



Court File No. 574/23

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN:

ENVIRONMENTAL DEFENCE CANADA INC.

Applicant

- and -

MINISTER OF MUNICIPAL AFFAIRS AND HOUSING

Respondent

**NOTICE OF APPLICATION TO DIVISIONAL COURT
FOR JUDICIAL REVIEW**

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following pages.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar by the method of hearing requested by the applicant, unless the court orders otherwise. The applicant requests that this application be heard in person at the following location: Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS APPLICATION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for hearing or terminated by any means within five years after the notice of application was filed with the court, unless otherwise ordered by the court.

Date: Oct 16, 2023

Issued By



Local Registrar

Address of
court
office

Divisional Court
Superior Court of Justice
Osgoode Hall
130 Queen Street West
Toronto, ON M5H 2N5

TO: MINISTER OF MUNICIPAL AFFAIRS AND HOUSING
Ministry of Municipal Affairs and Housing
Minister's Office
College Park 17th Floor, 777 Bay Street
Toronto, ON M7A 2J3

AND TO: ATTORNEY GENERAL OF ONTARIO
Crown Law Office – Civil
8th Floor, 720 Bay Street
Toronto, ON M7A 2S9

APPLICATION

1. The Applicant, Environmental Defence Canada Inc., seeks judicial review of the Minister of Municipal Affairs and Housing's failure to provide it with a final access to information decision under section 26 of the *Freedom of Information and Protection of Privacy Act (Act)*.
2. Using the *Act's* access to information procedures, the Applicant requested information from the Ministry of Municipal Affairs and Housing about the government's withdrawal of lands from the Greenbelt protected area, a matter that has generated significant and ongoing public interest in Ontario.
3. When the Minister failed to make a final access to information decision by the statutory deadline, the Applicant successfully appealed to the Information and Privacy Commissioner. The Commissioner ordered the Ministry to make a final access to information decision by September 15, 2023.
4. Contrary to that order, the Minister has not made a final access to information decision. Now, having exhausted the *Act's* appeal process, the Applicant applies to this Court to enforce its vested legal right to receive a final access to information decision.

RELIEF SOUGHT:

5. The Applicant makes application for:
 - (a) An order of *mandamus* requiring the Minister and/or his delegates to make a final access decision under section 26(a) of the *Act*, including any final

fee determination under section 57, and, if access to any records is to be given, give the Applicant access under section 26(b) forthwith or in such reasonable time as the Court may permit;

(b) An order requiring the Minister to certify to the Information and Privacy Commissioner that an access decision under section 26 of the *Act* has been provided to the Applicant;

(c) Costs of this application if the parties cannot agree on costs or, in the alternative, an order that the parties bear their own costs; and

(d) Such other and further relief as counsel may advise and this Honourable Court may deem just.

GROUND:

6. The grounds for the application are as follows:

The parties

7. The Applicant is an incorporated non-profit charitable organization that works to protect the environment and human health. Among other things, the Applicant works to protect the Ontario Greenbelt against development. The Greenbelt is a protected area comprising green space, farmland, forests, wetlands, and watersheds surrounding the Golden Horseshoe region. In recent years, the government's proposals and decisions to withdraw lands from the Greenbelt have generated significant and ongoing public opposition.

8. The Applicant, acting through counsel, requested access to information about these withdrawals under section 24(1) of the *Act* and, under section 26 of the *Act*, has a statutory right to receive written notice from the Minister about whether or not the Minister will give access to the information and to receive the information to which the Minister must give access.
9. Under section 2(1) of the *Act*, the Ministry is an “institution”; the Minister is the head of the institution. In that capacity, under section 26(a), the Minister has a duty to decide and notify the Applicant about whether he will give access to the requested information and, if access is to be given, a duty under section 26(b) to give the Applicant access to those records.

The *Act* creates a legal right to access information and imposes corresponding duties on the Minister

10. The *Act* aims to provide a right of access to information held by government institutions, subject to limited and specific exemptions. Section 10 gives a requester the right to access information held by a government institution unless the information falls within an exemption defined in the *Act* or the head of the institution decides that the request to access information is frivolous or vexatious. Section 24 establishes a procedure for making access to information requests.
11. When a person makes such a request, section 26 imposes two duties on the head of the institution in making a final access decision:
 - a. Under section 26(a), the head must decide whether to grant access to the requested information. In other words, the head must decide whether any

statutory exemptions to disclosure apply or whether the request is frivolous or vexatious. If not, the head must grant access.

- b. If the head decides to give full or partial access to the requested information, section 26(b) requires the head to give the requester access to the information and, if necessary, to produce it.

12. The head must comply with both requirements within 30 days of receiving a request. While the head can extend this time limit in certain circumstances set out in sections 27, 28 and 57 of the *Act*, those exceptions are spent or do not apply in this case.

13. When the head of an institution does not notify a requester about a final access decision within the statutory time limit, section 29(4) of the *Act* deems the head to have given notice of refusal to give access to the information.

14. By deeming the head to have made a decision, this provision allows a requester to commence a statutory appeal. Under section 50, the *Act* permits requesters to appeal any decision of a head to the Information and Privacy Commissioner.

The Minister did not make a final access decision within the statutory time limit

15. On November 18, 2022, the Applicant, acting through counsel, submitted an access request to the Ministry for records of information concerning the government's withdrawals of lands from the Greenbelt.

16. On December 19, 2022, the Minister, through his delegate, extended the time limit for making an access decision under section 27 of the *Act*. Following this

extension, the Minister was required to make a final access decision by January 18, 2023.

17. The Minister did not do so. Instead, through his delegate, the Minister made an interim access decision on January 26, 2023. The interim decision stated that the Applicant may be granted partial access to the requested information. Relying on section 57 of the *Act*, the interim decision included a fee estimate and required the Applicant to pay a 50% deposit before the Ministry would proceed with the request.

18. The Applicant paid the deposit on February 15, 2023 under protest. The Applicant submitted a fee waiver request to the Minister's delegate, who denied the request. To date, the Minister has not determined or requested payment of a final fee amount under section 57.

The Applicant successfully appealed the Minister's deemed refusal to grant access to the Information and Privacy Commissioner

19. On February 8, 2023, the Applicant appealed the Minister's failure to make a timely access decision to the Commissioner.

20. On August 4, 2023, during the appeal process, the Minister's delegate confirmed that the Minister would not need to consult with third parties before making a final access decision. Accordingly, the time limit exception set out in section 28 of the *Act* does not apply to the Applicant's information request.

21. Throughout the appeal process, the Minister's delegate communicated to the Commissioner and the Applicant that the Minister aimed to make a final access

decision by late August to late September 2023. In its latest communication on this point, on August 4, 2023, the Minister's delegate communicated her intent to make a final access decision by mid-September 2023.

22. On August 28, 2023, the Commissioner rendered an order finding the Ministry to be in a deemed refusal situation under section 29(4) of the *Act*. The order required the Ministry to make a final access decision by September 15, 2023, without recourse to any further time extensions under section 27 of the *Act*.

The Minister has not made a final access decision, contrary to the Commissioner's order

23. The Minister did not make or notify the Applicant about a final access decision indicating whether the records would be disclosed by September 15, 2023, and did not make a final fee decision or disclose the records.
24. The Minister did not seek judicial review of the Commissioner's order within the 30-day limitation period for doing so, which expired on September 27, 2023. On September 29, 2023, the Applicant, through counsel, sent a letter to the Minister's delegates with a copy to the Minister, demanding that the Ministry comply with the Commissioner's order and make a final access decision forthwith.
25. The Applicant did not receive a response to this letter.

The Applicant meets the requirements for an order of *mandamus*

26. The Minister has a public legal duty to make a final access decision under section 26 of the *Act*, as confirmed by the Commissioner's order.

27. The duty is owed to the Applicant, which is the person who requested the information under section 24(1) of the *Act* and paid the interim fee deposit required under section 57 of the *Act*.
28. There is a clear right to the performance of the duty. The Applicant has satisfied all conditions precedent giving rise to the duty, including seeking to enforce its right to receive an access decision through a successful appeal to the Commissioner. The Minister has breached the deadline for making an access decision set out in the Commissioner's order. The Minister has also unreasonably delayed in responding to and implicitly refused to comply with the Applicant's request to comply with the order and make the access decision.
29. The Minister has no discretion under the *Act* to refuse to comply with section 26 or the Commissioner's order; wilfully failing to comply with the latter is an offence under section 61(1)(f) of the *Act*.
30. In refusing or failing to comply with the order, the Minister and his delegates acted and continue to act unlawfully and without jurisdiction.
31. The Applicant has exhausted the statutory appeal process and there is no other adequate remedy available to the Applicant.
32. The Minister's failure to make an access decision leaves the Applicant's access to information request in limbo: the Applicant cannot get the requested information or appeal a decision to withhold the information until it receives the access decision under section 26.

33. This continuing breach of the duties under section 26 frustrates the *Act's* access regime, which entitles requesters to the information they seek in a timely manner unless an exemption applies. An order of *mandamus* would have the practical effects of upholding the integrity of the *Act's* scheme and allowing the Applicant to either receive some or all of the requested information or pursue further statutory appeals if the Minister decides to rely on any exemptions to deny access.
34. There is no equitable bar to issuing an order of *mandamus*.
35. The balance of convenience favours issuing an order of *mandamus*. There are strong public interests in upholding the rule of law and fostering access to information as set out in the *Act*. An order of *mandamus* requiring the Minister to comply with his statutory duty, as set out in the *Act* and the Commissioner's order, will promote those public interests. Denying an order of *mandamus* would permit the Minister to continue frustrating the access to information scheme on a matter of significant, ongoing public interest and would more broadly undermine the rule of law and the *Act's* access regime.

STATUTORY INSTRUMENTS RELIED UPON

36. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31.
37. *Judicial Review Procedure Act*, RSO 1990, c J.1.
38. *Rules of Civil Procedure*, RRO 1990, Reg 194.
39. Such further and other grounds as counsel may advise and this Honourable Court may deem just.

DOCUMENTARY EVIDENCE

40. The following documentary evidence will be used at the hearing of the application:

- (a) Affidavit(s) of the Applicant, to be affirmed;
- (b) Affidavit of Charlotte Ireland, Paralegal, Ecojustice, to be affirmed;
- (c) Such other affidavits and material as counsel may advise and this Court may allow.

October 13, 2023

Laura Bowman, LSO # 53645K
Ian Miron, LSO # 63445O
1910-777 Bay Street, PO Box 106
Toronto, ON M5G 2C8
lbowman@ecojustice.ca
imiron@ecojustice.ca
Tel: 416-368-7533
Fax: 416-363-2746

Counsel for the Applicant

Court File No. _____

ENVIRONMENTAL DEFENCE - and -
CANADA INC.
Applicant

MINISTER OF MUNICIPAL AFFAIRS AND HOUSING
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

NOTICE OF APPLICATION
FOR JUDICIAL REVIEW

ECOJUSTICE CANADA SOCIETY

1910-777 Bay Street, PO Box 106
Toronto, ON M5G 2C8

Laura Bowman, LSO # 53645K

Ian Miron, LSO # 63445O

lbowman@ecojustice.ca /

imiron@ecojustice.ca

Tel: 416-368-7533 ext 522 / 540

Fax: 416-363-2746

Counsel for the Applicant,
Environmental Defence Canada Inc.