PLACE OF HEARING:	OTTAWA, ONTARIO

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	STRICKLAND J.
DATED:	JUNE 6, 2017

WRITTEN REPRESENTATIONS BY:

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