



Court File No. T-1360-24

FEDERAL COURT

ENVIRONMENTAL DEFENCE CANADA INC.

Applicant

- and -

MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD
and the MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and the
ATTORNEY GENERAL OF CANADA

Respondents

APPLICATION UNDER SECTION 18.1
of the *Federal Courts Act*, RSC 1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicants. The relief claimed by the applicants appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at **Toronto, Ontario**.

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 a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the [Federal Courts Rules](#) and serve it on the applicants' solicitor or, if the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the [Federal Courts Rules](#), information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE
GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: June 6, 2024

Issued by: "Imrana Ahmed"
(Registry Officer)

Address of local office: 180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

TO: MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST
GUARD

AND TO: MINISTER OF ENVIRONMENT AND CLIMATE CHANGE

AND TO: ATTORNEY GENERAL OF CANADA

c/o DEPARTMENT OF JUSTICE CANADA
Ontario Regional Office
Department of Justice Canada
120 Adelaide Street West
Suite #400
Toronto, Ontario M5H 1T1

APPLICATION

1. This is an application for judicial review seeking the issuance of *mandamus* requiring the Minister of Fisheries, Oceans and the Canadian Coast Guard (**Minister of DFO**) and the Minister of the Environment and Climate Change (**Minister of ECCC**) referred to collectively herein as the “**Ministers**” to publish a finalized recovery strategy for the redbide dace (*Clinostomus elongatus*) (**redside dace**) on the species at risk public registry pursuant to subsection 43(2) of the *Species at Risk Act*, SC 2002, c 29 (the **SARA**).
2. The Ministers have failed to comply with statutory timelines under the *SARA* requiring listing, recovery planning and protection of the habitat of the redbide dace for well over a decade. These delays have put the survival and recovery of the redbide dace at serious existential risk. It is critical that the Ministers finalize the recovery strategy identifying the habitat necessary for the survival and recovery of the redbide dace, or that habitat will likely be destroyed.

THE APPLICANT MAKES APPLICATION FOR:

1. An order in the nature of *mandamus* compelling the Ministers to publish a final recovery strategy for the redbide dace forthwith.
2. An order for costs in favour of the applicant throughout.
3. Such further and other relief as the applicant may request and this Honourable Court may see fit to order.

THE GROUNDS FOR THIS APPLICATION ARE:

The *Species at Risk Act* and the redbase dace

1. The *SARA* came into force in 2002. The stated purpose of the *SARA* set out in its section 6 is to prevent wildlife species from becoming extirpated or becoming extinct, and to provide for the recovery of wildlife species that are extirpated, endangered or threatened as the result of human activity.
2. The redbase dace is a small insectivorous minnow and is an “aquatic species” under subsection 2(1) of the *SARA*, listed as “endangered” under Schedule 1, Part 2 of the *SARA* since 2017. It lives only in the Great Lakes region and is concentrated in the Greater Toronto Area.
3. The listing of the redbase dace triggered the *SARA*’s provisions to prevent extirpation and extinction and to provide for the survival and recovery of the species. This includes various prohibitions against harm and a requirement for the Ministers to undertake recovery planning.
4. Essential to the recovery planning process is the preparation of recovery strategies which must address the threats to the survival and recovery of the species and identify critical habitat. The identification of critical habitat in a final recovery strategy is a necessary precondition to the protection of that habitat under section 58 of the *SARA*.
5. Protecting critical habitat is often necessary for the survival and recovery of a species. This is reflected in the preamble to the *SARA* which states that the habitat of a species at risk is key to their conservation. This is also reflected

in the definition of “critical habitat” under section 2(1), which is the habitat *necessary* for the survival and recovery of the species.

The parties

6. The applicant Environmental Defence Canada Inc. (“Environmental Defence” or the “Applicant”) is a federally registered charity incorporated in Ontario that operates nation-wide to protect and preserve the natural environment for the benefit of all Canadians.
7. The Applicant has a genuine and long-standing interest in protecting and ensuring the survival and recovery of endangered species in Canada, including the redbide dace. The applicant has argued extensively for the protection of the redbide dace against development pressures for many years, has participated in public consultations on redbide dace habitat, and has a history as a public interest litigant successfully seeking protection for critical habitat under federal recovery strategies for similar species.
8. The Minister of DFO is the competent minister with respect to aquatic species, including the redbide dace, pursuant to the definition of “competent minister” in subsections 2(1) and 2(3) of the *SARA*. The Minister of DFO is therefore the competent minister for the purposes of proposing and finalizing a recovery strategy for the redbide dace under sections 42 and 43 of the *SARA*.
9. The Minister of ECCC is the competent minister for the purpose of finalizing the recovery strategy for the redbide dace with respect to

individuals in or on federal lands administered by the Parks Canada Agency.

The redbird dace occupies the Rouge National Urban Park.

10. The Attorney General of Canada is responsible for the regulation and conduct of all litigation against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada, under subsection 5(d) of the *Department of Justice Act*, RSC 1985, c J-2 and subsection 18(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7. The Attorney General of Canada is named as a respondent under Rule 303(2) of the *Federal Courts Rules*, SOR/98-106.

The Ministers have a public legal duty to propose and finalize recovery strategies on legislated timelines for all listed extirpated, endangered or threatened species

11. The *SARA* provides a set of clear and strict requirements for halting the loss of species. The *SARA* protects at-risk species first by listing them according to their level of decline – a move which protects them from certain direct harms such as killing, harming and harassing of species. Second, the *SARA* aims to quickly identify and protect critical habitats from destruction by providing mandatory timelines and procedures for the identification of and protection of habitats.
12. Subsection 37(1) of the *SARA* requires the Ministers to prepare a recovery strategy for listed extirpated, endangered or threatened species. The recovery strategy must identify the threats to a species' survival and recovery as well as its "critical habitat". Once the critical habitat for the species is identified,

the *SARA* requires decisions about applying the prohibition on the destruction of that habitat under section 58 of the *SARA* within 180 days.

13. The *SARA* sets out numerous mandatory and other deadlines for Ministerial and Cabinet action to ensure that the protection of species and their habitats is not unduly delayed. For example, once a scientific committee has assessed the status of the species, a decision must be taken about whether to list the species within nine months (subsections 27(1.1) and (3)); then subsection 42(1) of the *SARA* requires that the Ministers publish a proposed recovery strategy to the public registry within one year of any wildlife being listed as an endangered species.
14. Subsection 43(1) of the *SARA* requires the Ministers to leave the proposed recovery strategy open for public comment on the registry for 60 days; then subsection 43(2) of the *SARA* requires that the Ministers finalize the recovery strategy on the public registry within 30 days of the end of the comment period.
15. Subsection 50(1) also requires that a proposed action plan be published on the public registry. Subsections 50(2) through 50(3) of the *SARA* then require the Ministers to finalize a proposed action plan within 90 days of the posting of a proposed action plan.

The reidside dace is a listed endangered aquatic species under Schedule 1 of the *SARA* with an overdue recovery strategy

16. Upon the *SARA*'s proclamation in 2003, the reidside dace was included in Schedule 3 of the *SARA* as a species of "special concern". It was

subsequently recommended to be uplisted to “endangered” by a scientific expert committee established under the *SARA* on August 30, 2007.

17. This report triggered a duty to make a listing decision within nine months (subsections 27(1.1) and (3)). Cabinet published a “response statement” outlining a consultation plan, but Cabinet and the Ministers did not pursue any of the required listing decision options under subsection 27(1.1).
18. The mandatory timeline for a subsection 27(1.1) listing decision by Cabinet and the Ministers expired in May of 2008. In violation of the requirements of subsection 27(3), the Ministers delayed listing of the redbide dace as endangered for nearly nine years. On April 13, 2017, the Governor in Council finally listed the redbide dace as an endangered species under Schedule 1, Part 2 of the *SARA*. This listing delay represented one of the longest delays ever for the listing of an aquatic species under the *SARA*.
19. After the near decade-long delay in listing, the deadline under subsection 42(1) of the *SARA* for the Ministers to publish a proposed recovery strategy expired on April 12, 2018. After the expiry date, there was no action taken by the Ministers for nearly six more years.
20. If the Ministers and Cabinet had complied with the mandatory duties under sections 27 and 42 of the *SARA*, the proposed recovery strategy would have been published by no later than May of 2009. As such, the proposed recovery strategy was delayed by over 14 years, during which time the critical habitat of the redbide dace has been unlawfully unprotected.

21. On January 4, 2024, Fisheries and Oceans Canada published the 2024 “Proposed Recovery Strategy and Action Plan” for the redbreasted dace (“**proposed recovery strategy**”) for a 60-day public consultation.
22. After the end of the 60-day consultation period for the proposed recovery strategy under subsection 43(1) of the *SARA*, the Ministers had 30 more days under subsection 43(2) of the *SARA* to finalize the recovery strategy by publishing it on the public registry. This deadline expired on April 3, 2024. The Ministers did not publish the final recovery strategy by that date.
23. The proposed recovery strategy identified the features and locations of redbreasted dace critical habitat.
24. As of the date of this Notice of Application, the Ministers have not published a finalized recovery strategy and action plan for the redbreasted dace. Therefore, the critical habitat identified in the proposed recovery strategy remains unprotected.
25. Unless and until the final recovery strategy is posted on the public registry, the mandatory 180-day deadline for the Ministers to issue a protection order or statement under subsections 58(4) and (5) of the *SARA* – another necessary step to prohibit the destruction of the critical habitat of the redbreasted dace – does not begin to run.

The Ministers’ delays have undermined the survival and recovery of the species

26. In 2007 the expert committee established under the *SARA* released a report that noted that there were only six stable populations of the redbreasted dace left in Canada, and that more than 50% of those were in locations “expected to be

developed within the next 10 to 15 years”. Over at least the last decade and a half, while the federal government failed to implement required protections, the population of redbide dace has declined over 50%. The redbide dace has been extirpated from nine watersheds and is on the brink of extirpation from four others. None of the remaining populations are considered in good condition, and the majority are in poor condition.

27. Loss of critical habitat is the major factor contributing to redbide dace declines. The greatest threat to the species is urban development. Many of the remaining populations are found in areas currently scheduled for urban development or areas where development could occur, affecting more than 80 per cent of the redbide dace found in Canada. The need to protect the critical habitat of the redbide dace is therefore highly time-sensitive.

The Applicant wrote to the Ministers to demand finalization of the recovery strategy

28. On April 30, 2024, the Applicant wrote to the Ministers, highlighting that the finalized recovery strategy and action plan was overdue according to the mandatory legislative timelines.
29. In this letter, the Applicant demanded that the Ministers publish the finalized recovery strategy and action plan forthwith and without further delays. The Applicant advised the Ministers that if publication was not finalized forthwith, the Applicant held a continuing intention to pursue this matter.
30. The Applicant’s letter highlighted the time-sensitive threats to the critical habitat of the redbide dace and the urgent need to protect the critical habitat.

31. As of the date of this Notice of Application, the Applicant has not received any written response from the Ministers in relation to this letter and the Ministers have not committed to any specific timeline for the finalization of the recovery strategy or a protection order or statement.

The Applicant is entitled to a *mandamus* order

32. The Applicant meets the requirements to seek *mandamus* to compel the Ministers to finalize the recovery strategy for the redside dace.
33. The Ministers were and remain under a legal duty to finalize the recovery strategy for the redside dace within 90 days of their publication of the proposed recovery strategy on January 4, 2024, as per section 43 of the *SARA*. Since April 3, 2024, this legal duty has been violated.
34. The Applicant has satisfied any and all conditions precedent to giving rise to the performance of this duty. The Applicant made a prior demand for the performance of the duty forthwith. The Ministers have had 37 days further since receiving that letter to comply with their duty, and have not.
35. The Ministers have impliedly refused to execute their duty under subsection 43(2) to finalize the proposed recovery strategy.
36. No other adequate remedy is available to the Applicant.
37. The requested order would have a practical effect. The order sought would compel the Ministers to finalize the recovery strategy under subsection 43(2) of the *SARA*, which is a necessary precondition to trigger a 180-day statutory timeline for the Ministers to prevent the destruction of the critical habitat of

the redbreasted dace under subsections 58(4) and (5) of the *SARA*. Ensuring this mandatory timeline proceeds without further delay is crucial to prevent further destruction of the redbreasted dace's critical habitat.

38. There is no equitable bar to the order of *mandamus* sought in this application.
39. The balance of convenience favours the issuance of an order of *mandamus* for the reasons set out above. If the order is not issued the redbreasted dace's critical habitat would likely be destroyed, resulting in its potential extirpation from Canada.

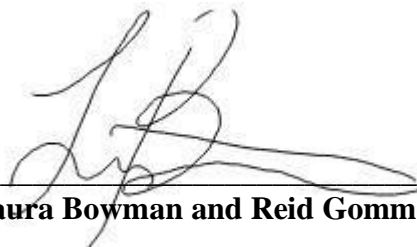
General grounds for the application

40. The Applicant relies on: sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7; the *Federal Courts Rules*, SOR/98-106; the *Species at Risk Act*, SC 2002, c 29; the *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993); the *Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity*: Kunming-Montreal Global Biodiversity Framework, CBD/COP Dec 15/4, UNEP/WHO, 2022; and such further and other grounds as counsel may advise the Court.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. The affidavit of a representative of Environmental Defence, to be sworn.
2. Other affidavits and evidence that the Applicant may file and this Court may see fit to consider.

June 6, 2024



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